

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3988-I

Appeal MA19-00329

Toronto Police Services Board

December 15, 2020

**Summary:** The appellant made an access request to the Toronto Police Services Board (the police) for a copy of a 911 call recording. The police denied access, citing the personal privacy exemptions found in the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*). The appellant appealed. During the adjudication stage of the appeal, the police took the position that they do not have custody of the record because the call was related to a medical issue and was responded to by the City of Toronto's paramedic service. The police also argued that the city has a greater interest in the record, and that the appellant cannot access the record from the police under *MFIPPA* because the *Personal Health Information Protection Act, 2004* (*PHIPA*) applies to it.

In this order, the adjudicator finds that the police have custody of the record, that the police did not transfer the request to the city, and that it is too late for the police to do so. She also finds that *PHIPA* has no application in the circumstances.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 4(1) and 18; *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched. A, section 52.

**Orders and Investigation Reports Considered:** Orders MO-2385 and P-1498, and *PHIPA* Decision 27.

### OVERVIEW:

[1] This interim order addresses the claim of the Toronto Police Services Board (the police) that an audio recording of a 911 call is not in its custody or control because the

police transferred the caller to the City of Toronto's (the city) ambulance services. In this order, I find that the police have custody of the 911 call recording at issue.

[2] By way of background, an individual was found unresponsive at a site operated by a charitable organization. An employee of the organization called 911 and the individual was taken to hospital, where he later died.

[3] After the individual's death, the appellant made a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to the related police report and the audio recording of the 911 call.

[4] The police issued a decision granting the appellant some access to the requested records. The police granted partial access to a general occurrence report and a log of the 911 call titled "I/CAD Event Details Report," with some severances to these records. The police withheld the audio recording of the 911 call in its entirety.

[5] In denying access to portions of the occurrence report and call log, and to the 911 call recording in its entirety, the police cited the personal privacy exemptions at sections 14(1) and 38(b) of the *Act*. The police also stated the following about their decision to withhold the 911 call recording in its entirety:

Additionally, it was determined that a written transcript of the 9-1-1 call<sup>1</sup> would suffice at this time, as there would be difficulties obtaining third party authorization for the release of the 9-1-1 audio.

[6] The appellant was dissatisfied with the police's decision, and appealed it to this office. During the mediation stage of the appeal process, the appellant confirmed that she only seeks access to the audio recording of the 911 call. The mediator notified the caller (through the caller's representative) of the appeal. The caller (affected party) did not consent to disclosure of any of their information to the appellant.

[7] As no further mediation was possible, the appeal was transferred to the adjudication stage. The adjudicator originally assigned to the appeal sought and received representations from the police and the affected party on the personal privacy exemptions relied on by the police to withhold the 911 call recording. The affected party's representations addressed the issue of whether the personal privacy exemption applies to the record.

[8] However, the police's representations clarified that their predominant argument was no longer that the personal privacy exemptions applied. Rather, the police provided a new basis for denying access:

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<sup>1</sup> During the mediation stage, the police clarified that the "written transcript" of the 911 call (referred to in the extract above) was a reference to the I/CAD Event Details Report.

- The police noted that the call was transferred to ambulance services, though the police stayed on the line, and, on this basis, now take the position that the record at issue is “technically NOT our record to begin with.”
- Based on this determination, the police consulted with the city’s paramedic service to obtain their views on whether they have a greater interest in the record, and any views on release of the record to the appellant. The city advised that it has “issues with any release of the audio from a *PHIPA* [*Personal Health Information Protection Act, 2004*] perspective.”
- The city advised the police that it has, in the past, denied such requests for audio clips under *PHIPA*, and cited this office’s *PHIPA* Decision 27 as an example.
- Based on this feedback, the police now take the position that they “do not have the greater interest in the record at issue,” and, accordingly, no longer rely on *MFIPPA* to resist disclosure.
- The police take the position that the 911 call recording is a record of personal health information of the deceased individual, to which the appellant does not have access rights superseding the rights of the affected party.
- The police take the position that the request for the 911 call recording “should have been transferred” to the city.
- The police take the position that the appellant does not have a right of access to the record, through the police, under *MFIPPA*, and that the appeal should be closed.

