Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3814-I

Appeal MA16-323

Region of Peel

August 8, 2019

Summary: The appellant's verbal access request under the *Act* for his Ontario Works file was transferred, in part, to the Region of Peel. The region granted the appellant access to most of the responsive records but withheld discrete portions of two records pursuant to the discretionary personal privacy exemption in section 38(b). The appellant appealed the region's decision to this office and claimed that additional records should exist. The appellant also appealed the region's $6,030.50 fee to locate and provide access to email records.

The adjudicator does not uphold the region's fee on the basis that it is not entitled to charge search and preparation costs for requests for personal information. Accordingly, the adjudicator sets the fee aside and ordered the region to issue a new fee decision referring to section 6.1 of Regulation 823. The adjudicator orders the region to conduct a further search for records identifying the name of a security officer on duty on a specific day. However, the adjudicator finds that the region's search for surveillance videos and security reports was reasonable and dismisses this part of the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) definition of "personal information", sections 17, 45(1) and 38(b); Regulation 823, ss. 6 and 6.1.

OVERVIEW:

[1] The appellant filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Regional Municipality of York (York Region) which transferred the request under section 18(3) of the *Act*[1] to the Region of Peel (the region). The request sought access to "any and all information held by Ontario Works with [his] name in any means stored (e.g. computers, paper, microfiche, etc.)."

[2] The region conducted a search for responsive records and issued an interim access decision, dated April 15, 2016, granting the appellant access to 123 pages of records from his Ontario Works file. The region claimed that disclosure of portions of some records would constitute an unjustified invasion of personal privacy under section 38(b). The region also requested the payment of a fee in the amount of $37.80, representing photocopying and shipping costs.

[3] In response, the appellant telephoned the region to provide information about his financial situation and requested that the region waive its fee. The appellant advised that he was also seeking access to his Ontario Disability Support Program (ODSP) records.

[4] The region subsequently issued a final access decision, dated May 11, 2016, granting the appellant partial access to the 123 pages of records identified in the interim decision. The region claimed that the personal privacy exemption at section 38(b) applied to several pages and that it would withhold those pages on that basis. The region also advised the appellant that it waived its fee but that the appellant would have to file a separate request to the Ministry of Community and Social Services for his ODSP records as it did not have access to those files.

[5] The region also issued a decision, dated May 12, 2016, in which it advised the appellant that it conducted a search for security camera footage and security guard reports for the time periods identified by the appellant but did not locate any records.

[6] The appellant appealed the region's decisions to this office and a mediator was appointed to explore settlement with the parties. In the appeal form, the appellant advised that he is seeking access to his "personal file" in addition to the video footage of his attendance at the region's office in July 2015. The appellant advised that he also seeks access to the security report relating to his attendance and name of the security guard on duty on the day in question.

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[1] Section 18(3) states that:

> If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

[7] During mediation, the appellant raised questions about the reasonableness of the region's search for his Ontario Works file and clarified that he also sought video footage when he attended the region's office in July or August 2015 and on April 19, 2016. Though the region took the position that the appellant's questions related to records outside the scope of his request, it agreed to conduct a further search. The region subsequently issued a third decision letter on February 27, 2017 granting the appellant full access to 44 additional records created after the date of the original request.

[8] The region's third decision letter also advised the appellant that:

- the requested video recordings for the period of July to August 2015 and April 19, 2016 do not exist as it is the region's policy to only retain such recordings for 30 days, unless an access request is made before the expiry of the 30 days;

- security guard incident records for 2015 and 2016 were searched for any incident relating to the appellant, but no responsive records were located; and

- the estimated fee to search for email accounts and previously stored emails (archived emails) for 50 staff members is $6,030.50. However, the estimated cost is reduced to $2,530.00 if the scope of his request is narrowed to only email accounts.

[9] In response, the appellant agreed to narrow the scope of the requested emails to two individuals who had communications with him from July 1, 2015 to August 31, 2015. The region agreed to conduct an electronic search for these records and located four records, which it disclosed in full to the appellant in its fourth decision letter, dated May 8, 2017. However, the appellant was not satisfied with the disclosure of these four records.

