

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-37

December 3, 2015

ALBERTA COLLEGE OF ART AND DESIGN

Case File Number F8073

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to a certain video recording that had been aired on national television. The Public Body denied having custody or control of the video. The Adjudicator found that the Public Body initially failed in its duty to assist the Applicant in his request for access. She found that the Public Body had conducted an adequate search for the video once the request had been clarified, and also found that the Public Body did not have custody or control of the requested video.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 18, 25, 72.

Authorities Cited: **AB:** Orders 2001-016, F2007-029, F2012-09.

I. BACKGROUND

[para 1] A student at the Alberta College of Art and Design (the Public Body) killed a chicken in the Public Body cafeteria and arranged to have this filmed by a fellow student. The Applicant requested a video recording of this event from the Public Body.

[para 2] The Public Body located CCTV footage of the event that had been recorded by the Public Body's camera. It denied the Applicant's request, citing sections 18 (disclosure harmful to individual or public safety) and 25, (disclosure harmful to economic and other interests of a public body).

[para 3] The Applicant requested review of the Public Body’s decision. In his request for review, the Applicant stated that the video he sought had aired on national television on CTV and had been widely discussed in the media.

[para 4] The Commissioner authorized mediation to resolve the dispute. Mediation was unsuccessful to resolve the issues, and the Applicant requested an inquiry. In the request for an inquiry it is stated:

Further after having denied access to materials saying that it would harm their donor base, ACAD is now stating that they don’t have the video we are requesting (page 4 of the Report of Findings states that interviews were carried out with President and CEO and ACAD Faculty Instructor of the student, and that these denied “any knowledge or possession of the said video”) but only a CCTV video that shows the art student from the back and does not allow to view [sic] the killing of the chicken. If the video in ACAD’s possession did not document the activity we are seeking evidence of, why would ACAD have initially refuse[d] to provide it by citing sections 18(1) and 25(1)?

II. RECORDS AT ISSUE

[para 5] As the issue for inquiry is whether the Public Body met its duty to assist the Applicant, there are no records at issue.

III. ISSUES

1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records. In addressing this question, the following questions should be answered:
 - a. Does the Public Body have possession of the requested record?
Evidence relevant to this issue includes:
 - i. an explanation of the circumstances in which the project was conducted, whether the Public Body had any role in terms of granting permission, whether the project was submitted for grading (and if so, whether it was returned), any policies about ownership of student art, etc.).
 - ii. the details of any search conducted for the record by the Public Body after it discovered which video the Applicant was seeking (see Note below).
 - b. If the Public Body does have possession of the requested record, does it have custody or control over the record such that it would have the duty to provide it in response to an access request?
 - c. If the Public Body does not have the requested record in its possession, does it have control over the record, such that it could obtain possession of it so as to provide it in response to an access request?

IV. DISCUSSION OF ISSUES

[para 6] The Public Body admits that it failed to clarify the initial request for information. As a result, the Public Body proceeded under the mistaken assumption that the Applicant was requesting a copy of the closed circuit television (CCTV) footage captured by the Public Body. Once that footage was obtained, the Public Body refused disclosure under various sections of the *Freedom of Information and Protection of Privacy Act* (the Act).

[para 7] The Applicant requested a review of the decision to withhold information. During that review it was determined that the Applicant was not requesting the CCTV footage. Rather, the request was for video footage created on behalf of the student by one of his classmates or friends. That video was released to various media outlets.

[para 8] The Public Body searched for the requested video and asserts that it does not have and never did have possession, custody or control of the information requested by the Applicant.

[para 9] The Applicant, in attachments to the Request for Inquiry, asserts the following:

It is clear that [the Public Body] has changed their story from not being able to provide the video (citing section 18(1) and 25(1)) to claiming now that they do not have the video. Therefore, we feel that the matter dealt with in mediation/investigation has not been settled or resolved.

[para 10] The Public Body has indicated, in submissions, that the only video footage of the incident in question that is in its possession, is the CCTV footage which does not show the actual killing of the chicken.

Did the Public Body complete a reasonable search for responsive records?

[para 11] Section 10 of the FOIP Act states, in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 12] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records.

[para 13] In Order 2001-016, the Commissioner said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive

to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 14] A public body bears the burden of proving that it conducted a reasonable search for responsive records.

[para 15] In Order F2007-029, former Commissioner Work explained the kinds of evidence that a public body must produce or adduce in an inquiry in order to establish that a search was conducted in a reasonable way. He said:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 16] The Public Body indicates in its submissions that, after it had been determined that the CCTV footage was not the video footage the Applicant was seeking, a new search was conducted. The search included document searches, systems searches and interviews with those individuals who were involved in the incident and subsequent investigation.

[para 17] Interviews were conducted with the Manager, Academic Administration, the President and CEO of the Public Body, the Faculty Instructor of the student, and the President of the Faculty Association. All of these people as well as the Director of Human Resources and FOIP Coordinator swore affidavits attesting that they were not and never had been in possession or control of a “copy of the video recording the killing of a chicken by art student [named]”. They all also attested that they had no knowledge that any member of the Public Body had custody or control of the video.