[9] Following receipt of these representations, the adjudicator invited further representations from the police on the issues of custody or control of the record, the *Act’s* transfer of request provisions, and the relevance of *PHIPA* in the circumstances.

[10] The police provided representations in response. At the same time, the police issued a supplementary decision letter in which they purported to transfer the appellant’s access request to the city under section 18(3) of *MFIPPA*. However, in the same letter, the police told the appellant to file a request with the city. The police later advised this office that they never transferred the request. I discuss the transfer issue in more detail below, under Issue B.

[11] The appeal was then transferred to me. I made some further inquiries of the police with respect to the transfer of request issue, which are described below. I also notified the city of the appeal and invited it to provide representations on the custody and control issue. The city provided representations.

[12] In this interim order, I find that the police have custody of the 911 call recording, that the police did not transfer the request to the city and it is now too late for them to

do so, and that *PHIPA* does not apply to the appellant's access request to the police. The inquiry into the police's application of the personal privacy exemptions in *MFIPPA* to the record at issue will continue.

## **RECORD:**

[13] The record at issue is an audio recording of a 911 call.

## **ISSUES:**

- A. Is the record "in the custody" or "under the control" of the police under section 4(1)?
- B. Do the provisions in section 18 of *MFIPPA* relating to the transfer of a request to another institution apply?
- C. What is the relevance of *PHIPA* in the circumstances of this appeal?

### **Issue A: Is the record "in the custody" or "under the control" of the police under section 4(1)?**

[14] The police take the position that the record is not a police record, because the person who called 911 was, at some point during the call, transferred to the city's paramedic services, and the call recording reflects this.

[15] 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 . . .

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

[17] A record will be subject to *MFIPPA* if it is in the custody or under the control of an institution; it need not be both.<sup>2</sup>

[18] 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.<sup>3</sup> A record within an institution's custody or control may be excluded from the application of

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<sup>2</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>3</sup> Order PO-2836.

*MFIPPA* 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).

[19] The courts and this office have applied a broad and liberal approach to the custody or control question.<sup>4</sup>

***Factors relevant to determining "custody or control"***

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

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<sup>4</sup> *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.

<sup>5</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>6</sup> Order 120.

<sup>7</sup> Orders 120 and P-239.

<sup>8</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>9</sup> Order P-912.

<sup>10</sup> *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.

<sup>11</sup> Orders 120 and P-239.

- 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?<sup>13</sup>
- Does the institution have a right to possession of the record?<sup>14</sup>
- Does the institution have the authority to regulate the record's content, use and disposal?<sup>15</sup>
- 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?<sup>16</sup>
- To what extent has the institution relied upon the record?<sup>17</sup>
- How closely is the record integrated with other records held by the institution?<sup>18</sup>
- 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?<sup>19</sup>

### ***Police's representations***

[21] The police explain that they are the host agency for the 911 call system in Toronto. When a 911 call is made, the telephone company routes it through to the public safety answering point (PSAP). The police are the municipal PSAP for the city, operating within a defined geographical area. The call-taker is then responsible for dispatching first responders to the scene. If the call is police-related, it is dealt with immediately. If the call relates to a medical issue, it is transferred to ambulance services. The police will stay on the line to monitor the call in case police or any other agencies are required, for better efficiency.

[22] The police submit that the simple storage of records on an institution's computer does not definitively substantiate a finding of custody or control. They state that "based upon the medical nature of the call, the limits on the use of the record are very clearly

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<sup>12</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>13</sup> Orders 120 and P-239.

<sup>14</sup> Orders 120 and P-239.

<sup>15</sup> Orders 120 and P-239.

<sup>16</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>17</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

<sup>18</sup> Orders 120 and P-239.

<sup>19</sup> Order MO-1251.

defined within *PHIPA*."