[10] At the end of mediation, the appellant confirmed that he wanted access to all email communications from any Ontario Works employee about himself from 2014 to the date of the request, including previously stored emails. The appellant also requested that the region waive any fee associated with providing these records to him. The appellant advised that if the region is not prepared to waive its fee, then he seeks a review of the region's $6,030.50 estimated fee.

[11] The appellant also confirmed that he is no longer seeking access to ODSP records from the region or any personal information contained in a tenancy agreement. However, the appellant advised that he continued to seek access to information contained in a Benefit Summary and Note Detail the region withheld under the discretionary personal privacy exemption in section 38(b).

[12] Finally, the appellant advised that he does not accept the region's explanation as to why security reports or surveillance videos relating to his attendance at the region's office do not exist.

[13] Throughout mediation, the appellant requested proof that the region had sent

him copies of the records and requested copies of courier signature slips. The region advised the appellant that it does not have custody or control of the signature collected by the courier, but it re-sent the records to the appellant along with copies of its courier slips. In my view, this issue was resolved at mediation and I will not address it further in this order.

[14] The parties were unable to resolve any further issues and the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry. During the inquiry, I sought and received the representations of the parties which were shared in accordance with this office's confidentiality criteria.[2] The appellant's representations were summarized and the region provided reply and supplemental reply representations.

[15] In this order, I disallow the region's $6,030.50 fee on the basis that it was not calculated under the correct part of Regulation 823, and I order it to issue a new fee decision using section 6.1 of the Regulation to reflect the fact that this is a request for personal information about the appellant. I also order the region to conduct a further search for records identifying the name of the security officer on duty the day the appellant claims he slipped and fell at the region's office. I uphold the region's search for surveillance videos and security reports. Finally, I uphold the region's decision to withhold the personal information of another individual under section 38(b).

RECORDS:

[16] The records at issue are the following two records:

- One-page Benefits Unit summary withheld in its entirety (not dated); and
- The severed information in an April 16, 2014 Note Detail.[3]

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to who does it relate?

B. Does the discretionary personal privacy exemption at section 38(b) apply?

C. Did the region properly exercise its discretion?

D. Is the region's $6,030.50 fee reasonable?

E. Was the region's search for surveillance videos and security reports reasonable?

DISCUSSION:

[2] IPC *Practice Direction Number 7*.
[3] The Note Detail was incorrectly referenced in the Notice of Inquiry as being dated on March 3, 2003.

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to who does it relate?

[17] There does not appear to be a dispute that the withheld information in the records contains personal information as defined in section 2(1). The region's decision letter to the appellant granted partial access to the Note Detail and withheld the Benefit Summary in its entirety. The region advised the appellant that the withheld portions of the records contain information that relates to a "third party".

[18] The region's submissions did not provide greater detail than what was already set out in its decision letter. The appellant's submissions do not specifically address this issue.

[19] I have reviewed the records and am satisfied that the withheld portions contain information that relates to another individual. I am also satisfied that the records contain information that relates to the appellant. Accordingly, I find that the records contain the name and other personal information, including information about a financial transaction relating to another individual, and that this is "personal information" as defined in paragraphs (a), (b), (c), (d) and (h) of the definition.

B. Does the discretionary personal privacy exemption at section 38(b) apply?

[20] Since I found that the records contain the personal information of the appellant and another individual, section 36(1) of the *Act* applies to the appellant's access request. Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[21] Under section 38(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the appellant.

[22] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b).

[23] If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. The parties have not claimed that any of the exceptions in paragraphs (a) to (e) apply or section 14(4) apply and I am satisfied that none apply.

[24] Sections 14(2) and (3) also help in determining whether disclosure would or

would not be an unjustified invasion of privacy.

[25] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.[4]

[26] The submissions of the parties do not specifically address whether the factors or presumptions in sections 14(2) and (3) apply. However, having reviewed the records, I am satisfied that the presumption at section 14(3)(c) applies in the circumstances. Section 14(3)(c) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information, relates to eligibility for social service or welfare benefits or to the determination of benefit levels.

