

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4447

Appeal MA22-00021

Toronto District School Board

October 2, 2023

Summary: The appellant made a request to the TDSB for records relating to an investigation conducted by the TDSB's Integrity Commissioner. The adjudicator finds that the responsive records are not within the TDSB's custody or control. The adjudicator also finds that the TDSB conducted a reasonable search for any responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 4(1), 17; *Education Act*, R.S.O. 1990, c. E.2; *Municipal Act, 2001*, S.O. 2001, c. 25; *City of Toronto Act, 2006*, S.O. 2006, c. 11.

Orders and Investigation Reports Considered: Orders 120, P-85, P-221, P-239, P-624, P-912, PO-1954-I, PO-2306, PO-2469, PO-2554, PO-2559, PO-2592, PO-2683, PO-2836, PO-4419, M-165, M-315, M-506, M-909, MO-1251, MO-2185, MO-2213, MO-2246, MO-2381, MO-2586, MO-2629-R, MO-3226.

Cases Considered: *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, 2011 ONSC 172 (Div. Ct.); *Ontario (Criminal Code Review Board) v. Ontario (Information & Privacy Commissioner)*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA); *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.); *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.); *David v. Ontario (Information & Privacy Commissioner)* (2006), 217 O.A.C. 112 (Div. Ct.); *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25; *Greater Vancouver Mental Health Service Society v. British Columbia (Information & Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.); *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner)*, 2018 ONCA 559.

OVERVIEW:

[1] An individual (the requester) made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto District School Board (the board) for records relating to the board's Integrity Commissioner (the IC). Specifically, the requester seeks records relating to the IC's retainer of a lawyer at a named law firm (the investigator) to investigate the conduct of a specific board trustee (the trustee).

[2] In response, the board stated that any responsive records, if they exist, would be in the custody or control of the IC, not the board.

[3] The requester, now the appellant, appealed the board's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation stage of the process, the appellant raised the issue of whether the board had conducted a reasonable search for any responsive records.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry under the *Act*.

[6] The adjudicator commenced the inquiry by seeking representations from the board on the custody or control and reasonable search issues. The board provided representations in response. The adjudicator then sought representations from the appellant, who also provided responding representations. The board then replied to the appellant's representations and, in turn, the appellant replied to the board's reply representations.

[7] The appeal was then transferred to me to continue the adjudication process. I have reviewed the parties' representations and determined that I did not need to hear from them further before making my decision.

[8] In this order, I find that the board does not have custody or control of the IC's records in the circumstances of this appeal. Further, I uphold the board's search for responsive records.

RECORDS:

[9] The appellant is seeking access to four types of records:

1. the investigator's report to the IC (the investigator's report)
2. the retainer agreement between the IC and the investigator (the retainer agreement)

3. social media statements made by the investigator in possession of the board at the time the investigator was retained (social media statements)
4. records regarding the appropriateness of retaining the investigator in light of the investigator's social media statements (records on the appropriateness of the retainer)

ISSUES:

- A. Are the records "in the custody" or "under the control" of the board under section 4(1) of the *Act*?
- B. Has the board conducted a reasonable search for responsive records as required by section 17 of the *Act*?

DISCUSSION:

Issue A: Are the records "in the custody" or "under the control" of the board under section 4(1) of the *Act*?

Introduction

[10] Section 4(1) establishes the right of access under the *Act*. That section 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...

[11] This section makes it clear that 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.¹

[12] A finding that a record is in an institution's custody or control does not necessarily mean that a requester will be provided access to it.² Such a record 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 at sections 6-15.

[13] The courts and the IPC have applied a broad and liberal approach to the custody

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

² Order PO-2836.

or control question.³ The IPC has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution.⁴ I will address these factors below.

The board's IC

[14] In 2015, the board developed a "Code of Conduct for Board Members" (the code) and appointed its first integrity commissioner. The board was the first to do so in Ontario. The main role of the IC is to apply and enforce the code, "a comprehensive ethical document designed to supplement the rules of the *Education Act*" with respect to the actions and behaviour of board trustees.⁵

[15] The individual who held the IC position during the time period of the investigation in question was appointed in 2016 and served until early in 2022. The board appointed a new IC in early 2022.

