SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT LA-2010–002

City of Saskatoon

Summary: The Applicant requested access under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) to the report resulting from a harassment investigation carried out by the City of Saskatoon in respect to that employee of the Saskatoon Police Service (SPS). The City asserted that it had neither possession nor control of the record and refused to provide the Saskatchewan Office of the Information and Privacy Commissioner (OIPC) with a copy. When the OIPC provided the City with a draft analysis that suggested that the City did have at least possession of the record, the City transferred the report it had been storing for approximately eight years to the SPS.

The Commissioner determined that his office was entitled to require the production of the record in order to make a determination on the issue of possession or control. He found that jurisdiction by the OIPC required only possession by the City and a measure of control and that the control did not have to be exclusive. He found that the SPS also had some control over the record but did not need to quantify that degree of control in light of his finding that "possession" for purposes of LA FOIP had been made. He also found that that the City had failed to meet its duty to assist the Applicant.

As well the Commissioner found that the City had not met the burden of proof in establishing that the record had been placed in the possession of the City by or on behalf of persons or organizations other than the local authority for archival purposes in accordance with section 3(1)(c) of LA FOIP.

Statutes Cited: *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 2(e)(i), 2(j), 3(1)(c), 5, 7, 16(1)(b), 16(2), 23(1)(b), 26, 38, 39, 43; *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93, s. 3(1)(g); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.3, s. 52(4); *Privacy Act*, R.S.C. 1985, s. 12(1)(b); *The Archives Act, 2004*, S.S. c. A-26.1, s. 19.

Authorities Cited: Saskatchewan Office of the Information and Privacy Commissioner (OIPC) Reports: F-2004-003, F-2004-005, F-2004-007, F-2005-005, LA-2004-001; Investigation Reports: File No. F-2008-002, H-2007-001, LA-2004-001; Alberta IPC Orders: 98-002, 2000-003, F-2009-003, P-2009-013, P-2009-014, F-2009-023; Ontario IPC Orders: MO-2051; BC IPC Orders: 308-1999, 02-30, F-08-01, F-10-0; *Ontario (Minister of Health)* v. *Holly Big Canoe* (1995) 512 (ON C.A.); *Canada Post Corp.* v. *Canada (Minister of Public Works)* [1995] F.C.J. No. 241; *General Motors Acceptance Corporation of Canada v Saskatchewan Government Insurance* [1993] S.J. 60; *Canada (Privacy Commissioner)* v. *Canada (Labour Relations Board)* [2000] 15487 (F.C.A.); *British Columbia (Ministry of Small Business, Tourism and Culture et. al)* v. *British Columbia (Information and Privacy Commissioner)* [2000] BCSC 929; *Simon Fraser University* v. *British Columbia (Information and Privacy Commissioner)* 2009 BCSC 148; *Canada Post Corp.* v. *Canada (Minister of Public Works)*, [1995] 2 F.C. 110.

Other Sources Cited: *The Saskatoon Anti-Harassment Policy and Investigative Procedures for Members of City Council and Senior Administration. Council and Senior Administration.* Clause 1, Report No. 17-2006 of the Executive Committee; *City of Saskatoon Archives Donor Agreement*; Saskatchewan OIPC's *Helpful Tips, Privacy Breach Guidelines, Saskatchewan FOIP FOLIO.*

I. BACKGROUND

File 034/2005–LA FOI/AI (City File: C.K. 416-10/04)

[1] The Applicant was an employee of the Saskatoon Police Service (SPS). She had initiated a harassment complaint against a colleague. The subsequent investigation was undertaken not by the SPS but by employees of the City of Saskatoon.

[2] The Applicant made a formal request for access to the City under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP)[1] for the findings of the 2002 harassment investigation. This formal request was received by the City on August 27, 2004.

[3] By a letter dated September 13, 2004 the City denied the Applicant's request and advised as follows:

> ...*The Local Authority Freedom of Information and Protection of Privacy Act* does not apply to the Saskatoon Police Service. My review of your application was undertaken only because the 2002 harassment investigation complaint was handled by the Employee Services Branch of the Corporate Services Department of the City of Saskatoon, in accordance with civic policy. A decision in your favour could only be presented to the Chief of Police as a recommendation, not a directive.
> ...
> All parties (i.e. you as the complainant, the respondent and witnesses) were advised, at the outset, of the process to be followed and who would receive each type of information. Witnesses were assured that the information that they provided would be kept confidential. It is for this reason that I cannot recommend that you be provided with the complete report. To do so would be a breach of privacy for the witnesses, who supplied information on the understanding that it would be kept confidential. This information is also considered to be a result of consultations involving employees of the municipality, and as such is not releasable pursuant to Section 16(1)(b) of *The Act*.

[4] On September 30, 2005 our office received a request for review from the Applicant with respect to the above noted request for access. Pursuant to section 38(2) of LA FOIP, an Applicant must make a request for review within one year of being given notice from a local authority. At the time the Request for Review was made, the time limit had expired. However, upon review of the City's response to the Applicant's request dated September 13, 2004, I found that the City did not inform the Applicant of her right to request an appeal from my office pursuant to section 7(3) of LA FOIP and did not provide contact particulars for my office. Section 7 provides as follows:

> 7(1) Where an application is made pursuant to this Act for access to a record, the head of the local authority to which the application is made shall:

[1] *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990 1991, c.L-27.1 (as amended) (hereinafter LA FOIP)

> (a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or
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> (b) transfer the application to another local authority or to a government institution in accordance with section 11.
>
> (2) The head shall give written notice to the applicant within 30 days after the application is made:
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> (a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;
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> (b) if the record requested is published, referring the applicant to the publication;
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> (c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;
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> (d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;
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> (e) stating that access is refused for the reason that the record does not exist; or
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> (f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4).
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> **(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.**
>
> (4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.
>
> (5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.
>
> [emphasis added]

[5] After reviewing representations from the City on the preliminary issue of jurisdiction, I concluded that since the requirement in section 7(3) is mandatory, the one year period for requesting a review by this office had not expired.

[6] Our office opened the first file 034/2005–LA FOI/AI (City File: C.K. 416-10/04).

File 062/2005–LA FOI/AI (City File: C.K. 416-20/05)

[7] In the meantime, the Applicant made another access to information request to the City for the same records. The Applicant's second access to information request form to the City does not have a date; however, based on the City's section 7 response dated October 31, 2005, the form would have been received by the City in October 2005. It states:

> Findings from harassment complaint initiated in May of 2002 ([Co-worker] – respondent) ([Applicant] – complainant)

[8] With her request for review, the Applicant included a letter dated October 31, 2005 from the City Clerk that responds to the Applicant's second access to information request. This letter is almost identical to the City's letter of September 13, 2004 quoted above. My office opened a second file to deal with this second request: file 062/2005–LA FOI/AI (City File: C.K. 416-20/05).

[9] My office has since consolidated these two files as the record and issues are identical in each file.

Correspondence with the City

[10] Early in this review, in accordance with our customary practice, my office invited the City to provide a copy of the record for our review and its submission. I received letters from the City dated October 7, 2005 and November 3, 2005 explaining its position on the preliminary issues but the record was not included. The City also clarified its position in an e-mail dated June 6, 2007.

[11] My office provided the City with our preliminary analysis dated January 19, 2010. The City submitted a rebuttal and further submission dated January 29, 2010. My office took the City's new submission into account and provided an updated analysis dated March 24, 2010. Again at that time, my office requested a copy of the record.