[27] I find that the withheld information relates to another individual's eligibility for social service or welfare benefits or to the determination of benefits level, and that the presumption in section 14(3)(c) applies. The appellant's submissions do not appear to raise the application of any listed or unlisted factors favouring disclosure and I am satisfied that none apply in the circumstances of this appeal. Accordingly, I find that disclosure of information to the appellant would constitute an unjustified invasion of personal privacy under section 38(b), subject to my review of the region's exercise of discretion the withheld.

C. Did the region properly exercise its discretion?

[28] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[29] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[30] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[5] This office may not, however,

[4] Order MO-2954.
[5] Order MO-1573.

substitute its own discretion for that of the institution.[6]

[31] The region did not provide submissions specifically addressing this issue. However, in my view, the explanation the region provided to the appellant in its decision letter regarding its claim of section 38(b), in addition to the fact that it granted the appellant partial access to one of the withheld records, reflect the manner in which discretion was exercised.

[32] I am satisfied that the region took into consideration that the appellant should have a right of access to his own personal information while balancing the principle that exemptions from the right of access should be limited and specific. In my view, the region's decision to withhold only the personal information relating to the other individual while disclosing the remaining information to the appellant demonstrates that it took into account these two principles. Finally, the region's decision to not disclose the information to which the presumption at section 14(3)(c) applies demonstrates that it took into consideration the nature of the information and the extent to which it is significant and/or sensitive to the other individual.

[33] Having regard to the above, I am satisfied that the region in exercising its discretion took into account relevant factors, and did not consider irrelevant considerations or exercise its discretion in bad faith or for an improper purpose.

[34] Accordingly, I find that the region properly exercised its discretion to withhold the personal information that I found exempt under section 38(b). I uphold the region's decision to withhold this information from the appellant.

D. Is the region's $6,030.50 fee reasonable?

[35] At the end of mediation, the appellant confirmed that he continues to pursue access to all email communications from any Ontario Works employee about him from 2014 to the date of the request, including previously stored emails.

[36] In its February 28, 2017 decision, the region provided the appellant with a $6,030.50 fee estimate, which was calculated as follows:

> … searching email accounts and previously stored email files for 50 staff members … will cost an estimated $6030.50, based on the following:
>
> • determining responsive documents at 1 minute per page for approximately 3000 pages at $30 per hour ($1500.00); and
>
> • 3 hours of search and preparation time at $30.00 per hour for each account searched (150 hours total, $4500.00);
>
> • $30.50 for shipping costs.

[6] Section 43(2).

[37] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[38] Relevant to this order, section 6.1 of Regulation 823 reads:

> The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

[39] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[7] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[8]

[40] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

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[7] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[8] Order MO-1520-I.

Representations

[41] The representations filed by the region did not expand on its explanation of the breakdown of its $6,030.50 fee set out in its February 28, 2017 decision to the appellant. However, in its representations, the region describes the search it conducted during mediation in response to the appellant's narrowed request for the email records of two named staff members.

[42] The region states:

> [D]uring mediation [the appellant] clarified the request and narrowed the scope to [an] email search of two staff members in an effort to obtain notes for a meeting he believes took place in July 2015 with someone at the Region of Peel. We again conducted additional searches based on this new scope… In an effort to assist [the appellant], we advised that email for Ontario Works clients is not common and hence broadened the scope to search calendar entries (stored in the same database as email). Please note that three of the four pages found were calendar entries.

[43] At the end of mediation, the appellant advised that he was not satisfied with the region's search for records responsive to the narrowed scope of request and indicated that he still wanted access to all email records from any Ontario Works employee relating to him from 2014 to the date of the request, including previously stored emails.

[44] In his representations, the appellant questions the reasonableness of the region's fee and clarified that he was not seeking access to emails sent to him as he does not have an email account and thus has not received emails from the region. The appellant advised that a meeting took place in 2015 and that individuals from external agencies were present at the meeting. The appellant submits that emails should exist regarding this meeting. He also advised that he filed complaints against staff members and argues that these individuals should have email records about him, though he questions whether they would turn any records relating to him over given his complaints.

Analysis and Decision

[45] Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[9]

[46] Though the region's fee breakdown includes its search time to locate "email accounts and previously stored email files for 50 staff members", the region did not provide an explanation as to why it anticipated that 50 staff members would have records relating to the appellant's Ontario Works file.