Background to the IC's investigation

[16] In June 2021, the IC commenced an inquiry into two similar complaints the IC had received alleging that a trustee had violated the code.

[17] The IC determined that the complaints raised three issues. The IC decided that one of the three issues should be investigated by an independent investigator. As a result, in July 2021, the IC retained the investigator, an expert in human rights, harassment and discrimination, to investigate the issue on the IC's behalf. In September 2021, the investigator provided its report (the investigator's report) to the IC which addressed the one issue.

[18] In November 2021, the IC gave the trustee a copy of its own report containing its preliminary findings on all three issues raised by the matter. The IC asked the trustee for comments. The trustee provided comments to the IC.

[19] The IC issued its final report in November 2021, and gave a copy of the final report to the parties and to the board's Board of Trustees. The final report contains excerpts from, and summarizes parts of, the investigator's report.

[20] Once the IC's final report was made public, some members of the public and public interest groups raised concerns that the investigator was in a conflict of interest because of comments the investigator had made on social media.

³ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA); and Order MO-1251.

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

⁵ IC's Annual Report (2016), p. 4.

Factors relevant to determining custody or control

[21] In the overview of the appeal given above, I set out the principles of custody or control and referred to the IPC having developed a non-exhaustive list of factors to consider in determining the issue. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. The non-exhaustive list of factors considered includes:

- Was the record created by an officer or employee of the institution?⁶
- What use did the creator intend to make of the record?⁷
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁸
- Is the activity in question a “core”, “central” or “basic” function of the institution?⁹
- Does the content of the record relate to the institution’s mandate and functions?¹⁰
- 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?¹¹
- If the institution does have possession of the record, is it more than “bare possession”?¹²
- 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?¹³
- Does the institution have a right to possession of the record?¹⁴
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁵

⁶ Order 120.

⁷ Orders 120 and P-239.

⁸ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information & Privacy Commissioner)*, cited above.

⁹ Order P-912.

¹⁰ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.) (*Ottawa*); and Orders 120 and P-239.

¹¹ Orders 120 and P-239.

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

¹³ Orders 120 and P-239.

¹⁴ Orders 120 and P-239.

- 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?¹⁶
- To what extent has the institution relied upon the record?¹⁷
- How closely is the record integrated with other records held by the institution?¹⁸
- 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?¹⁹

[22] 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?²⁰
- 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?²¹
- Who paid for the creation of the record?²²
- What are the circumstances surrounding the creation, use and retention of the record?²³
- 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
- 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

¹⁵ Orders 120 and P-239.

¹⁶ *Ministry of the Attorney General v. Information & Privacy Commissioner*, cited above.

¹⁷ *Ministry of the Attorney General v. Information & Privacy Commissioner*, cited above; Orders 120 and P-239.

¹⁸ Orders 120 and P-239.

¹⁹ Order MO-1251.

²⁰ Order PO-2683.

²¹ Order M-315.

²² Order M-506.

²³ Order PO-2386.

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

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

[23] The factors are to be considered contextually in light of the purpose of the legislation.²⁹ Where an institution does not have possession of the record, a relevant factor is whether it could reasonably be expected to obtain a copy on request.

[24] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,³⁰ (*National Defence*) the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?

Representations

Board's initial representations

[25] The board says it does not have custody or control of the records. The board

²⁵ Orders M-165 and MO-2586.

²⁶ *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) (*Walmsley*); and *David v. Ontario (Information & Privacy Commissioner)* (2006), 217 O.A.C. 112 (Div. Ct.) (*David*).

²⁷ Order MO-1251.

²⁸ Order MO-1251.

²⁹ *Ottawa*, cited above.

³⁰ 2011 SCC 25.

begins by addressing the investigator's report. It submits that this report was created by the investigator, and the investigator was contracted independently by the IC's office, an independent office that is separate from the board.

