

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4013

Appeal MA17-540

Orangeville Police Services Board

February 23, 2021

Summary: At issue in this appeal is whether the Orangeville Police Services Board (the police) have custody or control of records setting out the total amount paid to settle a lawsuit against the police arising out of the death of a named individual. In this order, the adjudicator finds that the police have control over responsive records in the possession of its insurer. The adjudicator orders the police to identify any responsive records in the possession of their insurer and to issue an access decision on these records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1, and 4(1); *Insurance Act*, R.S.O. 1990, c. I.8.

Order considered: Order MO-3189.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *Ontario (Criminal Code Review Board) v. Doe*, 1999 CanLII 3805 (ONCA); *Abick v. Continental Insurance Co. of Canada*, [2002] O.J. No. 877 (Div.Ct.); *Chersinoff v. Allstate Insurance Company*, 1969 CanLII 700 (BCCA) and *Alexander v. Great-West Life*, 2004 NBQB 285.

OVERVIEW:

[1] The Orangeville Police Services Board (the police or OPSB) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) from a media requester for access to the total amount paid to settle a specific lawsuit against the police arising out of the death of a named individual.

[2] In their initial decision letter the police relied on the exemptions at sections 10(1)(d) (third party information), 12 (solicitor-client privilege) and 14(1) (personal privacy) to deny access to the requested information, in full.

[3] The requester (now the appellant) appealed the access decision.

[4] During the intake stage of the appeals process, the police provided a further decision letter to the appellant clarifying their position. The police maintained their reliance on the previously claimed exemptions and advised that it was their insurer that was responsible for defending the specified lawsuit and, accordingly, they did not have custody and control of responsive records under section 4(1) of the *Act* (custody or control). They explained:

The settlement documentation was prepared by counsel retained by [Ontario Municipal Insurance Exchange (OMEX)] for use in the settlement of that litigation. The terms of the settlement were expressly made confidential. The [police were] not a party to, nor provided with a copy, of any settlement documentation. That is, the [police] does not have any records setting out the amount, if any, of the settlement with the [named] family.

The settlement of the [named] action did not affect [the police's budget] and any settlement funds that may have been paid were not paid by the [police].

[5] At mediation, the police maintained their position that they did not have custody or control of the requested record under section 4(1) of the *Act*, and after receiving the Mediator's report, confirmed that if they were found to have custody or control, the above-claimed exemptions would apply.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process. I decided to address the issue of custody and control first and I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the police. The police provided responding representations. In their representations, the police indicated that their insurer OMEX should be given an opportunity to provide representations in the appeal, as their interests may be affected by my determinations on the issues before me. Accordingly, I decided to seek representations from OMEX. OMEX provided responding representations. I then shared the police's¹ and OMEX's representations with the appellant who provided responding representations. Those were shared² with the police and OMEX who provided representations in reply. Further information was requested from the police in the course of the inquiry.

¹ I decided to withhold small portions of the police's representations under the confidentiality criteria in Practice Direction 7 and section 7 of the IPC Code of Procedure.

² Ibid.

[7] In this order, I find that the police have control of the responsive records in the possession of OMEX. Accordingly, I order the police to identify any responsive records in the possession of OMEX and to issue an access decision on these records.

DISCUSSION:

[8] The sole issue to be addressed in this order is whether the police have custody or control of records in the possession of their insurer, that are responsive to the appellant's request for the total amount paid to settle a specific lawsuit against the police arising out of the death of an individual.

[9] 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 . . .

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

[11] 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.³

[12] 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.⁴ 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).

[13] The courts and this office have applied a broad and liberal approach to the custody or control question.⁵

[14] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*⁶, 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?

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

⁴ Order PO-2836.

⁵ *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.

⁶ 2011 SCC 25, [2011] 2 SCR 306.

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

Factors relevant to determining “custody or control”

[15] 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.⁷ 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?⁸
- What use did the creator intend to make of the record?⁹
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹⁰
- Is the activity in question a “core”, “central” or “basic” function of the institution?¹¹
- Does the content of the record relate to the institution’s mandate and functions?¹²
- 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?¹³
- If the institution does have possession of the record, is it more than “bare possession”?¹⁴
- 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?¹⁵

⁷ Orders 120, MO-1251, PO-2306 and PO-2683.

⁸ Order 120.

⁹ Orders 120 and P-239.

¹⁰ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹¹ Order P-912.

¹² *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.

¹³ Orders 120 and P-239.