[9] Order MO-1699.

[47] In any event, the search and preparation costs calculated by the region are not allowable under the *Act*. Section 45(1) requires the person who makes a request for access to a record to pay fees in the amount prescribed by the regulations. Section 6.1 of Regulation 823, which applies where the records contain requester's personal information, provides that an institution can only charge for photocopies, CD-ROMs, the development of a computer program or other method of producing a machine readable record or invoiced costs for to its retrieval of records relating to the individual making the request. The calculations the region referred to in its fee decision refer to section 6 of Regulation 823, which prescribes the amounts an institution can charge a requester to access to general records. Section 6 does not apply in this situation.

[48] Accordingly, I do not uphold the region's $6,030.50 fee. I order the region to provide a new fee decision to the appellant, prepared in accordance with the fee provisions in section 6.1 of Regulation 823.

[49] Given my decision, it is not necessary for me to also consider the region's refusal to waive its fee. Should the appellant decide to pursue a fee waiver after receiving the region's new fee estimate, he should submit his request for a fee waiver directly to the region.

E. Was the region's search for surveillance videos and security reports reasonable?

[50] The appellant takes the position that records consisting of video footage created by the region's surveillance cameras should exist of his attendance at the region's office in July and August 2015 and April 19, 2016.

[51] The appellant also submits that responsive records identifying the name of the security guard who was on duty the day he claims he slipped and fell at the region's office in July 2015 should exist. In addition, the appellant submits that a copy of the security/incident report created the same day should also exist.

[52] Where a requester claims that additional records 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.[10] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[53] 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.[11] To be responsive, a record must be "reasonably related" to the request.[12]

[54] A reasonable search is one in which an experienced employee knowledgeable in

[10] Orders P-85, P-221 and PO-1954-I.
[11] Orders P-624 and PO-2559.
[12] Order PO-2554.

the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[13]

[55] 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.[14]

[56] 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.[15]

Representations of the parties

[57] The region advised the appellant in its May 12, 2016 decision letter that "security camera footage" or a "security guard report" documenting a fall that the appellant says occurred in July 2015 at the region's office do not exist.[16] In support of its position that no surveillance records exist, the region provided a copy of its corporate Video Surveillance Policy, which contains its retention policy.[17]

[58] The relevant portions of the region's Video Surveillance Policy provide that:

- Video surveillance information shall be retained for a minimum period of thirty days unless an access request under the *Act* is made during that period; and

- Video surveillance information of which access has been requested will be retained and securely stored for a minimum of one year from the time of the request, if the information in the footage is deemed responsive/relevant.

[59] The region also provided a copy of an email between its Freedom of Information Office and Property Manager exchanged on May 11, 2016. In the email, the region requested a search for:

- Security camera footage from [specified dated] at [specified location] showing a fall (male) in front lobby during the day; and

- Security guard report documenting the fall (male) at [specified location on the specified date].

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[13] Orders M-909, PO-2469 and PO-2592.
[14] Order MO-2185.
[15] Order MO-2246.
[16] The region reiterated its position in its February 17, 2017 decision letter to the appellant.
[17] Section 30(4) provides that an institution "shall dispose of personal information under the control of the institution in accordance with the regulations. Section 3(3) of Regulation 823 provides:

> Every head shall ensure that reasonable measures to protect the records in his or her institution from inadvertent destruction or damage are defined, documented and put in place, taking into account the nature of the records to be protected.

[60] The Property Manager responded on May 12, 2016 that "[n]o records exist, nor CCTV nor written for detailed request" and the region wrote to the appellant on the same day to advise that no records existed.

[61] The appellant's original verbal request for his Ontario Works file was received by York Region on March 1, 2016 and a portion of the request relating to records held by the Region of Peel was transferred under section 18. However, the appellant's original verbal request did not include surveillance videos or security records. Based on my review of the file, it appears that the appellant made a request for this information some time after his request was transferred to the region, which would have been more than six months after the time he submits he experienced a fall.[18]

[62] With respect to his request for video surveillance or security records relating to his attendance at the region's office to attend a meeting or pick up records, the region states in its February 27, 2017 decision that:

> Security guard incident records for 2015 or 2016 were searched for any incident relating to you. No responsive records were found.