[26] The board accepts that the investigation report relates to an investigation into the conduct of a board trustee, but says the report was to be used solely by the IC and not the board. Further, the board submits that it did not rely on the record; rather, it was relied on by the IC for the purposes of the IC's investigation and ultimate report. The board says it does not possess or control records collected, prepared or used by the IC in the IC's preparation of reports to the board.

[27] The board submits that the contract between it and the IC specifically states that the IC "maintains custody and control of her complaint and inquiry files and on completion of her term of appointment, will transfer open files relating to ongoing matters to the incoming Integrity Commissioner."

[28] The board submits that there is nothing in the agreement between it and the IC which provides the board with the contractual right to require the IC to disclose copies of records used in her inquiry to the board. The board only receives a record of the results of such inquiries in the form of a report.

[29] The board goes on to explain that the contract was specifically formulated so as to ensure the IC's independence from the board so that investigations can be conducted impartially.

[30] The board cites section 6(b) of its contract with the IC, which reads:

[IC] agrees to submit reports and other materials related to the performance of the Services as agreed by Integrity Commissioners and TDSB from time to time, at such times as may be scheduled for submission.

[31] The board submits that it is clear from this section that the board is entitled to receive a copy of the IC's report into an investigation. The board says that the term "other materials related to the performance of the Services" means records relating to the IC's advisory functions as well as reports to the board "on the IC's activities and any other work she deems appropriate to implement" the code.

[32] Based on the above, the board says that the records the IC is required to produce to the board do *not* include any records which would normally be associated with an investigation (for example, notes, witness statements, drafts, investigative retainers). The board submits that, as noted under section 6(b) of the contract cited above, such files expressly reside in the IC's custody or control.

[33] The board further states that in early 2022, it appointed a new IC. The new contract states:

No provision of this Agreement will be construed so as to give [the board] any control or custody whatsoever over the [IC's] complaint and inquiry files, records, reports and their associated documents.

[34] The board cites a previous IPC decision involving the board, Order MO-2381. In that case, the board had contracted with a service provider ("advisory panel") to prepare a report in the wake of a school shooting on board property. The requester sought the advisory panel's notes used to prepare the report. The IPC ruled that the board did not have custody or control of the records, because the advisory panel was not made up of board employees, and the board's purpose in retaining the advisory panel was to receive independent recommendations. The IPC stated that the board had no statutory or contractual right to control the records or require that they be dealt with in any way.

[35] The board further submits that, in Order MO-2381, the IPC found that some of the records were held in the board's computer system, but that even those records were outside the board's custody or control.

[36] The board notes that, as in Order MO-2381, the IC is an independent contractor, based on the contract between the board and the IC. The board cites section 6(a) of the IC's 2016 contract which states: "The [IC] is an independent contractor and not an employee of [the board]."

[37] The board also relies on Order MO-3226, another order in which it was involved. In that case, a requester asked for mobile device text messages. The IPC found that the contract between the board and the mobile device service provider did not give the board the right to access text messages stored on the service provider's servers. In that case, relying on the two-part *National Defence* test, the IPC found that (i) the records related to a board matter, but (ii) the board could *not* reasonably expect to obtain copies of the records on request due to the absence of a contractual right to receive them.

[38] The board then makes specific submissions with respect to the three other types of records the requester seeks (apart from the investigator's report).

[39] First, regarding the retainer agreement, the board submits that the investigator was retained by the IC, and not the board, which is why it does not have custody or control of this record.

[40] Second, regarding the investigator's social media statements, the board says that it has never had these records in its possession. It submits that the investigator is not an officer or employee of the board, and the investigator does not have a board authorized social media account.

[41] Third, the board says it has no records regarding the appropriateness of the retainer, or any records relating to the selection of the investigator, because it was not

involved in the selection process.

[42] The board provided an affidavit supporting its representations. The appellant raised concerns about the accuracy of some of the facts stated in the affidavit. As a result, the board filed a further affidavit clarifying and/or correcting some of the information in the original affidavit.

Appellant's initial representations

[43] The appellant submits that, under the *Education Act*, the board is responsible for investigating an alleged breach of the code, and that statute does not mention an integrity commissioner or any other official carrying out such investigations.

