



OFFICE OF THE  
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Order F18-45

## CITY OF WHITE ROCK

Celia Francis  
Adjudicator

November 6, 2018

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**Summary:** In a re-opened inquiry, the adjudicator considered whether two records related to the City of White Rock connecting to the Metro Vancouver Regional District's water supply were in the custody or under the control of the City of White Rock. The adjudicator found that they were not.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1).

### INTRODUCTION

[1] This order flows from Order F17-17<sup>1</sup> in which the adjudicator found that a number of exceptions in the *Freedom of Information and Protection of Privacy Act* (FIPPA) did not apply to certain records. The adjudicator then ordered the City of White Rock (White Rock) to disclose the records.

### ISSUE

[2] The issue in this case is whether two of the records in dispute in Order F17-17 are in the custody or under the control of White Rock, for the purposes of ss. 3(1) and 4(1).

[3] Section 57 of FIPPA, which sets out the burden of proof in inquiries, is silent respecting the burden of proof regarding the issue of custody or control.

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<sup>1</sup> Order F17-17, 2017 BCIPC 18 (CanLII).

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However, past orders on this issue have said that, in the absence of a statutory burden of proof regarding a given issue, as a practical matter, all the parties should provide evidence and argument to support their respective positions.<sup>2</sup>

I agree.

## **DISCUSSION**

### ***Background***

[4] The applicant made a request under FIPPA to the City of White Rock in April 2015 for access to records related to the financial viability of connecting White Rock to the Metro Vancouver Regional District's (MVRD)<sup>3</sup> water supply. White Rock disclosed some records, withholding information under a number of exceptions. The applicant requested a review by the Office of the Information and Privacy Commissioner (OIPC) of White Rock's decision and, ultimately, the matter led to Order F17-17.

[5] The MVRD then requested that the adjudicator re-open the inquiry, arguing that two of the records the adjudicator had ordered disclosed were not in the custody or under the control of White Rock but, rather, were MVRD's records. The adjudicator decided to grant the MVRD's request for a number of reasons, including these: the MVRD did not receive adequate notice of the inquiry; and it was not given an opportunity to make submissions on the custody and control issue.<sup>4</sup>

[6] Accordingly, the OIPC invited submissions from the applicant, White Rock and the MVRD on the issue of custody and control respecting the two MVRD records. The applicant and the MVRD both made submissions. White Rock declined to take a position or provide a submission on the custody and control issue.

### ***Records at issue***

[7] The records at issue are these:

- the agenda for an April 4, 2013 Metro Vancouver Utilities Committee closed meeting ("agenda");

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<sup>2</sup> Order F17-41, 2107 BCIPC 45 (CanLII), and Order F17-20, 2017 BCIPC 21 (CanLII).

<sup>3</sup> The MVRD was previously known as the Greater Vancouver Regional District (GVRD); para. 6, MVRD's initial submission.

<sup>4</sup> Adjudicator's decision of March 16, 2018.

- the minutes of a February 28, 2013 Metro Vancouver Utilities Committee closed meeting (“meeting minutes”).

[8] White Rock’s initial submission to the inquiry that led to Order F17-17<sup>5</sup> listed minutes (as opposed to the agenda) of the closed meeting of April 4, 2013 as one of the records in dispute.<sup>6</sup> The adjudicator clarified with White Rock that the meeting in question occurred on February 28, 2013.<sup>7</sup> Although the applicant appears to believe that the minutes of the April 4, 2013 closed meeting are also at issue here,<sup>8</sup> the adjudicator dealt with the agenda and meeting minutes listed in the previous paragraph as the records at issue, both in Order F17-17 and in her decision of March 16, 2018. Moreover, the MVRD made a submission on those two records in this inquiry. I am therefore satisfied that they are the records at issue here.