¹⁴ Order P-120 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁵ Orders 120 and P-239.

- Does the institution have a right to possession of the record?¹⁶
- Does the institution have the authority to regulate the record's content, use and disposal?¹⁷
- 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?¹⁸
- To what extent has the institution relied upon the record?¹⁹
- How closely is the record integrated with other records held by the institution?²⁰
- 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?²¹

[16] 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?²²
- 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?²³
- Who paid for the creation of the record?
- What are the circumstances surrounding the creation, use and retention of the record?
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?²⁴

¹⁶ Orders 120 and P-239.

¹⁷ Orders 120 and P-239.

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

¹⁹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Order 120.

²⁰ Orders 120 and P-239.

²¹ Order MO-1251.

²² Order PO-2683.

²³ Order M-315.

²⁴ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

- 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?²⁵ 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?²⁶
- 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?²⁷
- 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?²⁸

[17] 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.²⁹

The police’s initial representations

[18] The police explain that the information requested by the appellant relates to a civil action brought by the family of the named individual against the police and several of its officers.

[19] They explain the civil action was defended by the police’s insurer, OMEX, in accordance with the terms of an insurance policy under which the police had coverage. They submit that:

OMEX assumed responsibility and control over the OPSB’s defence and any liability arising out of the [civil action], including but not limited to choosing, instructing and paying counsel directly. OMEX retained an

²⁵ Orders M-165 and MO-2586.

²⁶ *Walmsley v. Ontario (Attorney General)* 1997 CanLII 3017 (ONCA) and *David v. Information and Privacy Commissioner Ontario*, 2006 CanLII 36618 (Div. Ct.).

²⁷ Order MO-1251.

²⁸ Order MO-1251.

²⁹ *City of Ottawa v. Ontario*, cited above.

external law firm, [named law firm] (the "External Counsel"), in relation to the [civil action].

[20] The police state that the civil action was settled by OMEX following a pre-trial conference. They explain that:

The OPSB was not present at the Pre-Trial nor during any settlement discussions between the family of [the named individual] and OMEX following the Pre-Trial. An agreement was subsequently reached between OMEX and the [family]. The settlement documentation was prepared by the External Counsel retained by OMEX for use in the settlement of that litigation. The OPSB was not a party to the settlement nor is it privy to the actual terms that were negotiated directly between OMEX and the [family]. The amounts that were paid by OMEX to the [family], if any, were within the indemnity limits of the applicable insurance policy.

[21] The police state that external counsel retained by OMEX advised the police afterwards that the civil action had been settled and that the action against the police would be dismissed. The police submit:

It was also confirmed to the OPSB by the External Counsel that the terms of the settlement were expressly made confidential and that the [family] was not to publicly discuss or disclose the settlement terms. The OPSB were not provided with a copy of any settlement documentation by either OMEX or the External Counsel. The OPSB do not have any records setting out the amount, if any, of the settlement with the [family].

The External Counsel provided the OPSB with a copy of the court order dismissing the [civil action] without costs on consent of the parties The dismissal order does not state or confirm any other settlement terms.
...

[22] The police add that the dismissal order is a publicly-available document that is located in the court's file.

[23] The police further state that they issued a media release after being contacted by the media requesting information about the settlement of the civil action.

[24] The police submit:

As set out in the media release, (i) the OPSB referred the [civil action] to its insured (i.e. OMEX), (ii) the settlement of the [civil action] was confidential, and (iii) the settlement of the [civil action] did not affect the OPSB's budget and any settlement funds that may have been paid were paid by OMEX and not by the OPSB or taxpayers.

As a result, the OPSB does not have any records in its custody or control that are responsive to the appellant's request for the settlement amount records.

[25] The police submit that the settlement amount records are an issue for OMEX and the external counsel, not for the police.

[26] The police rely on the reasoning in Order MO-3189 in support of their position, which involved a request for access to records showing the amount of legal fees paid by an insurance company to an external law firm for its services in defending the Toronto Police Services Board (the Toronto police) in a civil action. In that order, the adjudicator determined that the responsive information was not within the custody or control of the Toronto police.

[27] The police submit that:

... the analysis of the IPC in Order MO-3189 applies with greater force in this case. The relationship between the OPSB, OMEX and the External Counsel closely resembles that of the corresponding entities in Order MO-3189. However, while that case addressed invoices that were provided by the external counsel to the insurance company for legal fees incurred by the insurance company in the ordinary course, this case involves settlement amounts that were paid by OMEX to the [family] with respect to a confidential settlement agreement. The OPSB therefore submits that the IPC should reach the same conclusion in this case as was reached in Order MO-3189.