[63] In his submissions, the appellant maintains that video surveillance and security records should exist relating to his attendance at the region's office in July or August 2015 and April 19, 2016. In his Appeal Form, the appellant asserts that he believes that the video footage of his slip and fall in July 2015 exists and should be stored on the region's computer system. The appellant also advises that the security guard on duty that day told him that he was working on a report. The appellant states that if the video footage of his slip and fall is no longer available that "someone should be held accountable." The appellant submits that he made a request for the video footage on the day his slip and fall occurred.

[64] The appellant also does not accept the region's position that no records relating to his attendance at its office to attend a meeting and pick up records exist. He asserts that the region received his request for this information within the one year they are to retain records. In addition, the appellant takes the position that the region should provide him with the name of the security guard on duty on the day of his fall.

[65] During the inquiry, I invited the region's supplemental reply representations regarding its position that it does not have custody or control of records that would identify the security guard on duty the day appellant advises he fell. In its reply representations, the region states:

> [S]ecurity personnel at Region of Peel facilities are employees of a third-party security agency. We do not have custody or control of employee information regarding scheduling of shifts and cannot verify the name of the security guard.

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[18] The region's letter, dated March 21, 2016 to the appellant advises that it received the transfer request from York region on March 18, 2016.

[66] In its supplemental reply representations, the region states:

> [T]he Region of Peel does not require any collection of, or access to security personnel shift log information, as this information is not necessary to support any function, activity, statutory or basic duty that the Region of Peel carries out. In addition, we have also confirmed that we do not have possession or have the right to possess this type of record from the security agency providing services during this time.

[67] In support of its position, the region provided a copy of the tender document, which contains the terms of the contractual relationship between the region and the security vendor responsible for security during the relevant time frame. I have reviewed the tender document and agree with the region that it does not contain a provision that requires the security vendor to provide daily shift log information.

Analysis and Findings

Security reports and surveillance video records

[68] Based on my review of the submissions of the parties, I am satisfied that the region conducted a reasonable search for security reports relating to the appellant's attendance at the region's office. Given my review of the contractual terms between the region and the vendor, I am satisfied that any security reports created by the vendor's staff would be held on-site and are in the region's custody or control for the purpose of the *Act*. Further, I find that the region expended a reasonable amount of effort by searching its record holdings to determine whether responsive security reports exist.

[69] I am also satisfied that the region's search for the requested video surveillance records was reasonable. I am satisfied that the region's search for the video footage in question was conducted by an experienced individual knowledgeable about the subject matter of the request. In addition, I note that the terms of the region's retention policy require the retention of surveillance records for 30 days, unless an access request under the *Act* is filed within that time frame. As detailed above, the appellant's request under the *Act* for the surveillance records was made well in excess of the 30 day time-frame. Though the appellant claims that he made a request for a copy of the video footage created the same day he slipped and fell, there is insufficient evidence before me demonstrating that a request under the *Act* was made to the region for this record. In fact, the appellant's evidence suggests that he discussed this matter with the security guard on duty on the day in question, and this individual would not be in a position to receive an access request for the region.

[70] As mentioned above, 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. In this case, I am satisfied that the region expended a reasonable effort to identify and locate the requested video surveillance and security reports. In addition, I accept the region's submission that if video footage of the

appellant had existed at one time, its retention policy supports the position that it would no longer exist.

Name of the security guard

[71] However, I do not accept the region's position that it does not have control over records that would identify the security guard on duty on the day the appellant says he slipped and fell at the region's facility. 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 . . .

[72] 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 in the custody OR under the control of an institution; it need not be both.[19] 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.[20] Accordingly, a finding that the name of the security guard on duty on the day in question is within the region's control does not mean that the appellant is entitled to access this information.