[9] The meeting minutes do not refer to the subject matter of the request. However, it appears that this record was included with the original responsive records because it was attached to the agenda.<sup>9</sup>

### **Sections 3(1) and 4(1)**

[10] Sections 3(1) and 4(1) of FIPPA set out the right of access to records that are in the custody or under the control of a public body. Section 3(1), which defines the scope of FIPPA, states:

3(1) This Act applies to all records in the custody or under the control of a public body ...

[11] Section 4(1) of FIPPA incorporates the element of custody or control into the right of access to records:

4(1) A person who makes a request under section 5 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.

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<sup>5</sup> Exhibit I, Affidavit #1 (November 10, 2017) of OIPC Registrar.

<sup>6</sup> White Rock’s letter of August 5, 2016 to the applicant also referred to minutes for the closed meeting of April 4, 2013 (Appendix D, applicant’s response submission).

<sup>7</sup> Email of January 26, 2017, Exhibit B, Affidavit #1 (May 25, 2017) of legal assistant to MVRD’s law firm. Footnote 4, Order F17-17.

<sup>8</sup> Applicant’s response submission, para. 137.

<sup>9</sup> Paras. 13 & 21.b., Affidavit #1 (May 12, 2017) of MVRD’s Corporate Officer, para. 13; Affidavit #1 (May 25, 2017) of MVRD’s Corporate Officer, para. 11 (Exhibit B, Applicant’s response submission).

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[12] FIPPA does not define “control” or “custody”.

[13] Following the modern approach to statutory interpretation, the words of a provision are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of legislators.<sup>10</sup>

[14] With regards to the objects of FIPPA, s. 2(1) states: “The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy.” Further, with regards to the first of those two objects, the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*<sup>11</sup> said:

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

[15] Either custody or control over a particular record will suffice to bring it within the scope of s. 3(1). Both are not required.

[16] The MVRD argued that the records are neither in the custody nor under the control of White Rock. The applicant argued that they are. I have concluded, for reasons set out below, that the records are neither in the custody nor under the control of White Rock for the purposes of ss. 3(1) and 4(1) of FIPPA

### **Custody**

[17] The indicators of custody include the following: whether the public body has possession of the records; whether the records are integrated with other records the public body holds; and whether the public body has any rights or responsibilities for the records, including respecting their use, disclosure or destruction. Past orders have said that physical possession of records is not enough to establish custody and that a public body will only have custody if it has “some right to deal with the records and some responsibility for their care and protection.”<sup>12</sup>

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<sup>10</sup> See, for example: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

<sup>11</sup> 1997 CanLII 358 (SCC), at para. 61.

<sup>12</sup> See, for example, Order 02-30, 2002 CanLII 42463 (BC IPC); Order No. 308-1999, 1999 CanLII 2976 (BC IPC), and Order F15-65, 2015 BCIPC 71 (CanLII).

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*Discussion and analysis*

[18] There is no dispute that White Rock had physical possession of the records at the time it received the applicant's request.<sup>13</sup> The MVRD argued, however, that White Rock's possession of the records was "inadvertent and accidental."<sup>14</sup> While the MVRD admitted that White Rock's mayor had access to the records in dispute, via a secure electronic login process, it said that this was for his use solely in his capacity as a member of the MVRD Utilities Committee.<sup>15</sup> MVRD also provided an affidavit from White Rock's Manager, Property, Risk Management and Freedom of Information (White Rock Manager), in which he said that the mayor advised him he has no recollection of downloading or saving the records to a White Rock computer.<sup>16</sup>

[19] The MVRD did not explain why it did not provide direct evidence from the mayor on these points, which would have been helpful. Nevertheless, I accept that the mayor had access to the records only in his capacity as a Utilities Committee member and not as mayor of White Rock. This is similar to the case in Order F15-65,<sup>17</sup> in which three individuals had access to another body's records. I was satisfied in that case that they had access to the records only in their capacities as directors of that body and that their roles as directors were separate and distinct from their roles as public body employees.