In determining whether the Settlement Amount Records are in the control of the OPSB, the factors that are commonly applied by the IPC must be considered contextually in light of the purpose of the *MFIPPA*. More specifically, the Settlement Amount Records relate to settlement funds that were paid by OMEX pursuant to a confidential settlement authorized by OMEX as reflected in settlement documents. The Settlement Amount Records were created by the External Counsel retained by OMEX with the expectation that they would remain confidential. The OPSB did not pay any of the settlement funds, did not authorize the settlement, and was not involved in retaining the External Counsel that created the Settlement Amount Records.

[28] With respect to the factors this office has developed to consider in determining whether or not a record is in the custody or control of an institution, the police submit that:

- The settlement amount records were not created by the police. The external counsel that created the settlement amount records was retained by OMEX to be

the legal representative of the police under the authority provided to it under a contract of insurance. The external counsel was not an officer or employee of the police.

- The external counsel created the settlement amount records upon being authorized by OMEX to enter into a confidential settlement agreement that would resolve the civil action. The creation of the settlement amount records resulted in the dismissal of an action against the police in which OMEX had a duty to indemnify the police.
- The duties that resulted in the creation of the settlement amount records were (i) OMEX's duty to defend and to indemnify the police in the civil action and (ii) the external counsel's duty to represent the police as a result of having been retained by OMEX. The police did not have a statutory duty to carry out the duties that resulted in the creation of the settlement amount records.
- The settlement of civil litigation is not a core, central or basic function of the police. The interactions between OMEX and the external counsel and the creation of settlement documents are not core, central or basic functions of the police but of OMEX and the external counsel.
- The settlement amount records do not relate directly to the police's mandate and functions. The contents of the settlement amount records relate to the terms upon which OMEX was prepared to settle a specific civil action in which it had an obligation to indemnify the police pursuant to an insurance policy.
- The police do not have possession of the settlement amount records. The police do not have a right of access to the settlement amount records as such access would be incompatible with the well-established contractual requirements of a policy of insurance.³⁰
- The settlement amount records are not being held by an officer or employee of the police, either for the purposes of their duties as an officer or employer or otherwise. The settlement amount records are held by OMEX and the external counsel retained by OMEX under an insurance policy.
- The police do not have a right to possession of the settlement amount records created by the external counsel for OMEX. The IPC previously found in Order MO-3189 that a police services board did not have a right of possession with respect to invoices issued by an external law firm to an insurance company in similar circumstances. The police submit that the same analysis applies in this case, with the additional restriction that the settlement amount records (i) were created with the intention and expectation that they would remain confidential,

³⁰ The police reference paragraph 70 of Order MO-3189, and the authorities cited therein, in support of this submission.

and (ii) involve an additional third party, the family of the deceased to which the police have neither a direct nor an indirect contractual relationship.

- The police do not have the authority to regulate the content, use or disposal of the settlement amount records. As an insured, the police have very limited rights with respect to the regulation of documents related to the settlement of a civil action covered under a policy of insurance. More significantly for these purposes, the police have no rights to regulate a settlement document that was negotiated entirely by parties other than the police and which contains obligations of confidentiality involving a third party (i.e. the family).
- The police do not have the ability to use the settlement amount records.
- The police have not relied on the settlement amount records. The police's involvement in the civil action ended when that action was dismissed as against the police without costs, as confirmed in the Dismissal Order.
- The settlement amount records are being held by OMEX and the external counsel and are not integrated with other records held by the police.
- The ability for the police to access information created by the external counsel retained by OMEX on behalf of the police is restricted, as confirmed in Order MO-3189. As well, the duty to defend has been interpreted as meaning that the insurer (i) chooses and instructs counsel, (ii) authorizes counsel to create settlement documentation to settle litigation in which it has a duty to indemnify the party that has been sued, and (iii) pays the settlement funds if they are within the indemnity limits of the insurance policy.

[29] With respect to the factors that may apply where an individual or organization other than the police have possession of the record, the police submit:

- The settlement amount records were created by the external counsel and provided to OMEX for payment of the settlement funds by OMEX.
- Neither OMEX nor the external counsel are "institutions" for the purposes of the *Act*.
- The settlement amount records are "owned" by OMEX and the family, the parties that negotiated the confidential settlement agreement that resolved the civil action. Their "ownership" is subject to the confidential nature of the settlement. The police do not own the settlement amount records.
- OMEX "paid" for the creation of the settlement amount records, in that it retained and paid the legal fees for the external counsel that created the records. OMEX also paid the funds set out in the settlement amount records.