[para 18] The Public Body also interviewed and obtained an affidavit of the student who performed the piece. The Public Body sent me a copy of the affidavit *in camera*. I declined to accept it as the Public Body had already provided me with details of the content of the affidavit in submissions exchanged with the Applicant. The Public Body indicates that, in the affidavit, the student states the following:

- He performed “Chicken”, a performance piece for a class in which he killed a chicken.
- He had the performance video recorded by his own equipment for his own art practice.
- The video recording was not a part of the assignment, nor was it required for the assignment.
- At no time did he ever give a copy of the video recording to a member of the Public Body.
- He is aware that the video recording was released to CTV news as it was provided to CTV by the student he had asked to video record the performance.
- He has no knowledge that his video recording is, or has ever been, in the custody or control of any employee of the Public Body.

[para 19] The Public Body has explained the steps it took to locate the video, the scope of its search, the steps taken to locate all possible repositories, the areas involved in the search and its reasons for believing that the video is not in the custody or control of the Public Body. From its explanation, I am satisfied that it conducted a reasonable search for responsive records.

Does the Public Body have custody or control of the requested record?

[para 20] Section 6 of the FOIP Act establishes an applicant's right to access information. It states, in part:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required by the regulations.

[para 21] Previous orders of this office have considered what it means to have custody or control of records. In Order F2012-09, (para 10-15) the Adjudicator reviewed those orders:

In Order F2002-014, former Commissioner Work considered the concepts of custody and control and said:

Under the Act, custody and control are distinct concepts. “Custody” refers to the physical possession of a record, while “control” refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record.

A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three cases I set out, an applicant has a general right of access to a record under the Act.

In Order P2010-007, the Adjudicator considered how the terms custody and control have been defined in previous orders of this office. He said:

In prior FOIP orders, the term “custody” was defined as the physical possession of a record, whereas the term “control” was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have both custody and control (Order F2002-014). A recent Order of this Office also held that “bare” possession of information does not amount to custody, as the word “custody” implies that there is some right or obligation to hold the information in one’s possession (Order F2009-023).

In Order F2010-023, I said:

In section 6 of the FOIP Act, the word “custody” implies that a public body has some right or obligation to hold the information in its possession. “Control,” in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.

I find that the question “Does the Public Body have a right to obtain the records?” must be answered when determining whether a public body has control over records it does not possess. If a public body has rights it may exert over a record it may be able to obtain the record; if it does not have any rights in relation to the record, it may not be able to obtain it. As the Commissioner noted in Order F2002-014, the right to demand production of records speaks strongly in favor of a finding of control.

The phrase “custody or control” refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. “Custody or control” also imparts the notion that a public body has duties and rights in relation to a record, such as the duty to preserve or maintain records, or the right to destroy them.

Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?

- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body's mandate and functions?
- Does the public body have the authority to regulate the record's use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said that an entity, such as a treasury branch, has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records.

[para 22] The Public Body asserts that during the search for the video footage requested by the Applicant:

...it became very clear that no officer, employee, member or contractor created, or had possession, custody or control, or had any authority to make decisions about the video the Applicant was seeking. The student created the video, retained possession, custody and control of the video and exercised authority over the use or disposition of the video.

...In addition, the instructor very clearly indicated that he never required a video of the performance for the course, he never, at any time, received a copy of any video recording of the incident, nor did he assign marks to the performance.

[para 23] The Public Body provided me a copy of the *ACAD Guideline (090804) for Disposal/Storage of Student's Work*. The Guideline indicates that students are to remove their work from the college premises before a certain time on the last day grades are submitted to the registrar. Work left after that time is subject to disposal. It is also clearly indicated that the Public Body is not responsible for backing up or storing digital files. There is also a note that local hard drives are considered temporary workspaces and files on those drives can be deleted at any time.

[para 24] The video was created by a fellow student at the request of the student for his own use. While it is not clear if the video is now in the student's possession, it is clear that the Public Body, any of its officers, employees, members or contractors do not have possession of the video. It is also clear that the Public Body does not have any right to possess the video or regulate its use. I am satisfied, on the basis of the evidence and submissions provided to me, that the Public Body has never had custody or control of the video the Applicant is seeking.

[para 25] I find that the Public Body met its duty to the Applicant to conduct an adequate search for responsive records.

[para 26] The Public Body, as stated before, has acknowledged that it failed to assist the Applicant in his request for access to information by failing to clarify the request and properly identify the record the Applicant was requesting. When the Public Body obtained CCTV footage (that did not show the killing of the chicken), it was withheld from the Applicant.

[para 27] The Applicant asserts that the Public Body has the video he is requesting because they refused to provide it to him initially. The Public Body did withhold the CCTV footage citing sections 18 and 25 of the Act. It was upon review of that decision, that the request was finally clarified, and a new search undertaken.

[para 28] I am satisfied that the Public Body initially believed that the Applicant's request was for *any* video footage of the incident. Once CCTV video was located, the Public Body was not sufficiently open in its initial response to the Applicant. However, given the subsequent adequate search, it is not necessary to make an order compelling the Public Body to do anything further.

V. ORDER

[para 29] I make this Order under section 72 of the Act.

[para 30] I find the Public Body conducted an adequate search for records requested by the Applicant. I further find that the Public Body does not have the custody or control of the records requested.

Neena Ahluwalia Q.C.
Adjudicator