[23] The police also address, point-by-point, a number of the factors listed above. They submit:

- The call was clearly intended to identify a medical concern and request the assistance/attendance of ambulance services.
- The police's role within the 911 system is to transfer calls through to the appropriate emergency services (fire, ambulance or other police services), where the police may only be the secondary response. As the police's primary function is law enforcement, police attendance is usually determined by the identified service.
- The content of the record at issue does not relate to the police's mandate and functions, as the 911 call in question was strictly a medical call.
- The police do have the record within their possession, though it is not considered their record for the purposes of *PHIPA*. Once the call was transferred to ambulance services, the police's role was secondary, with ambulance services having the greater interest.
- The police's possession of the record was not for any purpose related to the carrying out their mandated duties.
- The police's possession of the record is no more than "bare possession." If the police were to take full ownership of all fire and ambulance calls, it would be beyond the "exigencies" of the police service to keep up with their true mandate.

### ***City's representations***

[24] The city submits that the portion of the 911 call that was transferred to its paramedic service is within the city's custody or control, and not the police's.

[25] The city notes that, after the police directed the appellant to file an access request with the city, the city did receive such a request. The city determined that the request for the 911 call recording was not required to be processed as a formal request under *MFIPPA*. Under the city's paramedic services' routine disclosure plan, certain individuals are entitled to access audio recordings of incoming calls to the city's paramedic services without a formal request under *MFIPPA*.<sup>20</sup> The city states that the requester was issued a refund for her *MFIPPA* request fee and redirected to request the

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<sup>20</sup> The city refers to <https://www.toronto.ca/wp-content/uploads/2017/08/9797-EMS-Routine-Disclosure-Plan-AODA-2016-02-19.pdf>

record from paramedic services directly. The city does not state whether the appellant has received access to the recording through that means. According to the appellant, she has not received a copy of the record from the city.

### ***Analysis and findings***

[26] As a starting point, I observe that it is possible for more than one institution under the *Act* to have custody or control of the same record. This stands to reason,<sup>21</sup> and is also evident from the wording of section 18 of the *Act*, which addresses transferring and forwarding access requests from one institution to another. That section provides in part:

(2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

(a) forward the request to the other institution; and

(b) give written notice to the person who made the request that it has been forwarded to the other institution.

(3) 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.

[27] Section 18 makes a distinction between the *forwarding* of a request under subsection (2), where the first institution does not have custody or control of a record, versus the *transferring* of a request, which appears to contemplate more than one institution having custody or control of the same record.

[28] Both the police and the city take the position that the city has custody or control of the record at issue. That, however, is not the issue before me. Even if the city has custody or control of the record, the police can also have custody or control of it.

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<sup>21</sup> To name one example, an individual might submit their curriculum vitae to a number of employers, including any number of institutions under the *Act*.



*The record is in the police's custody*

[29] For the reasons that follow, I am satisfied that the record at issue is in the police's custody.

[30] As the police explained in their representations, they are the host agency (public safety answering point or PSAP) for the city's 911 call system. When a 911 call is made, the telephone company routes it through to the PSAP.

[31] The police further explain that the call-taker is then responsible for dispatching first responders to the scene. If the call is police-related, it is dealt with immediately. If the call is medically related, it is transferred to ambulance services. The police will stay on the line to monitor the call in case police or any other agencies are required, for better efficiency. The police confirmed in their representations that they stayed on the line in this case.

[32] It is clear to me from this explanation that the 911 dispatch system is a matter within the police's mandate and functions, irrespective of the nature of any particular call. As the municipal public safety answering point for the city, the police are responsible for dispatching the appropriate first responders and for staying on the line to coordinate all necessary responses. While the police's primary function may be law enforcement, as they submit, the PSAP function is still clearly a matter within their mandate and functions. It is my view, further, that as the PSAP, the police are responsible for the care and protection of any 911 call tapes in their possession, and I reject their submission that their possession of the record at issue amounts to bare possession only.

[33] The police also make arguments to the effect that the city has a greater interest in the record, as well as arguments on the relevance of *PHIPA*. In my view, neither argument is relevant to the custody or control issue. As I have stated above, section 18 specifically contemplates that an institution that has custody of a record may nonetheless be of the view that another institution has a greater interest in the record. In such a case, the institution that received the request may choose to transfer it to the institution with a greater interest in the requested record. I will address the transfer of request issue below, under Issue B.

[34] Similarly, the police's statement that the record "is not considered their record for the purposes of *PHIPA*" is not relevant to whether they have custody of the record for the purposes of *MFIPPA*. I address the relevance of *PHIPA* below, under Issue C.