- The police were covered by an insurance policy provided by OMEX that provided the police with insurance benefits, which included an obligation to defend the police in a lawsuit. OMEX commenced a defence in respect of the civil action in the name of and on behalf of the police and its officers. OMEX instructed the external counsel to create the settlement amount records to set out the confidential terms on which the civil litigation was settled.
- As OMEX had a duty to defend the police in the civil action, OMEX had a corresponding right to control the defence, including by choosing, instructing and paying the external counsel, and by authorizing the external counsel to settle the civil action within the indemnity limits of the insurance policy. The police did not have the right to direct the defence of the civil action after it had been referred to OMEX, and did not have the right to instruct the external counsel that had been retained by OMEX.
- There were no coverage issues under the insurance policy issued by OMEX, and no conflict of interest issue as between the police and OMEX. The settlement funds paid by OMEX to the family were within the indemnity limits of the insurance policy, and so the police were not required to pay any part of the settlement funds.³¹
- The settlement amount records are confidential pursuant to the agreement between the family, who commenced the civil action, and OMEX, which paid the funds to settle that action.
- The police contacted the external counsel, who advised the police that the terms of the settlement were expressly made confidential and that the family was not to publicly discuss or disclose the settlement terms. The police submit that the position taken by the external counsel on behalf of OMEX is consistent with that taken by the insurance company and the external law firm in Order MO-3189.³²
- The external counsel was retained to be the legal representative of the police in relation to the civil action under the authority provided to OMEX under a contract of insurance. The courts have determined that the right of the insurer to control the defence, including directing legal counsel, is in return for its obligation to pay a proper claim.³³ There were no circumstances in this case where the police had a basis to require OMEX or the external counsel to provide the information in the settlement amount records. There was no conflict of interest identified between OMEX's interests and the duty of good faith of OMEX to the police and there were no policy coverage issues. The police were not kept apprised by the external counsel during the settlement negotiations that resulted in the creation

³¹ The police reference paragraphs 51 and 52 of Order MO-3189 regarding this submission.

³² The police refer to paragraph 84 in support of their position.

³³ The police refer to paragraph 85 of Order MO-3189 in support of their submission.

of the settlement amount records. The police were not present at the pre-trial where the settlement was negotiated.

- The external counsel was acting on behalf of OMEX when it created the settlement amount records and when it entered into the confidential settlement with the family. As part of OMEX's right to control the police's defence of the civil action, OMEX had the right to settle that action and obtain the Dismissal Order.
- It is not the practice of the external counsel and of the insurance company as the police understands it to provide a copy of the settlement document to the insured in situations where the insurance company is paying the entirety of the settlement funds pursuant to the coverage provided by an insurance policy. In Order MO-3189, the external law firm took a similar approach to the invoices it issued to the insurance company.
- The external counsel informed the police that it would not provide it with the settlement amount records, in accordance with the external counsel's practice in situations where it is retained by an insurance company and in which the party being defended is not responsible for paying any of the settlement funds. The external counsel provided the police with the Dismissal Order, which addressed the police's interests in the civil action.

[30] The police further submit that this case also involves additional factors relating to the confidentiality of the settlement agreement that were not present in Order MO-3189, which also weigh in favour of a finding that the police do not have custody or control of the settlement amount records.

OMEX's representations

[31] OMEX's representations were provided by its external counsel. OMEX adopted and agreed with the police's representations.

[32] OMEX's external counsel submitted that:

As counsel for the OPSB and its officers in the litigation in question, I was retained by OMEX which, by the provisions of its policy of insurance, took over the conduct of the litigation upon receipt of the claim by the plaintiffs. I received instructions from them and not from the OPSB, and I was involved in the drafting of all documentation which created and resulted from the settlement. The OPSB was not privy to the discussions that gave rise to the settlement, or to the documentation that brought it about. They have not now and never had custody or control of the documents or information sought by the applicant and in fact the Settlement Agreement which was entered into between the plaintiffs and OMEX specifically stipulates that its provisions are to be kept in the strictest confidence by all parties. Any breach of this confidentiality

agreement will terminate the settlement reached between the parties. As such, the interests of OMEX could be seriously affected in a deleterious manner by any disclosure.

[33] OMEX submitted that in light of these circumstances, it opposed the disclosure of any responsive information.