[12] My office received a letter dated May 6, 2010 from the City advising that it no longer had the record since it had sent the record to the SPS. Attached was a letter to the City from a lawyer from SPS dated April 19, 2010 requesting that the record be sent to him. My office raised concerns with this action and in a letter dated May 12, 2010 asked the City to retrieve the record and provide it to my office for the purposes of this review. I requested an affidavit from the City Clerk detailing and explaining her actions with respect to disposal of the record in the face of our ongoing review under Part VII of LA FOIP.

[13] My office received a detailed submission from the City dated June 29, 2010 and affidavits from both the City Clerk and a former Manager of the Employee Services Branch of the Corporate Services Department of the City. The former Manager was involved in the creation of the record in issue. Each affidavit addressed at some length the matter of a second harassment investigation undertaken by SPS. That investigation and the resulting report are not in issue in this review. This second investigation and process from 2003 also appears to have been very different in key respects from the 2002 investigation that is the subject of this Report. The affidavit of the former manager of Employee Services Branch includes a number of conclusions about the characterization of the relationship but is light on concrete details about the actual role of the SPS in the investigation of 2002, the dealings with the parties and the preparation of the report in issue in this Review. I note that this affidavit draws comparisons between the City's role and that of a private sector consultant. It makes no mention however of the significance of the contract in a typical consulting arrangement. The evidence is clear that there was no relevant contract between the City and the SPS in this case. Both requests for review at issue relate to two access requests made by the Applicant to the City but for the same record – a copy of the 2002 harassment investigation report. At the outset of the review, the City was advised by our office that the record in respect of both requests was the 2002 report. Nonetheless, it appears that the City seems to have assumed that the responsive record would be the 2002 harassment report, and also a second report apparently written in 2003. This is apparent in the two affidavits that discuss the 2003 harassment report and the process culminating in that report. To complicate matters, by correspondence dated September 13, 2004 the City Clerk advised the Applicant that she

was responding; "to your request for the findings of two harassment investigations regarding complaints that you filed in 2002 and 2003." She goes on to state: "I did not address your 2003 complaint, since the matter was handled in accordance with the newly-implemented "Respectful Workplace Policy" and a report on findings was not prepared."

[14] I replied to this submission with our updated analysis dated August 4, 2010. Our office received a further submission from the City dated September 3, 2010.

[15] My office has not at any time received a copy of the responsive record.

II. RECORD AT ISSUE

[16] The City of Saskatoon has refused to provide this office with the record responsive to the Applicant's access request. Furthermore, the City, without prior notice to our office and in the midst of our ongoing review, transferred the record to another body that is outside of our jurisdiction. From what I have been able to glean about the record it is in the nature of a report prepared by the Employment Services Branch of the City that details findings of a harassment investigation involving the Applicant. I understand that this record had been in the City's possession from May 2002 until approximately April 20, 2010 when the City divested itself of the record. I have been provided with no detailed description of the contents of the record. The City appears to have transferred the paper record to SPS but has made no reference to an electronic version of the record. I do not know whether there was an electronic version at any time and if so what has become of it.

III. ISSUES

1. Should the OIPC determine the issue of jurisdiction without the opportunity to examine the record?

2. Did the City of Saskatoon have possession of the record?

3. Did the City of Saskatoon have control of the record?

4. Did the City of Saskatoon meet its obligations under section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act*?

5. Have the records been archived for the purposes of section 3(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act*?

6. What is the appropriate response to the City's action in divesting itself of the record in the face of our review?

7. Should this request for review be dismissed because of the delay?

IV. DISCUSSION OF THE ISSUES

1. Should the OIPC determine the issue of jurisdiction without the opportunity to examine the record?

[17] The fundamental question is whether LA FOIP applies to the record and whether that can be determined without the opportunity to examine the record.

[18] LA FOIP does not require any determination as to who 'owns' a record. Ownership in law can be a complex question since it effectively involves a bundle of rights. In its wisdom, the Legislative Assembly by means of section 5 of LA FOIP provided that LA FOIP applies to records "in the possession or under the control of a local authority". I have determined previously, that 'control' only arises in circumstances where there is no 'custody' and furthermore that 'custody' in *The Health Information Protection Act* (HIPA) is interchangeable with 'possession' in *The Freedom of Information and Protection of Privacy Act* (FOIP)[2]. Consequently, I must determine if the City of Saskatoon has 'possession' of the record pursuant to section 5 of LA FOIP. Only if I find that there is no 'possession' would it be necessary to determine whether there is 'control'.

[2] Saskatchewan Office of the Information and Privacy Commissioner (hereinafter SK OIPC) Investigation Report H-2007-001, available online at http://www.oipc.sk.ca/Reports/H-2007-001.pdf

[19] At the time the access requests were made, it certainly appeared that the City of Saskatoon had 'possession' of the record. In fact, the record was created by employees of the City, namely employees in the Human Resources Department (formerly Employee Services Branch). It further appears that the record never left the possession of the City from the time it was created until it was voluntarily transferred to the SPS in April 2010. This voluntary transfer occurred within a month of our office sending to the City our updated analysis on March 24, 2010 that advised the City that it was entirely possible that I would find the record was in the possession of the City for purposes of LA FOIP.

[20] Significantly, the City did not provide any advance notice to us that it was divesting itself of the record in issue and the first I learned that the City no longer had the record was a letter from the City dated May 6, 2010 reporting that the record had been sent to the SPS at some point between April 19, 2010 and May 6, 2010. The City has provided no explanation for the timing of the transfer of the record beyond the April 19, 2010 letter from SPS requesting same. The City wrote to the SPS on April 19, 2010 advising of the access request from the Applicant and alerting SPS that our office may take a different view than the City, namely that the City was in fact in possession of the record for purposes of LA FOIP.

[21] Similarly, the letter from SPS offers no reason for the transfer demand at that particular time other than that "The Saskatoon Police Service no longer requires that you maintain archival storage of the 2002 and 2003 Harassment Complaint Investigation findings and related materials. Would you therefore kindly return those to us in their entirety at your very earliest convenience?"

[22] Our first notice of the transfer of the record from the City to SPS was a letter from the City dated May 6, 2010:

> I have received the attached letter dated April 19, 2010 from the Solicitor for the Saskatoon Police Service, requesting that the Human Resources Department return the Harassment Complaint Investigation findings and related material since they are the property of the Saskatoon Police Service. We have done so and thus do not have physical possession of the record and are unable to provide a copy to your office for examination.

[23] The City invites me to make my determination of "possession or control" on the basis of their submissions and without the opportunity to review the record.

[24] In any review under LA FOIP, I require that the record be provided to our office by the local authority. The authority for this requirement is section 43 that provides as follows:

> 43(1) Notwithstanding any other Act or any privilege available at law, the commissioner may, in a review:
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> (a) require to be produced and examine any record that is in the possession or under the control of a local authority; and
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> (b) enter and inspect any premises occupied by a local authority.
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> (2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:
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> (a) to give oral or written evidence on oath or affirmation; and
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> (b) to produce any documents or things;
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> that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.
>
> (3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

[25] This typically takes the form of a true copy of the original. I do not provide the record to the applicant but require it for the purpose of a review. This entails a consideration of mandatory and/or discretionary exemptions invoked by the local authority to deny access. The record is then securely retained until either shredded or returned to the local authority. In this case, the City has consistently refused to provide us with the record that would be responsive to the Applicant's request for access. I have never seen the record. The City Clerk[3] deposes that she has never seen the record. The City contends that review of the record is unnecessary; "…as the records themselves will not provide the OIPC with any insight into the indicia of custody and control required to make [the decision as to whether the record was in the possession or under the control of the City]".