[44] The appellant contrasts this with Ontario municipalities, which do have integrity commissioners, as provided for in the *Municipal Act* and the *City of Toronto Act*. The requester notes that under these statutes the integrity commissioners' records are confidential and that these confidentiality provisions prevail over the *Act*. The requester submits that because there are no analogous provisions under the *Education Act*, the records of the IC are *not* confidential, and the Legislature has made the choice to allow for public disclosure of records relating to school board integrity commissioners.

[45] The appellant refers to the board by-law under which the IC was appointed, and submits that the IC "is accountable, and reports directly, to" the board.³¹

[46] The appellant says that the by-law does not make the IC "independent of the board." I pause here to note that despite this submission, the by-law uses the word "independent" to describe the IC's work twice, at section 6.3.2 (the IC "carries out in an independent manner the duties and responsibilities of their office...") and section 6.3.11 (the IC "will provide advice and offer an independent, transparent and accountable process for conducting inquiries and complaint resolution.")

[47] The appellant says that under the by-law the IC is not independent of the board, but rather accountable to the board.

[48] The appellant submits that, contrary to the board's submissions, the board has a right to require the IC to disclose records to it, and that this right is implied in the accountability (section 6.3.3) and removal (sections 6.3.8, 6.3.9) provisions of the by-law. The appellant submits that the board could pass a resolution directing the IC to produce its records to the board. I note here that the resolution authority in sections 6.3.8 and 6.3.9 speak to the IC's appointment, extension or removal, and are silent with respect to any other matter, including the production of records.

[49] The appellant also makes a distinction between board *staff* and the board, and says that the IC may be independent of staff, but not the board itself.

³¹ Board Governance and Accountability Framework, s. 6.3.1

[50] Emphasizing the words “transparent and accountable” in section 6.3.11, the appellant submits that the board must be able to obtain the records, and that the IC must not be viewed as independent of the board.

[51] The appellant cites the different language in the new IC’s contract, and submits that this is an implicit acknowledgement by the board that the 2016 contract does not permit the IC to withhold records from the board.

[52] The appellant goes on to cite additional sections of the by-law, and says that these sections indicate that the board exercises “significant control” over how the IC performs its duties.³²

[53] The appellant points out instances in which the IC represented itself as being part of the board by, for instance, using board logos in its published materials, and listing the board head office as its own. The appellant also states there is evidence that the board was content with the IC doing so, and that this suggests the IC is an “officer” of the board.

[54] Regarding Order MO-2381 cited by the board, the appellant says that case is distinguishable on several grounds, including:

- the advisory panel maintained a separate physical address and its own website, unlike the IC
- the advisory panel concluded its work within six months, and the IC is appointed for a five year term
- an IT firm retained by the advisory panel deleted all information on the members’ devices before the devices were returned to the board; by contrast, the IC uses board email addresses and there is no evidence the IC’s data is segregated from the board’s IT systems
- the advisory panel made its own independent financial decisions, but the board acknowledges that it paid for the investigator’s services, and it appears there is no evidence of the IC having financial independence

[55] The appellant makes specific submissions on the factors outlined above. I have summarized them as follows:

- the IC was a board “officer” and not an independent employee
- the IC used the records for the final report and the board used the records to decide what action to take against the trustee

³² Board Governance and Accountability Framework, s. 6.3.12, TDSB Complaint Protocol (PR708), s. 6.9(a).

- the IC had the statutory power to carry out the activity that resulted in the creation of the records
- the work in question is an institution function which could have been carried out by the board itself
- the content of the records relates to the board's mandate
- it is not clear whether the board has physical possession of the records, but the board could conduct a search of the IC's board-assigned email account
- the board has more than "bare possession" of the records based on previous submissions
- the board has an enforceable legal right to obtain the records, and to regulate their contents, based on previous submissions and the by-law
- the board was permitted to use the records to determine whether to sanction the trustee, and to authorize payment of the investigator's fee

Board's reply representations

[56] I have summarized the board's reply submissions below:

- the fact that the IC is not subject to legislative confidentiality provisions akin to integrity commissioners for municipalities is not relevant
- in two previous court decisions, the entities that were found to be independent and whose records were held to be outside the scope of the *Act*, were not created by statute but by the institution, similar to this case³³
- the *Education Act* does not preclude the board from entering into contracts with arms length providers to conduct an inquiry into a code matter
- the *Education Act* does not empower the board to order disclosure of IC records
- the purpose of the by-law provision that says the IC is accountable to the board is to make it clear the accountability is to the board itself, rather than staff such as the Director of Education; this provision does not negate the IC's independence
- no part of the by-law "implies" that the board has power to require the IC to produce records

³³ Above, note 26.

- the by-law is silent on documentary disclosure, and the contract itself makes it clear that these documents are in the IC's control
- the change in the contract does not imply a distinction regarding control of documents; the revised wording is simply a reformulation of the same principle that the records are in the IC's control
- the board's power to direct the IC as to the services provided does not imply that the board has the power to control the IC's records
- the IC's use of board logos, graphics and address is only one limited factor that is outweighed by the much more significant contract terms
- the IC has used the term "officer" generically; the IC is appointed through the board's procurement process which is not consistent with the status of "officer"
- the fact that the records relate to a board matter is not determinative, as was the case in *Walmsley, David* and Order MO-2381
- since the activity in question relates to behaviour of elected officials it is reasonable for the board to ensure the conduct of such inquiries is performed at arm's length through contracted services to prevent undue influence rather than through individuals more directly connected to the board
- the board does not have physical possession of the records; even if it did, this is not determinative as in the *Ottawa* case³⁴

Appellant's reply representations

[57] The appellant responded to the board's reply submissions. I have summarized the key points below:

- in the cases the board relies on, the entities found to be independent were engaged temporarily to perform a specific task, unlike the IC who is appointed for a lengthy fixed term
- the board's record management procedure, which applies to the IC, indicates that the IC's records must be maintained in the board's custody or control, and this prevails over the contract between the IC and the board
- this case is similar to Reconsideration Order MO-2629-R, in which the IPC ruled that records held by a city auditor general were in the control of the city
- if any responsive emails are found in the IC's email addresses, they are in the custody of the board and therefore the *Act* applies to them

³⁴ *Ottawa*, cited above.

- the use of contractual language indicating that the IC's records are not in the board's custody or control represents an attempt to remove the records from the scope of the *Act*, and thereby prevent public scrutiny; this is contrary to the accountability purpose of the *Act*

Findings

Control

[58] For the reasons set out below, I find that the board does not have control over the four types of requested records.

[59] I will first consider the two-part test developed by the Supreme Court of Canada in *National Defence* 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?

[60] The board accepts that the records relate to an investigation into the conduct of a board trustee. I find that this can be characterized as a board matter. I agree with the appellant that, under the *Education Act*, the board is responsible for investigating an allegation that a trustee has behaved in a way that is contrary to that statute or the code. This finding is consistent with that in Order MO-3226, in which the IPC ruled that text messages between trustees related to a board matter.³⁵ Accordingly, the first part of the test has been met for the four record types.

2. Could the board reasonably expect to obtain a copy of the records on request?

[61] To answer this question, I will consider the various factors, discussed above, relevant to the "control" question. In particular, I will focus on the ten questions the Court of Appeal applied in *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner)*,³⁶ which in turn are derived from the factors developed by the IPC as discussed above. I will also consider any other relevant factors.

Was the record created by an officer or employee of the institution?

[62] Looking first at the retainer agreement, this record would have been created by the IC. The next question is whether the IC can be considered an officer or employee of the board.

[63] The IC may be an "officer" of the board in the generic sense of that word, but the IC was created to be an *independent* contractor as indicated in the contract between the board and the IC. The board set up the IC in this way to ensure that the

³⁵ Para. 18.

³⁶ 2018 ONCA 559, paras. 113-125.