The appellant's representations

[34] The appellant takes issue with the police's assertion that it has no records of the settlement amount and that it is not entitled to obtain that amount or the records of the settlement from OMEX. The appellant submits that the police should produce its policy of insurance to confirm that the total amount paid to settle the civil action is something they are not entitled to obtain. He adds:

Given that any sizeable settlement could impact on the Town of Orangeville and OPSB premiums, I'm skeptical that OPSB has no records of this. It strikes me as not credible that OPSB doesn't have copies.

[35] He further submits that a representative of the police would likely have signed Minutes of Settlement and/or other documents prepared by OMEX and its counsel. He argues that he should be provided a copy of the signatures of the Minutes of Settlement to prove that the police did not sign the settlement prepared by OMEX and its external counsel.

[36] He submits that:

OMEX is owned and operated by Ontario municipalities, of which Orangeville, including the OPSB, is an owner. As an owner, the OPSB must have a right to obtain the information requested. As an owner, it must have some authority to regulate its conduct as a member/shareholder.

I also take issue with the assertion that the record does not relate to the OPSB's mandate and functions, and that OMEX paid for the record, when OMEX is just a consortium of municipalities. The lawsuit was the result of OPSB performing its mandate to protect public safety to the Town of Orangeville. ...

[37] The appellant submits that there is a compelling overriding public interest in this information being disclosed. He submits that there is a need for public scrutiny involving potential misconduct by police and the public has a compelling interest in how lawsuits involving the police are being handled.

[38] With respect to the police's statement that the cost of the settlement was covered by OMEX, the appellant submits:

But what is the deductible? What public money is being spent on these settlements? This all relates to the accountability of the police and how public money is spent.

The police's reply representations

[39] The police repeat that they were not provided with a copy of any settlement documentation by OMEX or the external law firm retained by OMEX.

[40] The police submit that:

... a representative of the OPSB did not sign the settlement documentation prepared by the External Counsel. The appellant has provided no information to contradict the OPSB's representations regarding the custody and control of the settlement documentation. There is no legal basis for the appellant to insist on inspecting the "signing pages" of documents in the possession of third parties (i.e. OMEX and the [family]) based on nothing more than speculative claims.

[41] For the sake of clarity, the police confirm that their insurance policy with OMEX included the following provision giving OMEX the right, and also the duty, to conduct the defence of the claim brought by the family:

2. DEFENCE - SETTLEMENT - SUPPLEMENTARY PAYMENTS: As respects insurance afforded by this policy, the Insurer shall:

(a) defend in the name and on behalf of the Insured and at the cost of the Insurer any civil action which may at any time be brought against the Insured but the Insurer shall have the right to make such settlement and, subject to any claims administration agreement between the Insurer and the Named Insured³⁴, investigation and negotiation of any claim as may be deemed expedient by the Insurer or if the Insurer is prevented by law or otherwise from defending the Insured as aforesaid, the Insurer will reimburse the Insured for defense costs and expenses incurred with the consent of the Insurer ...

[42] The police submits that the effect of the above provision is consistent with "well-established principles of insurance that have been acknowledged by the IPC in previous decisions", such as Order MO-3189. They reiterate that in Order MO-3189 the adjudicator found that a police services board did not have a right of possession with respect to invoices issued by an external law firm to an insurance company in similar

³⁴ In the course of adjudication, the police advised that there is no claims administration agreement between OMEX and the police.

circumstances.³⁵

[43] The police submit that the same analysis applies in this case, with the additional restriction that the settlement amount records (i) were created with the intention and expectation that they would remain confidential, and (ii) involve an additional third party, the family, to which the police have neither a direct nor an indirect contractual relationship.

[44] The police add:

Since the claim by the [family] against the OPSB was covered by the OPSB's insurance policy with OMEX, the OPSB no longer retained authority to regulate the content, use or disposal of the resulting Settlement Amount Records. As the insurer, OMEX had the right to conduct the defence and to make such settlement as "may be deemed expedient by [OMEX]". The appellant's suggestion that the OPSB should have the right to interfere with or object to OMEX's decisions regarding settlement, whether due to concerns about future insurance premiums or some other external factor, is entirely contrary to the terms of the OMEX insurance policy specifically and the general principles underlying insurance policies.