[3] In the last two quotes, there is reference to the "head". In this regard, "head" is defined by LA FOIP as "in the case of a municipality, the mayor, reeve or chairman of the local advisory committee, as the case may be ..." [section 2(e)(i)]. Although the City Clerk refers to herself as the "head" in correspondence, this is inaccurate. The Mayor of Saskatoon has delegated to the City Clerk his rights and powers under LA FOIP pursuant to section 50 of LA FOIP. The delegation however does not change the status of the Mayor as the "head". The City Clerk is for purposes of LA FOIP in the role of FOIP Coordinator although we will refer to her in this Report as the City Clerk.

The effect of this argument is to suggest that the Commissioner's powers in section 43 of LA FOIP cannot be invoked in a review which must deal with a preliminary question of the Commissioner's jurisdiction.

[26] I am however guided by the decision by the Ontario Court of Appeal (*Ontario (Minister of Health) v. Holly Big Canoe*)[4], that supports the view that even when a question of jurisdiction is to be decided in the review of an access decision the Commissioner is entitled to require production of the record in dispute. The Ontario Court of Appeal decision includes the following:

> It is common ground (1) that the Commissioner is empowered under the *Freedom of Information and Protection of Privacy Act* to entertain the appeal of the requester in this case and commence the inquiry to review the decision of the head of the institution as provided for in s.52(1) under Part IV of the Act; and (2) that the Commissioner is authorized to determine, as a preliminary issue going to the Commissioner's jurisdiction to continue the inquiry, whether the records sought by the requester fall within the scope of s.65(2) of the Act. It is also acknowledged that the Commissioner's determination of this preliminary jurisdictional issue is subject to judicial review on a standard of correctness.
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> The narrow issue in this appeal is whether the Commissioner may invoke the provisions of s.52(4) of the Act and require the production and examination of the records in question for the purpose of determining whether the Commissioner has jurisdiction to continue the inquiry. The appellants contend that s.52(4), properly interpreted, is confined to issues which arise in inquiries relating to records referred to under Parts II and III of the Act and that s.52(4) is not applicable to records referred to under Part V of the Act or, more specifically, to records which may be excluded from the purview of the Act by s.65(2).
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> Notwithstanding the very able argument presented by counsel for the appellants, we agree with the conclusion reached by the Divisional Court. It is our opinion also that s.52(4) must be construed as being applicable to all inquiries conducted pursuant to the Act. Having regard to the purposes of the Act and the manner in which the section is framed, the procedures available to the Commissioner under s.52 in conducting an inquiry to review a head's decision are applicable to inquiries relating to a head's decision that records sought by a requester are excluded by s.65(2). We agree also with the Divisional Court that the Commissioner is not precluded by ss.8 and 35 of the *Mental Health Act* from determining the jurisdictional issue as to whether s.65(2) is applicable by requiring production of the relevant records pursuant to s.52(4).[5]

[4] 1995 CanLII 512 (ON C.A.)
[5] *ibid*., at p. 1

[27] Section 52(4) in the Ontario *Freedom of Information and Protection of Privacy Act*[6] is similar to section 43 in LA FOIP.

[28] The Ontario Information and Privacy Commissioner (Ontario IPC) is constituted as an administrative tribunal with order-making power unlike my office that has the powers of an ombudsman. Nonetheless, in both provinces the exercise of reviewing the denial of access and considering whether it should be upheld or not is quite similar.

[29] I am very troubled by the action of the City in disposing of the record in the face of a review by our office focused on that specific item. Later in this Report I will return to that issue. Since the City asserts that it had neither 'possession' nor 'control' of the record, a question of my jurisdiction is raised that must be dealt with even in the absence of the record.

2. Did the City of Saskatoon have possession of the record?

[30] The evidence is that City employees in the Human Resources branch created the record in question. The record was prepared after a process that explicitly followed the City's *Workplace Harassment Policy A04-016*[7]. The harassment investigation involved City employees who provided the respondent with the complaint and provided an opportunity for the respondent to respond. The complainant was provided with this response and was given an opportunity to address any additional issues identified in the response. The investigation report was then written by city employees and submitted to the Manager of the Corporate Services Department. That senior City employee then wrote a summary and provided it to the complainant, the respondent and the Chief of Police for follow up. The evidence has not established that the SPS was directly involved in those actions and that there was consultation with the SPS other than the above noted solicitation of representations from the parties to the complaint. The evidence is that the investigation

[6] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31
[7] City of Saskatoon Anti-Harassment Policy and Investigative Procedures for Members of City Council and Senior Administration. Council and Senior Administration. Clause 1, Report No. 17-2006 of the Executive Committee at pp. 1-7.

was directly supervised by the Manager of Employee Services although the affidavit of a former City employee states that the report was written and submitted to the Manager of Corporate Services Department who wrote the summary. In either event, both the Manager of Employee Services and the Manager of Corporate Services Department would have been City employees. There is no evidence that the employees of the City were paid by the SPS or that the investigation was directly supervised by anyone other than a municipal manager. The sworn statement of the former City employee is that the record was kept in a locked drawer in a "harassment" cabinet in the Human Resources office, separate from harassment investigation files pertaining to City employees. Only the Manager of Corporate Services Department, the former City employee and City support staff had access to the file. When the City Clerk wrote the Applicant on October 31, 2005 she stated; "My review of your application was undertaken only because the complaint was handled by the Employee Services Branch of the Corporate Services Department of the City of Saskatoon, in accordance with civic policy".

[31] The former City employee deposes that; "I was retained by the SPS. The SPS was my client. I obtained instructions about all aspects of the file from SPS, including opening the file, closing the file and archiving the file." She appears to be speaking about a general pattern of conducting harassment investigations for the SPS. The written submissions from the City Clerk at different times have indicated that all employees working on the file were contractors for the SPS and at other times that it was the corporate City that was the contractor.

[32] The above quote from the former City employee's affidavit is more consistent with the following scenario. Employees working under her supervision were all City employees who were working under the direction of their regular supervisor doing the same work they would routinely do in the case of harassment complaints initiated by any city employee. She provides no explanation or particulars of how a senior employee of the City could be "retained by SPS" and have a "client" other than her employer. She offers no particulars of instructions actually provided by SPS not on the opening or closing of the "file" but in respect to the actual work undertaken by the City including the collection

of evidence, the exchange and communication with the parties and the preparation of the report.

[33] The evidence is that at all material times there was no written contract that particularized the arrangement between the SPS and the City, and that specifically addressed the issue of possession or control of the record. The City Clerk had never seen the record. The City has contended that it was prejudiced by the delay in this investigation since persons who had direct knowledge of the arrangement between the City and the SPS were not available and that it was necessary to consult with those persons to determine what are or were the terms and conditions of the unwritten agreement with SPS. LA FOIP has applied to the City since 1993. The City must be taken to have notice that the scope of LA FOIP is broad and that if the City has documents on its premises for purposes of arrangements with outside agencies, it ought to clarify those arrangements by written agreements to accurately reflect the intentions of both parties. Failure to do so runs the risk that is the subject of this review, namely a finding that the City is in possession or control of those records. This is not a case of records left with the City on some temporary basis or on a basis where the City would have no responsibility whatsoever for the records.