IC's investigations are conducted in an impartial manner and, as the board put it, to avoid the IC being subjected to "undue influence" in its investigations. In my view, this is a legitimate and useful approach to enhance the public's and any involved parties' confidence in the validity of the IC's factual and legal findings and recommendations. A finding that the IC is merely an officer of the board would erode the important values of the IC's independence and impartiality from the board in the context of the IC's investigation and reporting functions.

[64] This finding is consistent with the ruling in Order MO-2381, in which the IPC found that the advisory panel was contracted to provide the board with independent recommendations.

[65] The appellant argues that the by-law does not make the IC "independent of the board." As I noted above, the by-law uses the word "independent" to describe the IC's work twice, at section 6.3.2 (the IC "carries out in an independent manner the duties and responsibilities of their office...") and section 6.3.11 (the IC "will provide advice and offer an independent, transparent and accountable process for conducting inquiries and complaint resolution.") These statements in the by-law reinforce the notion that the IC operates independently from the board and cannot be considered an "officer" or "employee" in the usual sense of those terms.

[66] I also note that the IC is appointed through the board's procurement process. While this is not conclusive, it is a factor weighing against a finding that the IC cannot be considered a board officer or employee.

[67] The appellant says that the IC is "accountable" to the board. It is true that the by-law and contract contain provisions that ensure a degree of accountability to the board. However, I agree with the board's submission that these provisions are intended to clarify that the IC is accountable to the board itself, rather than staff such as the Director of Education. I also agree that measures to ensure accountability in various ways does not negate the essential principle that the IC is independent of the board in the manner in which the IC's investigations are carried out.

[68] The appellant relies on the fact that the IC has represented itself as being part of the board by using board logos in its published materials, and listing the board head office as its own. The appellant also states there is evidence that the board was content with the IC doing so, and that this suggests the IC is an "officer" of the board. In other circumstances, these facts might lead to a conclusion that the individual was an officer of the board. However, in light of the strong indications of the IC's independence, these factors are not sufficient to support a finding that the IC is an officer of the board.

[69] The IC would naturally want to represent to the public that its purpose is to carry out a significant function on behalf of the board, and using logos and the board's address would make this clear. But these facts are not sufficient to alter the nature of the relationship between the IC and the board.

[70] The appellant points out that the advisory panel in Order MO-2381 had a relatively brief, temporary existence, as opposed to the IC who is appointed for a five-year term. I find that this distinction carries little weight. What is more important is the independent nature of the work of these entities, rather than their temporal existence.

[71] With regard to the investigator's report and the social media statements, these records were or would have been created by the investigator, not the IC. The investigator clearly is neither an officer nor an employee of the board. The investigator had no formal relationship with the board whatsoever.

[72] As to the records on the appropriateness of the retainer, it is not clear whether, if they exist, would have been created by the IC. Even if they were, for the reasons set out above, they cannot be considered to have been created by an officer or employee of the board. I will discuss below whether the board has custody or control of any such records that may have been created or compiled by board staff and not the IC.

[73] For these reasons, I find that the records in question that were created by the IC cannot be considered records created by an officer or employee of the board. This factor weighs strongly against a finding that the records are in the board's control.

What use did the creator intend to make of the records?

[74] The investigator's report, created by the investigator, clearly was intended to be used by the IC. The evidence indicates that the IC retained the investigator to provide a report to the IC, so that the IC could use it to prepare the ultimate report the IC gave to the board. There is no indication that the investigator intended that the report itself would be used directly by the board.

[75] In addition, the retainer agreement was intended to be used by the IC, since it is an agreement between the IC and the investigator, and the board is not a party to this contract.

[76] As to the social media statements and records as to the appropriateness of the retainer, if they exist in the hands of the IC, there is no indication that the creator of those records would have intended that they be used by anyone other than the IC.

[77] This factor weighs against a finding that the board has control of these records.

Does the board have possession of the records?

[78] The board's submissions and evidence (supported by affidavits) indicate that it does not and has not ever has possession of the requested records.

[79] In my view, the fact that the IC uses board email addresses and that it appears the IC's data is not segregated from the board's IT systems is not determinative. Rather, these facts are an indication that the board has "bare possession" of the

records. In the *Ottawa* case cited above, the emails in question were held on the city's servers, but the court concluded that this did not mean that the city had control of the records.