**Issue B: Do the provisions in section 18 of *MFIPPA* relating to the transfer of a request to another institution apply?**

[35] As I stated above, the transfer of request provisions<sup>22</sup> are found in section 18 of *MFIPPA*. The relevant portions of the section state:

(3) 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.

(4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,

(a) the record was originally produced in or for the other institution;  
or

(b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

(5) Where a request is forwarded or transferred under subsection (2) or (3), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it.

[36] Under section 18(3), an institution that receives an access request may, within 15 days, transfer the request to another institution that has a greater interest in the record. Which of the two institutions has the "greater interest" in a particular record depends on the circumstances of its creation and dissemination, having regard to the criteria in sections 18(4)(a) and (b).<sup>23</sup>

[37] The purpose of section 18(3) is to give the head of an institution some latitude to decline to respond to a request for a record that the institution does, in fact, have in

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<sup>22</sup> As I note above, section 18 also contains provisions about *forwarding* a request to another institution. Section 18(2) provides for the forwarding of a request to the institution with custody or control of the requested record, where the institution receiving the request does not have custody or control of it. Section 18(2) is not relevant in the circumstances, because I have found the police do have custody of the record.

<sup>23</sup> Order MO-1494.

its custody or control, if another institution is better able to respond to the request.

### ***Police's representations***

[38] The police explain that, at the time of the initial request, the appellant spoke to the police's freedom of information analyst, and it was decided that given that it was unlikely that the affected party would consent to the release of the 911 call recording, the appellant would accept the written transcript synopsis of the call. As the appellant advised she was willing to accept the written synopsis, a transfer of the request was not initiated within 15 days, nor was written notice of a transfer provided to the appellant within 15 days.

[39] The police maintain that it was only when they were notified of this appeal that they ascertained that ambulance services had a greater interest in the record, and that the police were merely a "conduit" for the 911 call.

[40] The police explain that they sent a new decision on access to the appellant, a copy of which they provided with their representations. The police say that in this new decision, they chose to exercise their discretion under section 18(3) of the *Act*. The police submit that while they are aware that all municipal government agencies are subject to the *Act*, the city's ambulance service has taken full ownership of all ambulance calls, and is mindful of applying *PHIPA*. They submit that the city, as a designated health information custodian under *PHIPA*, is the best equipped to determine the appellant's right of access.

### ***Further developments***

[41] I begin by noting the content of the police's revised decision in which they purport to transfer the appellant's access request to the city. The relevant portion states as follows:

It has been confirmed that the 9-1-1 audio call requested falls under the jurisdiction of City of Toronto (Emergency Services).

Please be advised that the institution [i.e. the police] has chosen to exercise its discretion under sections 18(3) and (4) of the *[Act]*.<sup>24</sup> These sections state:

18 (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the

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<sup>24</sup> The police's letter refers to section 18 of *PHIPA*. This is clearly a case of inadvertence and the police meant to refer to the *Municipal Freedom of Information and Protection of Privacy Act*. *PHIPA* contains no transfer of request provisions.

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

(4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,

(a) the record was originally produced in or for the other institution;

You may wish to contact the following agency regarding access: City Clerk's Office Corporate Information Management Services Toronto City Hall, 13<sup>th</sup> Floor, West Tower 100 Queen St. West.

[42] As is evident from this letter, the police did not in fact transfer the request to the city. Rather, they told the appellant that she may wish to contact the city regarding access.

[43] Following receipt of these representations, this office sought clarification from the police on the transfer issue. The police confirmed that they had not transferred the request to the city. They further noted that they were well beyond the 15-day window for doing so.

### ***Analysis and findings***

[44] The police did not transfer the appellant's access request to the city - not within the 15-day window prescribed by the *Act*, and not since that time. If the police had transferred the request to the city in a timely way, and had the appellant objected to the transfer, the issue before me would be whether the city has a "greater interest in the record" within the meaning of sections 18(3) and (4). However, because the police did not transfer the request, I do not need to determine whether the city has the greater interest in the record.