The OPSB submits that the appellant's representations regarding the structure of OMEX are not relevant to any matters at issue in this appeal. "Reciprocal" such as OMEX are a well-established form of insurance, and the insurance policies issued by reciprocals are subject to the same legal principles as those issued by other types of insurance companies. The fact that the OPSB happened to be covered by an insurance policy issued by OMEX rather than by an insurance company does not give it any additional rights to "regulate" OMEX's activities as the insurer. The appellant has provided no information to substantiate his claim that the Town of Orangeville (which is not a party to this appeal) "must have" a right to require an insurer such as OMEX to disclose confidential settlement records relating to a particular settlement of a claim that it entered into in accordance with its rights under an insurance policy.

Finally, regarding the reference in the appellant's representations to "the deductible" under the insurance policy, the OPSB notes that the appellant's request is for the "total amount paid to settle a specific lawsuit against the OPSB relating to the death of a named individual". No request has been made with respect to amounts that may have been paid by the OPSB to its insurer with respect to a deductible under an insurance policy.

³⁵ The police refer to paragraph 70 of Order MO-3189 in support of this submission.

OMEX's reply representations

[45] OMEX's reply representations were again provided by its external counsel. OMEX adopted and agreed with the police's representations.

[46] It submits that while the underlying facts of the civil claim did relate to the police's mandate and functions, the police's mandate and functions and the exercise of that mandate and the performance of those functions has no bearing on the "total amount paid to settle"; rather, the settlement is negotiated by OMEX based on its investigation of the claim and its rights and duties as an insurer. It submits that the case was settled on the basis of a consent dismissal order and that there were no Minutes of Settlement signed.

[47] Finally, OMEX submits that the Town of Orangeville was not an owner of OMEX but rather, the involved municipalities are members of an insurance reciprocal.

Analysis and finding

[48] I accept the police's position that they do not have possession of records setting out the settlement amount. Without possession, they do not have custody of the records. However, that does not end the inquiry. The question to be addressed is if the police have control over responsive records in OMEX's possession.

[49] It is important to consider the purpose, scope and intent of the legislation when determining the issue of whether records are within the custody or control of the public body.³⁶ In all respects, a purposive approach should be adopted.³⁷ In determining whether records are in the custody or control of an institution, the relevant factors must be considered contextually in light of the purpose of the legislation³⁸.

[50] The purposes of the *Act* are set out in section 1 as follows:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

³⁶ *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 at paragraphs 84 to 85. *City of Ottawa v. Ontario*, 2010 ONSC 6835 at paragraph 21.

³⁷ *City of Ottawa v. Ontario*, 2010 ONSC 6835 at paragraph 28.

³⁸ *Children's Lawyer for Ontario v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 642 at paragraph 89.

(iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[51] As set out above and as discussed by the majority of the Supreme Court of Canada *National Defence* at paragraphs 55 and 56 of the decision, the test for control applied by the Court has two steps:

Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the *Access to Information Act* is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.

Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the Access to Information Act (A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.

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

As "control" is not a defined term in the *Act*, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are

"under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "de jure" as well as "de facto" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The *Canadian Oxford Dictionary* defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "de facto" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act.³⁹ ...

Step one: Do the settlement amount records relate to a police matter?

[53] Although the police and OMEX do not specifically address the *National Defence* test in their representations, the police argue that settlement amount records do not relate directly to the police's mandate and functions. The police state that the contents of the settlement amount records relate to the terms upon which OMEX was prepared to settle a specific civil action in which it had an obligation to indemnify the police pursuant to an insurance policy. OMEX argues that the police's mandate and functions has no bearing on the total amount paid to settle the lawsuit. Rather, OMEX says, the settlement is negotiated by OMEX based on its investigation of the claim and its rights and duties as an insurer. The appellant argues that the lawsuit resulted from the performance of the police's mandate to protect the public safety of the town.

[54] In Order MO-3189, the adjudicator found that:

Concerning part 1 of the test, I find that the contents of the records at issue, the total legal fees paid by the insurance company to the law firm where neither institution can be responsible for payment, do not concern a departmental matter for either institution.⁴⁰

[55] In my view, however, the facts at issue before me are distinguishable. The contents of the settlement amount records relate to the police's mandate and functions as they concern the settlement of an action against the police and named police officers that arose in the performance of their duties. Hence, any responsive record would have been generated in the course of the performance of what was, essentially, a police function. Under the policy of insurance, OMEX had carriage of the police's defense and

³⁹ *National Defence* at paragraph 48.