[80] In Order PO-4419, the IPC stated that "bare possession" does not suggest control without "an independent right to deal with the information." For the reasons discussed both above and below, I find that the board does not have such an independent right as distinct from the IC.

[81] This finding is also consistent with Order MO-2381. In that case, the IPC ruled that, despite records existing on the board's servers, the records were outside the board's custody or control.

[82] This factor weighs against a finding that the records are in the board's control.

If the board does not have possession of the record, is it being held by a board officer or employee for the purposes of their duties as officer or employee?

[83] For the reasons cited above, I find that the records are *not* being held by a board officer or employee. Rather, the IC holds these records for the purpose of the IC's independent investigation and reporting duties.³⁷ This factor weighs against a finding that the board has control of the records.

Does the board have a right to possession of the records?

[84] I find that the board does not have a statutory or contractual right to possession of the records.

[85] I agree with the board that, based on the contract with the IC, the board's entitlement to access to IC records is limited to (i) the IC's report into an investigation, (ii) records relating to the IC's advisory functions, and (iii) reports to the board on the IC's activities and any other work the IC deems appropriate to implement the code. This is a reasonable interpretation of the language of the contract, and is consistent with the independent nature of the IC's role and functions. Clearly, the contract does not give the board an explicit right of access to all records relating to a specific investigation.

[86] Further, I do not accept the appellant's submission that such a right to possession of these records is "implied" by the terms of the by-law. As I noted above, the resolution authority in sections 6.3.8 and 6.3.9 speak to the IC's appointment, extension or removal, and are silent with respect to any other matter, including the production of records. It would not be reasonable to "read in" such access rights from these general provisions that speak to matters other than records.

[87] I also accept the board's submission that the change in the contract language

³⁷ *Children's Lawyer*, para. 117.

from 2016 to 2022 does not imply a distinction regarding control of documents, and that the revised wording is simply a reformulation of the same principle that the records are in the IC's, not the board's, control. In addition, I agree with the board's submission that the board's power to direct the IC as to the services provided does not imply that the board has the power to control the IC's records. The opposite conclusion would, once again, erode the vital principle of independence.

[88] I do not accept the appellant's submission that the change in contractual language represents an attempt to remove the records from the scope of the *Act*; there is simply no evidence to support this submission and, as I indicated above, the new language is more properly considered a clarification rather than a substantive change in the agreement.

[89] The IPC's ruling in Order MO-3226 supports the board's position. In that case, the IPC found that the contract between the board and the mobile device service provider did not give the board the right to access text messages stored on the service provider's servers. That contractual right is similarly absent here.

[90] The appellant submits that the board's record management procedure indicates that the IC's records must be maintained in the board's custody or control. I accept that this is one indication of the board having control of the requested records, but I find that it is outweighed by the by-law and contractual provisions stated above and, once again, the foundational principle of the IC's independence.

[91] The appellant cites Reconsideration Order MO-2629-R, and says that the IPC ruled in that case that records held by a city auditor were in the control of the city. In that case, the adjudicator considered whether the *Act* could allow city staff to search the investigation files of the Auditor General and other independent accountability officers. The adjudicator stated that there was no concern that these files could be accessed in this way because they were protected by the confidentiality provisions in the *City of Toronto Act*. A finding here that the board has no right to access records in the IC's investigation files would be consistent with that ruling.

[92] I find that the board has no right to possession of the records held by the IC.

Does the content of the records relate to the board's mandate and functions?

[93] The content of the records relates generally to the board's mandate and functions. However, in my view, the content of the records is more accurately described as relating to the mandate and functions of the IC specifically. While it is true that the board itself has the statutory duty to ensure compliance with the *Education Act*, it has set up the IC as an independent body to carry out the function of investigating and reporting on allegations of misconduct. Ultimately, the board carries out its own statutory duties by receiving the IC's reports and recommendations and taking whatever actions the board deems appropriate.