[34] In an e-mail to my office regarding this review dated June 6, 2007, the City Clerk stated:

> You are asking me to put the records together, but I don't have them because they aren't the City's records. I know that I would normally be compelled to provide you with the records in question, but I believe that this applies only to City records. My opinion is that I have no authority to demand that records that **our Human Resources Branch are holding** on behalf of the Saskatoon Police Service be provided to me and then onwards to the Information and Privacy Commissioner, and I am therefore not willing to do so.
>
> [emphasis added]

[35] I discussed the issue of possession and control in my Report F-2008-002[8] as follows:

[8] SK OIPC Investigation Report F-2008-002, available online at http://www.oipc.sk.ca/Reports/F-2008-002.pdf

> [23] In *Canada Post Corp*. v. *Canada (Minister of Public Works*), the minority opinion included the following helpful comments regarding the difference between possession and control:
>
> > **28**… in their normal and proper sense, the two words "control" and "possession" do not signify the same concept. "Control" connotes authority whereas "possession" **merely indicates custody**. It is true that they are used interchangeably in some contexts, but that occurs because normally one is an attribute of the other. Possession is usually a consequence of control. To say … that a person who has possession of a thing has some control over it simply means that a person has one of the basic attributes of control. There is no such thing as a proportion of control. While I am prepared to agree with the motions judge that the dictionary definition alone cannot solve the problem, it is necessary to recognize that, in common but proper language, "control" and possession" do not have the same meaning and cannot be taken one for the other.
> >
> > …
>
> [25] In order for a record to be subject to an access to information request, **the public body need only have possession or control, not both.** This is demonstrated through the legislature's choice to join the two terms with 'or', rather than 'and'.
>
> [emphasis added]

[36] My office explained our view to the City in a letter dated January 19, 2010. The City responded in its letter of January 29, 2010 as follows:

> The Employee Services Manager of the City's Human Resources Department provides some services to the Saskatoon Police Service. There are similar instances such as in labour relations, where the City's labour relations staff does work for the Saskatoon Police Service, and the Board of Police Commissioners, where the Deputy City Clerk acts as Secretary to the Board. Whenever these individuals are performing work for the Saskatoon Police Service or Board they report directly to the Police Chief or Board as the case may be, and not to the City Manager. The City Manager has no control over them during the time that they are doing this work.
>
> Just as the City Manager has no control over these individuals when they are working for the Saskatoon Police Service, the City's records management program has no control over their records. They are kept in locked cabinets apart from civic records, and access is restricted to only to those individuals who are directly involved. The City's Records Retention Policy does not apply. If the Saskatoon Police Service chose to have those duties performed either in-house or by contacting an outside agency, the records would be removed from City Hall.
>
> You suggest that my e-mail of June 6, 2007, which states "My opinion is that I have no authority to demand that records that **our Human Resources Branch are holding on behalf of the Saskatoon Police Service** be provided…", establishes that the City

> is in possession of the records. I suggest that it establishes no such thing. It merely establishes that the records are physically located within the walls of City Hall, and nothing more than that. The records are under the control of the Saskatoon Police Service, and inasmuch as the Employee Services Manager is acting as an agent of the Saskatoon Police Service when performing these services, and in holding these records, they are also in the possession of the Saskatoon Police Service.

[37] In its letter of June 29, 2010, the City asserts that possession must be something more than physical possession. It argued:

> From your correspondence of January 19, 2010, it would appear that your office takes the position that *possession* in Section 5 has the meaning of *merely located* in a building occupied by a municipality. The January 19, 2010 correspondence cites the minority decision in *Canada Post Corp v. Canada (Minister of Public Works)* ("Canada Post") and the Commissioner's decision in Report F-2008-002 in support of this interpretation. I note that both of these decisions involved fact situations where the matter of *control* of the responsive records by the authority was at issue rather than *possession* of the records.
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> It is the City's position that, while *possession* and *control* are different concepts, they are interrelated, in that *possession* requires an element of *control*.

[38] The City's letter went on to state:

> …there can be no possession without control, or, in the words of Marceau J. at paragraph 28 of *Canada Post*, "'control'" connotes authority where as "possession" merely indicates custody." and "Possession is usually a consequence of control." In contrast, there can be control without possession. Had Section 5 just referred to *possession*, the Act would not apply to records belonging to the municipality but located off its physical premises. In our respectful submission, this is the reason for including both terms in the Act and connecting them through "or" rather than "and".

[39] I note that the FOIP legislation in all other provinces (except for New Brunswick and Quebec) use the word "custody" instead of "possession" in provisions similar to section 5 of LA FOIP. I also stated in my Investigation Report H-2007-001:

> [29] In my last Annual Report, I explained that the word "custody" in HIPA is to be understood as "physical possession". FOIP, however, uses the term "possession" in the place of "custody". I find that these two terms are interchangeable as they have the same connotation.[9]

[9] *Supra* note 2 at [29]

[40] The City has submitted that there can be no possession without both physical control and an intention to possess. In this regard, the City relies on the decision in *Trachuk* v. *Olinek* (1995), 177 A.R. 225 at 233 (Alta. Q.B.) which dealt with personal property and not access to public records. I find that the personal property law jurisprudence is less helpful than the body of decisions that explicitly interpret and apply legislation similar to LA FOIP.

Treatment of "possession" in other jurisdictions

[41] The Office of the Information and Privacy Commissioner for Alberta (Alberta IPC) addressed how personal information comes into the possession of a public body in Order 98-002:

> [para 177.] In Order 98-001, I dealt with the issue of a public body's collection of personal information. It is implicit in Order 98-001 that it does not matter how a public body comes to have personal information; any manner of getting personal information is "collection" for the purposes of the Act. Therefore, I do not accept the Public Body's argument that it must actively "collect" personal information for that to be "collection" under section 32 of the Act.[10]

[42] If a public body has no intention to collect information, but receives it anyway, it is deemed to be a collection nonetheless. Accordingly, if a public body has no intention to possess the record, but has collected it and it is subsequently in its custody nonetheless, it still has possession.

[43] Commissioners in other jurisdictions have considered whether possession (or custody) is enough to make a record subject to their respective FOIP Acts. Alberta IPC stated in Order 2000-003 that:

> [para 31.] I have said that the word "or" indicates that only one of "custody" or "control" is required to meet the requirements of section 4(1). Both custody and control are not required. If a public body has either custody or control of a record, the Act applies to that record.

[10] Alberta Information and Privacy Commissioner (hereinafter AB IPC) Order 98-002 at [177], available online at http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1995

> [para 32.] "Custody" and "control" are not the same thing. If they were, there would be no need to have both words or to distinguish between them. A reference to "custody", as distinct from "control", is to recognize that it is conceivable that a public body might have custody, but not control of a record, or that a public body might have control of a record, but not custody. Of course, a public body may have both custody and control of a record.
>
> [para 33.] In Order 99-032, I had to decide whether a public body had custody or control of records. I reviewed some criteria that would assist in making that determination.
>
> [para 34.] **In that case, the records were physically in the public body's file. That physical possession was sufficient for a finding of "custody".** [11]
>
> [emphasis added]

[44] That view, if followed, would support a conclusion that the record in question was in the possession of the City for purposes of LA FOIP at least until the City transferred the record to the SPS.

