

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER MO-4094-R

Appeal MA17-107

City of Greater Sudbury

Interim Order MO-3646-I

August 18, 2021

**Summary:** The third party sought reconsideration of Interim Order MO-3646-I on the basis that there had been a fundamental defect in the adjudication process, as he had not been granted an opportunity to provide representations in the inquiry of the appeal. The adjudicator granted the reconsideration request in Order MO-4024-R, to the extent of reopening Interim Order MO-3646-I to seek representations from the third party on the issue of whether a record was under the city's control for the purposes of section 4(1) of the *Act*. After not receiving submissions on this issue from the third party, the adjudicator confirms the finding in Interim Order MO-3646-I that the record is in the city's custody or control and dismisses the reconsideration request.

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

**Orders Considered:** Orders MO-3646-I and MO-4024-R.

### OVERVIEW:

[1] In Reconsideration Order MO-4024-R, I granted the third party's request for reconsideration of Interim Order MO-3646-I on the basis of a fundamental defect in the adjudication process. This is my decision on the substance of the issue under reconsideration.

[2] Appeal MA17-107 (the subject of Order MO-3646-I) arose from the City of Greater Sudbury's (the city) decision in response to a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to general records relating to a named organization of which the city is a member. In particular, the request was for the named organization's meeting agendas and minutes circulated to members during a

specified time period.

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

[4] The affected party, now the appellant, appealed the city's decision to this office claiming the application of section 10(1) to most of the records. The appeal involved a large number of records, one of which is a record relating to the third party (the party who made the reconsideration request before me, as explained below).

[5] Mediation did not resolve the appeal and the file was moved to the adjudication stage where an adjudicator may conduct an inquiry under the *Act*. Before the inquiry began, the appellant contacted the mediator and asked that the issue of custody or control be added to the scope of the appeal. The adjudicator sought representations from both the appellant and the city. Despite being given a number of opportunities, the appellant did not submit representations. The city declined to submit representations stating that it continued to take the position that the records at issue should be disclosed.

[6] To this point, the third party (the party whose reconsideration request is before me) had not been notified by either the city (at the request stage) or the IPC (at the appeal stage).

[7] In Interim order MO-3646-I, the adjudicator found the following:

- The records at issue are in the custody and control of the city.
- With the possible exception of two records, section 10(1) does not apply to the records.
- Her determination on whether section 10(1) applies to the two records that were prepared by other third parties was deferred pending notification of these parties.

[8] Appeal MA17-107 was then reassigned to me to continue the inquiry into the two remaining records at issue. During the inquiry, I sought representations from the two third parties whose records remained at issue in the appeal. I received a reconsideration request from one of the third parties (the third party).

[9] In order to address the third party's reconsideration request, I also sought representations from the city and the original requester. The city declined to submit representations but I received representations from the original requester. In Reconsideration Order MO-4024-R, I granted the third party's request for reconsideration on the basis that there had been a fundamental defect in the adjudication process when the third party was not notified of the custody or control issue in respect of its record, and decided to reopen that issue in order to provide the third party with an opportunity to make representations on the issue of custody or control.

[10] I then sought representations from the third party on whether the record relating to the third party is under the custody or control of the city. Despite being given several opportunities to submit representations on this issue, the third party did not submit representations. Before closing the inquiry, I confirmed with the third party that I would be proceeding with my decision in the absence of any representations.

[11] In this order, I confirm the finding in Interim Order MO-3646-I that the city has custody or control of the record at issue and dismiss the reconsideration request.

## **DISCUSSION:**

[12] The sole issue in this reconsideration order is whether the city has custody or control of the record relating to the third party that is at issue in Appeal MA17-107. The record is a report of the third party that the city has in its record holdings.

[13] Section 4(1) reads, in part:

Every person has a right of access to a record or part of a record in the custody or under the control of an institution unless...

[14] 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.<sup>1</sup>

[15] 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>2</sup> 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).

[16] The courts and this office have applied a broad and liberal approach to the custody or control question.<sup>3</sup>

[17] 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>4</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>5</sup>
- What use did the creator intend to make of the record?<sup>6</sup>

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

<sup>2</sup> Order PO-2836.

<sup>3</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 (Fec. C.A.) and Order MO-1251.

<sup>4</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>5</sup> Order 120.

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?<sup>7</sup>
- Is the activity in question a “core”, “central” or “basic” function of the institution?<sup>8</sup>
- Does the content of the record relate to the institution’s mandate and functions?<sup>9</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>10</sup>
- If the institution does have possession of the record, is it more than “bare possession”?<sup>11</sup>
- 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>12</sup>
- Does the institution have a right to possession of the record?<sup>13</sup>
- Does the institution have the authority to regulate the records’ content, use and disposal?<sup>14</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>15</sup>
- To what extent has the institution relied upon the record?<sup>16</sup>
- How closely is the record integrated with other records held by the institution?<sup>17</sup>
- What is the customary practice of the institution and institution’s similar to the institution in relation to possession or control of records of this nature, in similar circumstances?<sup>18</sup>

[18] In determining whether records are in the “custody or control” of an institution, the

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<sup>6</sup> Orders 120 and P-239

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

<sup>8</sup> Order P-912.

<sup>9</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>10</sup> Orders 120 and P-239.

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

<sup>12</sup> Orders 120 and P-239

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

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

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

<sup>16</sup> *Ministry of the Attorney General v. Information and Privacy commissioner*, cited above and Orders 120 and P-239.

<sup>17</sup> Orders 120 and P-239.

<sup>18</sup> Order MO-1251.

above factors must be considered contextually in light of the purpose of the legislation.<sup>19</sup>

[19] In Interim Order MO-3646-I, the adjudicator determined that the city has custody and control of the records at issue. The adjudicator states:

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

[20] In the present circumstances, the only party claiming that the third party's record is not in the city's custody or control is the third party<sup>20</sup> itself. I granted the third party's reconsideration request on the basis that it had not been provided an opportunity to submit representations on the issue of the city's control of the record. The adjudicator's decision in Order MO-3646-I was that the city had custody or control of the records remaining at issue, given that the city has possession of it and the record relates to its mandate. In the absence of representations from the third party, I find that I have no reason to change the finding in Order MO-3646-I. I have no representations or evidence before me to change the finding that the record, which the city had in its possession, was in the city's custody or control under section 4(1) of the *Act*.

[21] Accordingly, I confirm the finding in Interim Order MO-3646-I that the city has custody or control of the record at issue relating to the third party and I dismiss the reconsideration.

**ORDER:**

1. I find that the record at issue is in the custody and control of the city.
2. I remain seized of the appeal to deal with the final issue of access to the records at issue.

Original signed by \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ August 18, 2021

<sup>19</sup> *City of Ottawa v. Ontario*, cited above.

<sup>20</sup> For clarification, the third party appellant and the third party both raised this issue. Neither party provided representations supporting their position.