[94] As a result, this factor can be considered to weigh in favour of a finding that the board controls the records. However, because of the distinction between the board's and the IC's roles, I find that it carries low weight.

Does the board have the authority to regulate the records' use?

[95] Consistent with the reasons cited above with respect to the by-law and the contract, and the board's lack of a right to possession, I find that the board does not have authority to regulate the records' use. The IC uses the records for the IC's own, independent purposes.

To what extent has the board relied on the records?

[96] I find that the board has not relied on any of the records. It is clear from reviewing the applicable process that the IC uses the records as part of the IC's investigation and reporting functions, and there is no indication that the board directly uses these records in this or any other investigation matter. The board submits, and I accept, that it has not seen, used or relied on any of these records. The fact that the board relies on the IC's ultimate report, which contains information that may be derived from the records (for example, the investigator's report) does not mean that the board has relied on the actual records.

How closely have the records been integrated with the other records held by the board?

[97] For the reasons cited above under "Does the board have possession of the records?", I find that even if the requested records are integrated or mixed with other board records, this is not an indication that the board has control of them.

Does a finding that the records are outside the board's control undermine the purposes of the Act?

[98] In *Children's Lawyer*, the court stated that

providing third parties with access to a child's records would seriously undermine the Children's Lawyer in her role as advocate for the child. It would also sabotage the child's heightened privacy rights, eviscerate the work of the Children's Lawyer and seriously limit the court's ability to fully address the child's best interests.

[99] It appears that these reasons strongly influenced the court's finding that the records in that case were outside the institution's custody or control.

[100] Here, there are similar considerations at play. A finding that the board has control of the records would also seriously undermine the IC's role and function as an independent investigator. Although the considerations are not as compelling as in the *Children's Lawyer* case as far as protecting the privacy of children, the IC's

independence is critical to the proper functioning of that office, and the public's trust in its operations, just as it is to the Children's Lawyer.

[101] I find that the records in question are not in the board's control.

Custody

[102] In light of my findings above, I need not conduct a full analysis as to whether the board has custody of the records. In particular, I refer to my findings under the headings "Does the board have a right to possession of the records?" and "How closely have the records been integrated with the other records held by the board?"

Accordingly, I conclude that the requested records are neither in the board's custody or under its control.

Issue B: Has the board conducted a reasonable search for responsive records as required by section 17 of the *Act*?

[103] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.³⁸ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[104] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.³⁹

[105] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;⁴⁰ that is, records that are "reasonably related" to the request.⁴¹

[106] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁴² The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴³

[107] If the requester failed to respond to the institution's attempts to clarify the

³⁸ Orders P-85, P-221 and PO-1954-I.

³⁹ Order MO-2246.

⁴⁰ Orders P-624 and PO-2559.

⁴¹ Order PO-2554.

⁴² Orders M-909, PO-2469 and PO-2592.

⁴³ Order MO-2185.

access request, the IPC may decide that all steps taken by the institution to respond to the request were reasonable.⁴⁴

[108] The board submits that it did make inquiries to confirm that no responsive records were in existence within its record holdings (as distinct from the IC's record holdings), and provides further details on these efforts in an affidavit. As the board's representations were shared with the appellant, I do not set out those details here.

[109] The appellant takes issue with the quality of these search efforts, and states that I should order the board to conduct further searches.

[110] In my view, no useful purpose would be served by such an order.

[111] Regarding the investigator's report and the retainer agreement, I accept that while these records may exist within the board's record holdings, the board itself has not possessed them or relied on them for the reasons set out above.

[112] As to the social media statements, and the records regarding the appropriateness of the retainer, there is no reasonable basis to believe that the board, as distinct from the IC, would hold these records.

[113] Accordingly, I find that the board has conducted a reasonable search for records.

ORDER:

1. I uphold the board's decision that the responsive records, if they exist, are not in the board's custody or under its control.
2. I uphold the board's search for responsive records as reasonable.
3. I dismiss the appeal.

Original signed by: _____
David Goodis
Adjudicator

_____ October 2, 2023

⁴⁴ Order MO-2213.