[45] The City submits that simply the fact that a record is physically located on its premises doesn't establish possession and that there must also be an element of control. There is authority for the City's proposition. In Alberta, the Information and Privacy Commissioner considered 'custody' in a more recent Order and found that bare possession of a record would not be sufficient to establish jurisdiction. The modified approach of the Alberta Commissioner's office is apparent in its Order F2009-023 as follows:

> [para 33] While the parties were preparing submissions for the inquiry, the Office of the Information and Privacy Commissioner of Ontario issued Orders PO-2836 and PO-2842. These orders find that Wilfrid Laurier University and the University of Ottawa respectively have custody or control of records created or received by academic staff members in relation to the evaluation of SSHRC applications. Like the Public Body, Wilfrid Laurier University and the University of Ottawa challenged the application of provincial freedom of information legislation to these kinds of records on the basis that they lacked custody or control of records relating to SSHRC committee work...

[11] AB IPC Order 2000-003 at [31] – [34] available online at http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1792

> **In my view, the Adjudicator is correct that "bare possession" of information does not amount to custody. The word "custody" implies that there is some right or obligation to hold the information in one's possession**. "Control" in the context of "custody" implies that a public body has some right to require or demand information that is not in its immediate possession. I therefore find that the question posed by the Adjudicator in Order PO-2836, that is, "Does the Public Body have some right to deal with the records and some responsibility for their care and protection?" would also apply when determining whether records are in the custody or under the control of a public body under the FOIP Act.[12]
>
> [emphasis added]

[46] The Alberta Commissioner then proceeded to consider whether the public body has some right to possess the record and whether it had some responsibility for the care and protection of potentially responsive records. He concluded that "the Public Body has some right to deal with any potentially responsive records that may be located on its server".[13] He also concluded that the public body had some responsibility for the care and protection of potentially responsive records.

[47] This led to his conclusion that he had authority under his legislation to find there was custody of the record by the public body.

[48] I have also considered the approach taken by the Ontario IPC. That Commissioner's Order MO-2051 states:

> Previous orders of this office have reviewed the issue of whether possession of a record constitutes "custody or control" of the record for the purpose of section 4(1) of the *Act*. In Order P-120, former Commissioner Linden also stated that subsection 10(1) of the *Freedom of Information and Protection of Privacy Act* (the equivalent to section 4(1) of the *Act* in this appeal) gives a person:
>
> > … a right of access to records that are "in the custody or under the control of an institution". Accordingly, only one requirement must be satisfied in order for a record to be governed by the *Act*.
>
> Regarding the issue of whether possession of a record was determinative of the issue of custody or control, former Commissioner Linden stated as follows in that order:

[12] AB IPC Order F2009-023 at [33] available online at http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2543
[13] ibid., at [33]

> In my view, although mere possession of a record by an institution may not constitute custody or control in all circumstances, **physical possession of a record is the best evidence of custody**, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession.

Furthermore, in Order P-239, former Commissioner Wright stated:

> ... mere possession does not amount to custody for the purposes of the *Act*. In my view, there must be some **right to deal with the records and some responsibility for their care and protection**.[14]
>
> [emphasis added]

[49] It appears that other Ontario IPC Orders considering the issue of custody as a matter of jurisdiction rely on former Commissioner Linden's interpretation.

[50] The Office of the Information and Privacy Commissioner of British Columbia (BC IPC) also agrees that custody requires some element of control. The BC Commissioner stated in Order 308-1999 that:

> The Liquor Distribution Branch's position on custody issues with respect to the diary includes the following points, with my own response added in parentheses, at least with respect to the present inquiry:
>
> - **Custody of records requires more than that the records be located on particular premises; (Submission of the Liquor Distribution Branch, paragraph 7.06) (I agree)**
> - "In order for a public body to have custody of records, the public body must have **immediate charge and control of these records**, including some legal responsibility for their safekeeping, care, protection, or preservation." (I agree)
> - "The Public Body submits that the use of the word 'custody' in the Act reflects a deliberate choice of the Legislature to clearly limit the Act's application to only 'government' records, and not to personal records of employees that happen to be located on public body premises." (Submission of the Liquor Distribution Branch, paragraph 7.07) (Thus a public body does not have custody of the wallet or purse of an employee, a personal scheduler of non-work related activities, or a "diary," in the traditional sense of the term, that an

[14] Information and Privacy Commissioner of Ontario (hereinafter ON IPC) at [4], available online at http://www.ipc.on.ca/images/Findings/up-mo_2051.pdf

> employee stores at work for privacy and safekeeping, and perhaps even writes in during lunch breaks at work. This does not mean, however, that the public body should automatically accept an employee's assertion that a document does not contain any work-related information. A proper review of the document, and the circumstances surrounding its creation, must be conducted.)[15]
>
> [emphasis added]

[51] I have attempted, when permitted by LA FOIP, to interpret and apply its provisions in a manner that is largely consistent with other Canadian oversight agencies. That approach in this case requires a consideration of 'control' as a factor assessing whether there is possession and whether LA FOIP applies to the record in question.

[52] Consequently, I need to consider the City's arguments on the issue of 'control'.

3. Did the City of Saskatoon have control of the record?

[53] The City states in its letter of June 29, 2010 that, "In the circumstances of this case, consideration of the above note indicia of custody and control point to the records being in custody and control of the **SPS rather than the City**." [emphasis added]

[54] The question becomes can both the City and SPS have control of the record? Alberta IPC comments on this issue in Order P2009-013\ P2009-014 as follows:

> **2. Did both Organizations have custody and/or control of the Complainant's personal information under section 5(1) of PIPA?**
>
> [para 33] Under section 5(1) of PIPA, an organization is responsible for personal information if the personal information is in its custody *or* under its control; it is not necessary for there to be both custody *and* control. **Here, I find that the Complainant's personal information on his driver's license was in the custody and/or control of both Organizations.**
>
> [para 34] Brooklyn Inc. does not dispute that it was the Complainant's employer and that it collected and retained a copy of the driver's license for employment purposes.

[15] Office of the Information and Privacy Commissioner of British Columbia (hereinafter BC IPC) at [9], available online at http://www.oipc.bc.ca/orders/1999/Order308.html

> It therefore had custody and control of it. As I have found that Murphy Inc. was also the Complainant's employer, it also had custody and control of the copy of the driver's licence that was provided by the Complainant for employment purposes.
>
> [para 35] I point out that, even if Murphy Inc. was *not* an employer of the Complainant, that Organization nonetheless had custody, if not also control, of a copy of the driver's licence. "Custody" refers to the physical possession of a record (Order F2002-014 at para. 12). While a recent Order of this Office noted that "bare" possession of information does not amount to custody, there is custody if there is some right or obligation to hold the information in one's possession (Order F2009-023 at para. 33). Here, a copy of the Complainant's driver's licence was kept at an office that was used jointly by Murphy Inc. and Brooklyn Inc. At the oral hearing, the CEO confirmed that the Office Administrator is responsible for maintaining the files of both Organizations, which are kept in a filing cabinet in her particular office. As she is employed by Murphy Inc., had possession of the copy of the Complainant's driver's license in her office, and was responsible for keeping it there, Murphy Inc. had a right and obligation to possess the copy of the Complainant's driver's license, even if Murphy Inc. was not itself the Complainant's employer.
>
> [para 36] **Because both Organizations had custody and/or control of the Complainant's personal information, both Organizations are responsible for it under section 5(1) of PIPA. This is regardless of whether both Organizations or only Brooklyn Inc. was the Complainant's employer.** [16]
>
> [emphasis added]

[55] I agree with the Alberta Commissioner in his view that more than one agency may have control of the same record at the same time. The control exercised by two different organizations need not be co-extensive and may be uneven between the two organizations. In fact, any analysis of possession and control needs to ensure that the words have different meanings. Therefore, the issue before me is whether the City had a measure of control of the record although it is not necessary that it would have sole control of the records for all purposes.