⁴⁰ At paragraph 56.

retained counsel for that purpose. If the police did not have insurance coverage they would have had the responsibility to retain their own counsel to defend their interests, and counsel would have reported to the police, not OMEX. The police were named as parties to the action and their interests were affected by the litigation. If the claim exceeded policy limits the police would be responsible for payment. In my view, the action and the settlement of the action related to a function of the police, and to a police matter. Furthermore, just because the matter was settled by OMEX and within the policy limits does not, in my view, change this analysis.

[56] Further, by choosing to engage OMEX under a policy of insurance to cover their risk, the police cannot divest themselves of their responsibility and accountability in relation to records directly related to that mandate which, but for the interposition of OMEX, would clearly have been within both the police's custody and control. In this connection, the decision of the Court of Appeal in *Ontario (Criminal Code Review Board) v. Doe*⁴¹, is instructive, where the Court stated:

... [T]he Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.⁴²

[57] Accordingly, I find that the first step of the *National Defense* test has been satisfied.

Step two: Could the police reasonably expect to obtain a copy of the settlement amount records upon request?

[58] Here, I must consider all relevant factors to determine whether the police could reasonably be expected to obtain the records upon request. These include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The factors I listed above are instructive, and I have considered them to the extent that they are relevant.

[59] The legal relationship between the insured and insurer is important here. Courts have determined that the right of the insurer to control the defence, including directing

⁴¹ 1999 CanLII 3805 (ONCA).

⁴² *Ibid*, at paragraph 35.

legal counsel, is in return for its obligation to pay a proper claim.⁴³ However, the external counsel's practice, while relevant to the factor of the customary practice of the party who created the record, is not legal authority for the external counsel to refuse to provide a copy of the settlement amount records to the police upon request.

[60] I have also reviewed the *Insurance Act*,⁴⁴ and I can find no provision in that statute or its regulations that speaks to this issue.

[61] There are, however, cases that stand for the proposition that the insurer's duty of good faith and fair dealing requires that they provide their insured clients with access to the files related to claims made against their policies. These cases concern allegations of bad faith against the insurer. For example, in *Alexander v. Great-West Life*⁴⁵ the court found that the insured, who was suing his insurer, was entitled to see documents concerning the claims appeal process or claims adjudication manual that the claims adjuster used in assessing and ultimately denying his claim. The decision also suggests that the insured should have been able to see his claims file even before commencing litigation in order to determine whether there was any bad faith on the part of the insurer⁴⁶. In my view, this supports a finding that the police do have the right to a copy of the settlement amount records.

[62] Furthermore, court decisions have found that where an insured is represented by counsel appointed by the insurance company, counsel for the insurer is also counsel for the insured.⁴⁷ This would suggest that the police, as one of the clients in the matter, could ask and be entitled to receive from external counsel a copy of the settlement amount records.

[63] In the context of a demand for production by the insured where the insured is suing the insurer after the insurer defended a claim against the insured, the courts have generally found that the insurer cannot claim privilege as against the insured over the litigation files that were created by the insurer or insurer's counsel in defending actions against the insured. The reasoning in these cases suggests that even outside of litigation brought by the insured against the insurer, the insured should be entitled to access documents related its insurance policy.

[64] For example, in *Chersinoff v. Allstate Insurance Company*⁴⁸ (*Chersinoff*), the British Columbia Court of Appeal found that,

⁴³ *Zurich of Canada v. Renaud & Jacob*, (1996), R.J.Q. 2160 (Que. C.A.).

⁴⁴ R.S.O. 1990, c. I.8.

⁴⁵ 2004 NBQB 285.

⁴⁶ *Ibid* at paragraph 17.

⁴⁷ See, for example *Chersinoff v. Allstate Insurance Company*, 1969 CanLII 700 (BCCA) and *Abick v. Continental Insurance Co. of Canada*, [2002] O.J. No. 877 (Div. Ct.) at paragraphs 11 and 12.

⁴⁸ Cited above.

... the insurer is not entitled to withhold from its insured documents prepared or acquired by the insurer for the purpose of aiding in the defence or settlement of a claim against the insured falling within the coverage of the policy. Indeed, it is bound to disclose them to the insured although they may be confidential and privileged as against other persons, especially persons adverse in interest to the insured.