[20] The White Rock Manager also gave evidence that, as far as he can determine, the records were not integrated with other records White Rock held, at least not before it processed the applicant's request.<sup>18</sup> Nor is there any evidence that White Rock had any responsibility for their care, disclosure or disposition.

[21] Except for the fact that the records were physically located in White Rock's files, none of the indicators of custody is present in this case. The

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<sup>13</sup> MVRD's initial submission, para. 28.b. The MVRD established a standing Utilities Committee in 2013 to oversee water and liquid waste management services through the MVRD. MVRD's initial submission, para. 7; Affidavit #1 (May 12, 2017) of MVRD's Corporate Officer, para. 8. The Mayor of White Rock was White Rock's member of the MVRD Board of Directors and also a member of the MVRD Utilities Committee. MVRD's initial submission, para. 28.b; Affidavit #1 (May 12, 2017) of MVRD's Corporate Officer, para. 8.

<sup>14</sup> MVRD's initial submission, para. 43. Affidavit #1 (May 15, 2018) of White Rock's Manager Property, Risk Management and Freedom of Information (White Rock Manager), para. 19.

<sup>15</sup> MVRD's initial submission, paras. 16-17; Affidavit #1 (May 12, 2017) of MVRD's Corporate Officer, para. 9.

<sup>16</sup> Affidavit #1 (May 15, 2018) of White Rock Manager, para. 8.

<sup>17</sup> 2015 BCIPC 71 (CanLII).

<sup>18</sup> Affidavit of White Rock Manager, para. 12.

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applicant suggested that White Rock has custody of the records because it had possession of them and disclosed them with other responsive records.<sup>19</sup> However, in my view, the MVRD's submission and evidence support the conclusion that White Rock does not have custody of the records for the purposes of ss. 3(1) and 4(1).

### **Control**

[22] I have determined that the interpretation of “control” that the Supreme Court of Canada used in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*<sup>20</sup> [*Minister of National Defence*] is the appropriate one to follow. In *Minister of National Defence*, the Court considered the meaning of “control” in relation to s. 4(1) of the federal *Access to Information Act*, which states that a requestor has a right to access “any record under the control of a government institution”. The Court made the following observations about “control”:

[48] 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 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 (paras. 91–95).<sup>21</sup>

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<sup>19</sup> Applicant's response submission, paras. 34-36, 41, 133.

<sup>20</sup> 2011 SCC 25.

<sup>21</sup> In *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, at paras. 155-160, the Ontario Court of Appeal referred to this passage in its discussion of “control” of certain records.

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[23] Further, in analyzing whether the emails are under White Rock's control, I have considered relevant indicators from previous BC orders. Those indicators, which overlap to some extent with those regarding custody, include whether: the record was created by an officer or employee in the course of carrying out his or her duties; the public body has statutory or contractual control over the records; the public body has possession of the records; the public body has relied on the records; the records are integrated within the public body's other records; the public body has the authority to regulate the use and disposition of the records; the content of the record relates to the public body's mandate and functions.<sup>22</sup> The list of indicators is not exhaustive and not all will apply in every case.<sup>23</sup>

*Analysis and discussion*

[24] The MVRD said, and the applicant did not dispute, that White Rock and the MVRD are separate public bodies.<sup>24</sup> White Rock and the MVRD agree that the MVRD Utilities Committee created the records in the course of the Committee's business.<sup>25</sup> The Utilities Committee's role is to oversee water and liquid management services through the MVRD.<sup>26</sup> My review of the records themselves shows that they relate to the Committee's business.

[25] The records also indicate that they are MVRD records: the agenda contains the MVRD logo; the agenda states that it is the agenda of the closed meeting of April 4, 2013 of the MVRD Utilities Committee; and the meeting minutes state that they are the minutes of the closed meeting of February 28, 2013 for the same committee. I also note that, in Order F17-17, the adjudicator was satisfied that the two records at issue were not White Rock's records but the records of another local public body, that is, the MVRD.<sup>27</sup>

[26] I have also considered other indicators of control and conclude that none is present here either. For reasons discussed above, I am satisfied from the evidence that White Rock's mayor had access to the records only in connection with his duties as a member of the MVRD Utilities Committee<sup>28</sup> and that White Rock's possession of the records was accidental or inadvertent. In Order F15-65,

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<sup>22</sup> See, for example, Order 02-29, 2002 CanLII 42462 (BC IPC), at para. 18.