[73] The courts and this office have applied a broad and liberal approach to the custody or control question.[21] 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.[22] The list is not intended to be exhaustive. The list of factors was sent to the region with my invitation for supplemental representations. The following is a list of the relevant factors to consider where an individual or organization other than the institution hold the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[23]
- 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?[24]
- Who paid for the creation of the record?[25]

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[19] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[20] Order PO-2836.
[21] *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.
[22] Orders 120, MO-1251, PO-2306 and PO-2683.
[23] PO-2683.
[24] Order M-315.
[25] Order M-506.

- What are the circumstances surrounding the creation, use and retention of the record?[26]

- 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?[27]

- 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?[28] 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?[29]

- 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?[30]

- 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?[31]

[74] 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.[32]

[75] As noted above, the region submits that the contractual terms between the region and the vendor did not include a policy or practice which would establish its control, retention or disposal of shift logs. I have reviewed the documentation provided by the region and agree that no formal arrangements were made between the region and the vendor regarding shift logs. This contrasts with the contractual obligation to

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[26] PO-2386.
[27] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[28] Orders M-165 and MO-2586.
[29] *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.).
[30] Order MO-1251.
[31] Order MO-1251.
[32] *City of Ottawa v. Ontario,* cited above.

create daily event logs and incidents reports which are to be stored at the region's facilities. However, physical possession of the record is not determinative of the issue of whether an institution has custody or control of a record.

[76] In my view, the contractual relationship between the region and the vendor entitles the region to request and obtain copies of further documentation, as required, from the vendor. In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [33] 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?

[77] In my view, the region pays the vendor for security services and the shift logs relate to an internal departmental matter within the region thus answering the first question in the affirmative.

[78] I also note that there do not appear to be any undertakings of confidentiality between the vendor and the region about the information in question. Accordingly, given the contractual relationship between the vendor and the region, along with the fact that the services provided to the region take place at the region's facility, I conclude that the region by implication has the right to possess or otherwise control any records created as a result of the vendor providing security services to it. Accordingly, I find that the second question of the *National Defence* test is also answered in the affirmative. In this situation, therefore, I find that the region could reasonably expect, upon request, to obtain a copy of the shift log that would contain the name of the security guard on duty the day the appellant says he slipped and fell at the region's office.

Summary

[79] I find that the region's search for surveillance videos and security reports for the time periods identified by the appellant is reasonable and dismiss this part of the appeal. However, I do not accept the region's position that it does not have custody or control of the shift log or other responsive record that would identify the security guard on duty the day the appellant advises that he fell.

[80] Accordingly, I order the region to conduct a search for responsive records that would identify the security guard on duty on the specified date. The region shall contact the security vendor, request copies of the relevant shift log or other record and issue an access decision to the appellant.

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[33] 2011 SCC 25, [2011] 2 SCR 306.

ORDER:

1. I uphold the region's decision to withhold the other individual's personal information contained in the two records at issue under section 38(b).

2. I do not uphold the region's $6,030.50 fee and order it to issue a fee decision in accordance with the fee provisions in section 6.1 of Regulation 823. The region should treat the date of this order as the date of the request for the purpose of determining what records are responsive to the request.

3. I order the region to search for records that would identify the security officer on duty the day the appellant says he slipped and fell at the region's office, which includes, if necessary, contacting the security vendor.

4. I order the region to issue an access decision to the appellant regarding access to any records located as a result of the search ordered in provision 3, in accordance with the *Act*, treating the date of this order as the date of the request.

5. I order the region to provide representations on the new search referred to in provision 3 and to provide me, by **September 6, 2019**, an affidavit describing the search conducted, including the efforts made to obtain the information and the result of the search. If no responsive records were located, the region's representations shall provide an explanation as to why no responsive records were located, including details of whether the records could have been destroyed.

6. The region's representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in Practice Direction Number 7 of the IPC's *Code of Procedure* and is available on the IPC's website. The region should indicate whether it consents to the sharing of its representations with the appellant.

7. I uphold the region's search for surveillance records created on the days the appellant says that he attended the region's office in July 2015, August 2015 and April 2016. I further uphold the region's search security reports relating to the appellant.

8. I remain seized of the appeal to address issues arising from order provisions 2, 3, 4 and 5 of this order.

Original signed by | August 8, 2019

Jennifer James
Adjudicator