[56] The City's position appears to be that in determining whether there was possession of the record for purposes of LA FOIP, I need to find that the City also had control of the record. That would obviate the need for the legislative drafters to provide the option of "possession" **or** "control". For the reasons noted earlier, all that is required is bare

[16] AB IPC Order P2009-013 \ P2009-014 at [33]-[36], available online at http://www.oipc.ab.ca/downloads/documentloader.ashx?id=2598

possession of the record coupled with some element of control albeit for perhaps limited purposes. It is not necessary to find that the SPS has no control over the record to find that the City had possession.

Indicia of control

[57] In its letter of June 29, 2010, the City began its argument that the City did not have control of the record by listing some factors that determine control that have been identified by other Commissioners. It then outlined its position as to why in its view the SPS has more control over the record. Finally, it discusses court and other IPC decisions that it believes support its arguments.

[58] In evaluating arguments regarding control, I would normally begin by considering the test I set out in my Report F-2008-002. The criteria found in that Report, as it relates to the matter at hand, is as follows:

1. How is the author of the record connected to the public body?
2. What are the circumstances surrounding the creation, use and retention of the record?
3. Given the public body's mandate and functions, how closely is the record integrated with other records held by the public body?
4. Is there any agreement that limits the use or disclosure of the record?[17]

[59] On these facts, the record was created by the Human Resources branch in the City. It was used to provide information and advice from the Human Resources branch apparently to the SPS and then was retained by the City for some eight years. The record was presumably kept in the same area as other human resources records, albeit in a separate locked file drawer. Access to the records would have been available to certain Human Resources staff in the City. There is no written agreement that limits the use or disclosure of the record by the City but there apparently was a form of unwritten arrangement although the terms are unclear. On the basis of that four point test, there

[17] SK OIPC Investigation Report F-2008-002 at pp. 12 and 13, available online at http://www.oipc.sk.ca/Reports/F-2008-002.pdf

would be a measure of control exercised by the City. It certainly could not be said that on those four criteria a measure of control was entirely absent.

[60] In the June 29, 2010 letter the City referenced the BC IPC Order F-10-01. From this Order, the City suggests 15 questions that may provide guidance in establishing a reasonable determination of 'control' in this instance. Some of these questions have been advanced by the City to support its contention that there was no possession of the record by the City.

[61] The 15 criteria suggested by the City for determining control are as follows:

1. The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body;
2. The record was created by an outside consultant for the public body;
3. The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement;
4. An employee of the public body possesses the record for the purposes of his or her duties performed for the public body;
5. The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed;
6. The content of the record relates to the public body's mandate and core, central or basic functions;
7. The public body has a right of possession of the record;
8. The public body has the authority to regulate the record's use and disposition;
9. The public body paid for the creation of the records;
10. The public body has relied upon the record to a substantial extent;
11. The record is closely integrated with other records held by the public body;
12. The contact permits the public body to inspect, review, possess of copy records produced, received or acquired by the contractor as a result of the contract;
13. The public body's customary practice in relation to possession or control of records of this nature in similar circumstances;
14. The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
15. The owner of the records.

[62] With respect to that list, I offer the following observations:

> *1. The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed by the public body.*

[63] The City's letter of June 29, 2010 stated: "The records were produced by persons who were employees of the City, but were acting in their role as consultants to the SPS."

[64] My office has asked the City several times to clarify the consulting relationship between SPS, the City and its employees. I have also asked that it provide copies of any applicable agreements. The City has never adequately addressed these questions. As such, as the City has not specifically stated whether, if a 'consulting relationship' exists, it may be between the City and SPS, not the individual employees and SPS. This is indicated by the City's statement of June 29, 2010:

> Although there are no written agreements between the SPS and the City respecting Human Resources consulting, **both the City and the SPS have agreed** that the SPS is the owner of the files and provides instructions to the consultant from the City on all matters pertaining to carriage of the file: **the SPS controls file opening, oversees processes undertaken and controls file closing and storage**.
>
> [emphasis added]

[65] As such, the City would likely have required its employees to create the record in the course of his or her regular duties.

[66] If the relationship was between the SPS and City employees themselves, it raises further questions. Who paid the employees to perform these duties? Were the employees authorized by the City to perform these duties?

[67] The City has not fully explained the relationship between its applicable staff and SPS so the nature of the relationship remains unclear.

2. The record was created by an outside consultant for the public body.

[68] The City offered this criterion, but did not elaborate on it. It appears the record was created by the City, not by an outside consultant.

3. The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement.

[69] The City's letter of June 29, 2010 states: "The records were not produced or kept as the result of any mandatory statutory or employment requirement of the City."

[70] Again, it appears that the record was produced by a City employee as an employment requirement. As the Alberta IPC stated in Order F2009-023:

> Consequently, records created for the SSHRC Committee were created as part of the creator's duties to the University, and therefore, the University, as employer, had some right to possess the record. [18]

[71] As such, there may also be an employment requirement for the City to possess the record.

4. An employee of the public body possesses the record for the purposes of his or her duties performed for the public body.

[72] The City's letter of June 29, 2010 makes the following two statements:

> While the files were active, they were kept on City property to allow the Human Resources personnel acting as consultants to the SPS easier access.
>
> ESB employees consulting on the SPS matters are well aware that they perform duties for the City as employees and also perform duties as consultants to the SPS. On SPS files, they report to the Police Chief and *not* to the City Manager, as is the case with City files. They understand that their work product is integrated into reports which become the property of the SPS and that all records in these files are records of the SPS. There is no control exerted over these files by the City or any of its employees. They must accede to the direction of SPS in opening, handling, closing and archiving the files. They must deliver SPS files to the SPS if requested to do so. There is no intent to exercise control over the files to the exclusion of the SPS.

[18] *Supra* note 12 at [35]

[73] Again, it appears that the employees had access to the record during the period in which the record was created and maintained on site.

5. The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed.

[74] The City has maintained that it has an agreement with SPS to provide human resources consulting services to the SPS. However, in its letter of June 29, 2010, it admitted:

> Although **there are no written agreements** between the SPS and the City respecting Human Resources consulting, both the City and the SPS have agreed that the SPS is the owner of the files and provides instructions to the consultant from the City on all matters pertaining to carriage of the file: the SPS controls file opening, oversees processes undertaken and controls file closing and storage... They agree that files are confidential and not to be disclosed to anyone other than the parties acting as consultants to the SPS. All of these factors point to the records being in the custody and control of the SPS.
>
> [emphasis added]

[75] To support its assertion, the City makes several references to an "agreement" or "arrangement". This is one such example:

> As indicated by the Head in her correspondence of November 3, 2005, the SPS has an arrangement with the Employee Services Branch of the City (the "ESB") for it to supply certain of its human resources obligations to SPS. In this case, pursuant to its long term agreement with the SPS, the ESB provided support to carry out an investigation under the Workplace Harassment Policy. The SPS chose to adopt the City's Workplace Harassment Policy. This relationship is further outlined in the Affidavit of [a former City employee].