[65] This reasoning is adopted by the Ontario Superior Court's decision in the appeal of a Master's Order regarding production of documents in *Abick v. Continental Insurance Co. of Canada*⁴⁹ (*Abick*). In both *Chersinoff and Abick*, the courts refer to the relationship between the insured, the insurer and the insurer's solicitor retained to defend the action against the insured as one where the insured and insurer are sharing a solicitor. As in any other relationship with a solicitor, either client in this scenario is entitled to see documents prepared by the solicitor on their joint behalf. While these cases concerned allegations of bad faith by an insurer against an insured, there is no principled reason why this would be any different in the case before me. The nature of the relationship between these parties pre-exists any claim by the insured against the insurer.

[66] In addition, the settlement resulted in the dismissal of the action against the police (not OMEX) which supports a conclusion that the police, as a party (defendant) in the litigation, has a right to the settlement amount records.

[67] I now turn to Order MO-3189. In that decision, the requester sought the legal bills paid by the insurer directly to counsel who defended a claim against the insured institution. The policy in that case provided that the insurer was responsible for unlimited defence costs. That decision found that the institution did not have custody or control of the records by virtue of being the insured.

[68] In Order MO-3189, the adjudicator found that the issue of joint privilege was not relevant in that case regarding the legal bills paid by the insurer. That is not the case here. I am of the view that the joint retainer is a relevant consideration in determining whether the institution is entitled to be given a copy of the settlement amount records.

[69] In particular, it is my view that the fact that the insurer can and did retain and instruct counsel in the settlement does not undermine the fact that counsel was acting for both the insurer and the institution. I would note that in both *Chersinoff and Abick*, the insurers controlled the defence of the claim against the insured. In the case before me, neither OMEX nor the police have provided any legal authority for the principle that the insured is not entitled to access to their insurance file, including the settlement amount records, even where there is no issue of insurance coverage or conflict of interest. Nor has any authority been provided to support the conclusion that providing a copy of the settlement amount records to the institution would result in a breach of the

⁴⁹ Cited above at paragraphs 11 and 12.

settlement's confidentiality provision. Rather, it would seem that as the institution was a client of the external counsel and a party to the litigation to which the settlement amount records relate, the confidentiality would be preserved.

[70] In addition, while the cases cited by the Adjudicator in Order MO-3189, and referenced by the police in their submissions, do address the duty to defend, they do not address the issue of whether the insured has a right to records in the litigation file created by the insurer or its external counsel. In other words, the right of the insurer to *direct* the legal defence does not answer the question of whether the insured has a *right of possession* by virtue of being either an insured who is owed the duty of good faith by the insurer, a party to the litigation, or a client of the external counsel.

[71] I have also reviewed the insurance policy provided in the course of adjudication and find that while its provisions do not explicitly create an entitlement for the insured institution to obtain a copy of settlement records or records related to the defence of a claim against the institution, it also does not contain a provision that allows the insurer to keep confidential from the institution any records created during the defence of the claim. The language in the policy also does not suggest an exhaustive assignment of the institution's rights to the insurer that would support a conclusion that the institution agreed to relinquish not only control of the defence, but also access to any information or records related to the defence.

[72] Again, as set out above, by choosing to engage OMEX under a policy of insurance to cover their risk, the police cannot divest themselves of their responsibility and accountability in relation to records directly related to that mandate which, but for the interposition of OMEX, would clearly have been within both the police's custody and control.

[73] Finally, to the extent that any prior orders of this office may be considered to be in conflict with my conclusion, including Order MO-3189, I decline to follow them.⁵⁰

[74] I would again emphasize that a finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.⁵¹ 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). In that regard, the police are free to make any relevant argument regarding the application of an exemption, including that the information is subject to settlement privilege.

[75] I conclude, therefore, that the police could reasonably expect to obtain a copy of any responsive records in the possession of OMEX on request. Therefore, the two-part

⁵⁰ In *Weber v. Ontario Hydro* [1995] 2 SCR 929, 1995 CanLII 108 at paragraph 14, the Supreme Court of Canada affirmed that tribunals are not constrained by past precedent.

⁵¹ Order PO-2836.

test in *National Defense* is met.

[76] Accordingly, I will order the police to identify any responsive records in the possession of OMEX and to issue an access decision on these records.

ORDER:

1. I do not uphold the police's access decision.
2. I order the police to identify any responsive records in the possession of OMEX and to issue an access decision on these records, without claiming that the request is frivolous or vexatious, in accordance with the requirements of sections 19, 21, 22 and 45 of the *Act*, as applicable, treating the date of this order as the date of the request, and to send me a copy of the decision letter when it is sent to the appellant.
3. The timelines noted in order provision 2 may be extended if the police are unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by: _____
Steven Faughnan
Adjudicator

February 23, 2021 _____