<sup>23</sup> See, for example Decision F10-01, 2010 BCIPC 5 (CanLII), at para. 9.

<sup>24</sup> MVRD's initial submission, paras. 6 and 9.

<sup>25</sup> Affidavit of White Rock Manager, para. 6; Affidavit #1 (May 12, 2017) of MVRD's Corporate Officer, paras. 12-14.

<sup>26</sup> MVRD's initial submission, para. 7; Affidavit #1 (May 12, 2017) of MVRD's Corporate Officer, para. 8.

<sup>27</sup> Order F17-17, para. 28-34.

<sup>28</sup> Affidavit of White Rock Manager, paras. 8-9.

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I found that a public body employee's inadvertent possession of records did not mean that the public body had control of the records.

[27] The MVRD said that distribution of agenda packages for confidential closed meetings is restricted. It said that confidential documents related to closed Committee meetings can only be released by resolution of the MVRD's Board of Directors. It added that there is no record that the Board authorized the release of the records<sup>29</sup> or that it delivered the records to White Rock.<sup>30</sup> The White Rock Manager's evidence is that White Rock does not normally possess such records, has no need for them, has no legal ability to compel them, has no record of requesting them from the MVRD and has not relied on them. The White Rock Manager also said that, as far as he could determine, the first time the records were integrated with other records in White Rock's files was when they were retrieved during the processing of the request.<sup>31</sup> There is no evidence to suggest otherwise. Taken together, these factors all support the conclusion that the records are not under White Rock's control.

[28] The applicant argued that White Rock had control of the records because, among other things, it disclosed them in severed form in accordance with the MVRD's consent.<sup>32</sup> This argument does not assist the applicant, in my view, for reasons discussed above. In addition, the MVRD has taken the position since at least May 2016 that it, not White Rock, had control of the records and that White Rock ought to have transferred the records to the MVRD for processing. In any case, the MVRD agreed to White Rock disclosing the records in severed form, apparently in the belief that s. 12(3)(b) of FIPPA would protect portions of the records.<sup>33</sup> The Adjudicator in Order F17-17 found, however, that this provision may be used only to protect a public body's own records, not those of another public body.<sup>34</sup>

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<sup>29</sup> MVRD's initial submission, para. 18; Affidavit #1 (May 25, 2017) of MVRD's Corporate Officer, para. 14 (Exhibit B to applicant's response submission).

<sup>30</sup> MVRD's initial submission, paras. 18-20; Affidavit of White Rock Manager, paras. 6-19.

<sup>31</sup> MVRD's initial submission, paras. 41.I.-p.; Affidavit of White Rock Manager, paras. 6-19.

<sup>32</sup> Applicant's response submission, para. 136.

<sup>33</sup> Exhibit B, Affidavit #1 (May 12, 2017) of MVRD's Corporate Officer; Affidavit #1 (May 25, 2017) of MVRD Corporate Officer, para. 16 (Exhibit B to applicant's response submission).

Section 12(3)(b) of FIPPA permits a public body to withhold information, the disclosure of which would reveal the substance of deliberations of, among other things, a meeting of the public body's elected officials, subject to certain conditions.

<sup>34</sup> Order F17-17, para. 34.



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## **CONCLUSION**

[29] For reasons set out above, I find that the records in dispute are neither in the custody nor under the control of White Rock. This finding in no way diminishes the applicant's access rights, as he is free to request these records under FIPPA directly from the MVRD, if he wishes. This in turn ensures that the public body which created the record and has the greater interest in them is accountable and in a position to make a decision on access under FIPPA.

November 6, 2018

## **ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

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