[76] The BC IPC considered a case where an applicant requested a record from the University of Victoria (University).[19] The University argued that the record was in the custody or control of the University of Victoria Foundation (Foundation), which is physically located on University of Victoria property. The applicant argued that the record was on University property and that University employees helped create the record. The University countered that, although there was no written agreement, the Foundation and the University had a "quasi-contractual" contract. The BC Commissioner stated:

[19] BC IPC Order 02-30, available online at http://www.oipc.bc.ca/orders/2002/Order02-30.pdf

> As I have also noted, the University, perhaps because there is no written agreement respecting this arrangement, calls this relationship "quasi-contractual". There may be no written agreement, but it seems to me the arrangement Sheila Sheldon Collyer describes can only be contractual.[20]

[77] However, the University did attest that the Foundation pays the University for services. This relationship is outlined in the Order as follows:

> At para. 15 of her affidavit, Sheila Sheldon Collyer deposed that the Foundation pays a fixed amount each year to the University for such services. She deposed, in the same paragraph, that the Foundation pays $5,000 a year to her office for administrative services and $25,000 to the University's Department of Financial Services, as an "administration charge".[21]

[78] In the case at hand, the City advised us that there is no written contract with SPS regarding the provision of human resources services, and has not commented on payment for any such services.

[79] It would be improper to adopt BC IPC's acceptance of an alleged oral agreement because in the present case, the City did not provide evidence of any kind of payment scheme for the services, as was the case with the University of Victoria. The two affidavits provided by the City include a number of assertions of the conclusion that there was an agreement. There was little detail on the terms of such an agreement, including the specific arrangements for undertaking the investigation, writing the report and storage of the report. The City has failed to substantiate the claims and conclusions in the two affidavits. Finally, in its letter of June 29, 2010 the City, in describing the reasons that the City Clerk wrote to the SPS regarding this review, stated:

> First, the Head was **seeking further particulars of the agreement** between the SPS and the City. Key ESB personnel who had worked on the records were no longer in the City's employ… the Head thought it prudent to request that the SPS **explain its understanding of the agreement**, in order to provide confirmation of the relationship to the OIPC.
>
> [emphasis added]

[20] *ibid*., at [19]
[21] *Supra* note 19 at [15]

[80] It is significant that the City itself appears not clear on the details surrounding the "agreement/arrangement" with SPS as it existed in 2002.

6. The content of the record relates to the public body's mandate and core, central or basic functions.

[81] The City raised this as a criterion, but again, did not address it. However, as stated above, its letter of June 29, 2010 stated: "The records were not produced or kept as the result of any mandatory statutory or employment requirement of the City."

[82] This raises the question of why employees of a public body would be performing tasks that are not related to mandatory or statutory requirement of the City. Were these actions performed to fulfil the City's mandate and core or central or basic functions? If not, under what authority did City employees deviate from their responsibilities to their employer?

7. The public body has a right of possession of the record.

[83] The City did not address the issue of whether it has the right to possess the record even though it raised this criterion. In this case, the City had the record for approximately eight years with the full knowledge, and presumably consent, of SPS.

8. The public body has the authority to regulate the record's use and disposition.

[84] The City at one point submitted that "[The City employees] must accede to the direction of the SPS in opening, handling, closing and archiving the files." The evidence of the former City employee however, is that the direction of SPS was limited to opening, closing and archiving. There is no evidence that illuminates how that direction was manifested for the subject record. There is no evidence from the City as to the day to day interaction between the Human Resources branch employees and the SPS.

9. The public body paid for the creation of the records.

[85] In absence of representation to the contrary, it would appear that the City paid for the creation of the record in so much as it presumably paid the salary of the employees who created the record and most likely the supplies used.

10. The public body has relied upon the record to a substantial extent.

[86] In its letter of June 29, 2010, the City claimed:

> [The Records] are not relied upon by the City for any purposes as they do not pertain to City matters.

> *11. Presumably, the City as employer would be able to make a limited use of the record, insofar as it must supervise and assess the performance of its employees who are paid by the City. The record is closely integrated with other records held by the public body.*

[87] In its letter of June 29, 2010, the City stated:

> In her affidavit, [a former City employee] attests that:… closed SPS harassment investigation files were kept or archived in a locked "harassment" file cabinet in the bottom drawer, separate from harassment investigation file pertaining to City employees.

[88] As outlined earlier, in Order F2009-023,[22] the Alberta IPC identified two factors to help determine whether a public body would have custody or control of responsive records. One of the factors is if the record is kept apart from the other records of the public body. It does not appear that the record is integrated with other records held by the City as it was stored separately in a drawer designated for harassment files related to SPS employees. It appears that the record was kept in the same area as City harassment complaints and would have been available to one or more employees in this office. I can only speculate about the use, disclosure and storage of electronic versions.

[22] *Supra* note 12

12. The contact permits the public body to inspect, review, possess, copy records produced, received or acquired by the contractor as a result of the contract.

[89] Again, the City argued that SPS has possession or control and "[The City employees] must accede to the direction of the SPS in opening, handling, closing and archiving the files."[23] Despite the affidavits submitted by the City it is not at all clear how the direction from SPS was manifest over the last eight years. However, as noted earlier, a contract or other written agreement does not exist. The City does not address if it is permitted to inspect, review, possess, copy records produced, receive or acquire records albeit with some tacit approval to do so by SPS.

13. The public body's customary practice in relation to possession or control of records of this nature in similar circumstances.

[90] The City does not offer specific comment on this criterion either.

14. The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances.

[91] On this issue, the City states in its letter of June 29, 2010 that:

> As is typical for consultants, reports and record produced by the consultant become records of the employer requesting the consulting services (ie. the SPS).
> …
> In addition, [a former City employee] attests in her affidavit that the City has retained outside consultants on various human relations matters. In accordance with common practice, the outside consultant produces a report which becomes the property of the City. In this case, the ESB employees produced and held the records while acting as consultants to the SPS. At all times, from when the file was opened to when it was archived, the records were (and continue to be) the property of SPS. At all times, the records were (and remain) in the possession and control of the SPS.

[92] Again, the City is arguing that SPS is the owner of the record. However, as stated earlier, both bodies could have some degree of control of the record simultaneously. The analogy to a private sector contractor is not helpful since local authorities are in a completely different situation in terms of the need for transparency and accountability

[23] The Affidavit of the former City employee refers only to direction of SPS in opening, closing and archiving.

that is unlike the situation in the private sector. Furthermore, the City's example details the common practice involving a relationship between a contractor and a public body. However, the City has not clarified if the alleged contractor in this case was the City or the employees of the City. It appears from the information provided by the City that to the extent there was a consulting arrangement it would be with the City and not with individual employees in the Employment Services Branch. Nor did the City comment on what arrangements exist between other cities and municipal police forces and liken to its own circumstances.

15. The owner of the records.

[93] Although the City has argued that the owner of the record is SPS, this is not helpful since the issue to be determined is whether the City had physical possession plus a measure of control of the record in question at the time the Applicant made her access requests.

[94] In summary, of the 15 criteria suggested by the City for establishing control of the record in question, I find that criteria #1, 4, 5, 6, 7, 8 and 9 when applied to these facts suggest not just bare possession by the City but possession with a measure of control. The City created the record. This was done by employees of the City presumably paid and supervised by the City. The City permitted certain of its employees to access or use the record in the course of their work investigating the harassment complaint. The record was stored in a locked file cabinet under the operational control of the Employment Services Branch of the City. When the SPS chose to take possession of the record they required the City to retrieve the record from storage and transfer the record to them.