[45] The police have custody of the record at issue, and did not transfer the request to the city. It is not open to the police to now refuse access on the basis that the city has a greater interest in the record. As noted in Order MO-2385, where a body other than the institution receiving a request has a greater interest in the record, the record is still considered to be a responsive record in the hands of the institution that received the request. The police cannot simply refuse to provide access to the 911 call recording on the basis that they are of the view that the city has a greater interest in it.

[46] It is also now too late for the police to transfer the request, even if they were to decide to do so. In Order P-1498, the adjudicator found that the legislature must have intended that this 15-day period be strictly applied in some circumstances and not

others, depending on the circumstances of a particular case. One of the circumstances to consider is any prejudice to the parties. In my view, even if it is appropriate to extend the 15-day window in some cases, this is not one of those cases. Given the passage of time, there would be significant prejudice to the appellant. I also note that the police did not immediately transfer the request once they became aware that the appellant was not, in fact, satisfied with the records she had received and had pursued access to the call recording by filing an appeal with this office.

[47] Since the police have custody of the record at issue and did not transfer the request to the city, they were required respond to the request by issuing an access decision. The police did so initially by denying access to the 911 call recording based on the personal privacy exemptions in *MFIPPA*. However, they later took the position that they do not have custody of the record and that they had transferred the request to the city. For reasons set out above, I have not upheld either of those arguments. The issue to be decided in this appeal, therefore, is whether the police's original decision should be upheld; that is, whether one of the personal privacy exemptions at sections 14(1) or 38(b) applies to the record.

**Issue C: What is the relevance of *PHIPA* in the circumstances of this appeal?**

[48] The police made several references to *PHIPA* in their representations. They argue that the record is a record of personal health information of the appellant's son, and that the appellant does not have a right of access to the record, through the police, under *MFIPPA*. The police also suggest that the reasoning in *PHIPA* Decision 27 is applicable in these circumstances.

[49] *PHIPA* governs the handling of "personal health information" by persons including "health information custodians," and establishes the right of an individual to records of his or her own personal health information in the custody or under the control of a health information custodian. "Personal health information" and "health information custodian" are defined terms in *PHIPA*.<sup>25</sup> *PHIPA* does not govern requests for access to information that is not in the custody or under the control of a health information custodian – even if the information at issue is personal health information.<sup>26</sup> In other words, *PHIPA* does not dictate how organizations that are *not* health information custodians are to respond to access requests, regardless of whether the requested information is personal health information. There does not appear to be any dispute that the police are not a "health information custodian" as defined in *PHIPA*. Therefore, *PHIPA* does not apply to the police or to the record at issue in the hands of the police.

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<sup>25</sup> See *PHIPA*, sections 3(1) and 4(1).

<sup>26</sup> See section 52 of *PHIPA*, which provides for an individual's right of access to personal health information about the individual in the custody or under the control of a health information custodian.

[50] Because the police are not a health information custodian, their reliance on PHIPA Decision 27 is misplaced. That decision involved a request to the City of Toronto for a copy of an audio recording of a 911 call. The city is both a health information custodian under *PHIPA* and an institution under *MFIPPA*, and thus requests for records in the city's custody or control may be subject to one or both statutes. In PHIPA Decision 27, the adjudicator observed that the city had custody or control of the requested record and that the requester was not the person to whom the personal health information in the record relates (and thus the requester had no right of access to the record under *PHIPA*). Ultimately, the adjudicator upheld the city's refusal of the request based on her finding that the requester had no right of access to the record under either *PHIPA* or *MFIPPA*.

[51] In the circumstances of this appeal, because the police do not qualify as a health information custodian under *PHIPA*, they cannot rely on *PHIPA* to refuse a request for access to a record in their custody or control. The police can, however, and did initially, rely on the personal privacy exemptions in *MFIPPA* to deny access to the record. Whether the personal privacy exemptions apply to the record at issue is the next question to be adjudicated in this appeal, once I have representations from the parties on that issue.

**ORDER:**

1. The police have custody of the record at issue and did not transfer the request to the city.
2. I remain seized to determine whether either of the personal privacy exemptions relied on by the police applies to the record.

Original Signed by: \_\_\_\_\_  
Gillian Shaw  
Senior Adjudicator

December 15, 2020 \_\_\_\_\_