[95] It is not necessary for me to determine how control may be apportioned between the City and SPS. It is clear that the SPS has an interest in the record and no doubt some measure of control of the record.

Personal information as a criterion for control

[96] The City has not provided us with a copy of the record as requested and as such I was forced to conduct this review in the abstract. The Applicant's description of the record from her access to information request dated November 1, 2005 is as follows: "I requested the harassment findings from the City of Saskatoon investigation where I was the Complainant + [Co-worker] was the respondent." I also know that both the Applicant and her co-worker were employees of SPS. It is reasonable to assume that the record may contain or constitute employment history of both the Applicant and her co-worker. The definition of personal information found in section 23(1)(b) of LA FOIP includes employment history as follows:

> 23(1) Subject to subsections (1.1) and (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:
>
> …
>
> (b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

[97] It appears safe to conclude that there could be other personal information of the Applicant and co-worker contained within the record.

[98] In my Report LA-2004-001, I stated:

> [41] The object of *The Freedom of Information and Protection of Privacy Act* was considered by this office in Report 2004-003 [8] to [11]. We apply the same object to *The Local Authority Freedom of Information and Protection of Privacy Act* with necessary changes to substitute local authority for government institution. We take the object of the Act to be to make local authorities more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records
>
> (b) **giving individuals a right of access to, and a right of request corrections of, personal information about themselves**
>
> (c) specifying limited exceptions to the rights of access
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act[24]

[emphasis added]

[99] That conclusion is consistent with the statement by the Saskatchewan Court of Appeal in *General Motors Acceptance Corporation of Canada* v. *Saskatchewan Government Insurance* [1993] S.J. 601 at [11] that:

> The [*Freedom of Information and Protection of Privacy Act's*] basic purpose reflects **a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language**. There are specific exemptions from disclosure set forth in the Act, but these **limited exemptions do not obscure the basic policy that disclosure, not secrecy is the dominant objective of the Act**.
>
> That is not to say that the statutory exemptions are of little or no significance. I recognize that they are intended to have a meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.[25]
>
> [emphasis added]

[100] The individual's right to his/her own personal information is at issue and it should be one of the factors weighed in determining possession.

Cases on control relied upon by the City

[101] The City relies on BC IPC Decision F-10-01[26] in its letter of June 29, 2010 as follows:

> Due to the dual nature of the work carried out by the ESB employees working on SPS matters, **it is necessary to determine whether the employees who worked with the record were acting in the capacity of an employee of the City, a consultant to the**

[24] SK OIPC Investigation Report LA 2004-001 at [41], available online at http://www.oipc.sk.ca/Reports/LA-2004-001.pdf
[25] CanLII 6655 (SK C.A.)
[26] BC IPC Investigative Report F-10-01, available online at http://www.oipc.bc.ca/orders/other_decisions/DecisionF10-01.pdf

> **City, or a consultant to the SPS during their work on the records**. The decision of the Office of the Information & Privacy Commissioner for British Columbia in *University of British Columbia* Decision F-10-01, [2010] B.C.I.P.C.D. No. 5 (*"UBC"*) indicates that such a consideration is appropriate as, depending on the circumstances of the case, records in the possession of consultants may be treated differently than those in the possession of employees. In that case, a doctor employed as a professor at UBC also maintained a private practice as a psychiatrist. The Commissioner found the following factors relevant in determining that she was acting as a private consultant when she created notes of her examination of the applicant: the letter of retainer was addressed to her private office; she was to invoice the University for her services, which indicated that conducting the assessment was separate from her duties as an assistant professor; and, she carried out the assessment in her private office.
>
> ESB employees consulting on the SPS matters are well aware that they perform duties for the City as employees and also perform duties as consultants to the SPS. On SPS files they report to the Police Chief and *not* to the City Manager, as is the case with City files. They understand that their work product is integrated into reports which become the property of the SPS and that all records in these files are records of the SPS. There is no control exerted over these files by the City or any of its employees, **including the ESB personnel who work on the file while they are in their role as City employees...**
>
> [emphasis added]

[102] I have reviewed the BC IPC decision and do not see how it supports the City's position. This quote appears inconsistent with the City's assertion discussed in paragraph [63] of this Report.

[103] The City asserts that "it is necessary to determine whether the employees who worked with the record were acting in the capacity of an employee of the City, a consultant to the City, or a consultant to the SPS during their work on the records"; however, as stated earlier, it has not clearly explained the roles of the parties or provided any evidence to substantiate. At different times the City suggests it was the City employees who were the consultants and at other times the City has indicated that the City was the consultant.

[104] The City noted that the BC IPC found the following factors relevant in determining that the employee in question was acting as a private consultant when she created the record: a) the letter of retainer was addressed to her private office; b) she was to invoice the University for her services; c) she carried out the assessment in her private office.

However, the City has not given any indication that there were invoices or letters of retainer in this case. That leads to the question of whether the City is implying that the City contracted the employees to act as a consultant. But again, the City has not shown any evidence of such a relationship as outlined in the decision.

[105] Pursuant to section 51 of LA FOIP, the City bears the burden of proof to establish that the record is not subject to LA FOIP.

[106] In its letter of June 29, 2010, the City relies on *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*. It appears that the quotation the City is relying upon is as follows:

> **101** The applicant first contends that the mere fact that the notes were "retrieved" and "reviewed" by the CLRB is evidence of its control over them. I disagree. As indicated earlier, the notes were produced for review on a "without prejudice" basis in the hope that the Commissioner might abandon their pursuit. According to the evidence, this review took place after the respondent had obtained the consent of the members. The fact that in this context the CLRB was able to produce the notes for review does not establish its control over them, and for the Commissioner to suggest otherwise in circumstances where he himself arranged for the review to take place on a "without prejudice" basis in the hope that he might thereafter abandon the claim borders on deception. I therefore do not accept the contention that control has been established because "in any event, the notes in this case have been retrieved and reviewed".
> …
>
> **108** It is noteworthy that the majority decision is based on the finding that the factual basis which underlies the decision of Marceau J.A. was wrong. Indeed, after noting that Public Works Canada had possession and custody of the records, Létourneau J.A. found as a fact that the records had been collected by Public Works Canada "in the performance of its official duties". Keeping the foregoing in mind, the decision of the Court of Appeal stands for the proposition that records accumulated by a government institution are "under the control" of that institution irrespective of the nature or type of control being exercised over them, so long as they are held by the institution in the course of the performance of its statutory functions.
>
> **109** It is apparent from the facts underlying the authorities on the meaning of the word "control", that the information in issue in each case had come under the control and/or custody of the government institutions in the course of the fulfillment of their respective statutory functions. Information coming under the control of government in that manner is the obvious class of information which Parliament intended to make accessible when it enacted the *Privacy Act* and the *Access to Information Act*.
>
> …

> **112** Nevertheless, the record does suggest that the notes in question were kept by the members either at the office or at home, but most likely at the office. A question therefore arises as to whether the mere fact that the notes may have been kept by the members on the premises of the CLRB could result in the Board having "control" over them as that word is used in section 12(1)(b) of the Act.
>
> **113** I do not believe so. Admittedly, the fact that records are left or kept on the government institution's premises allows for a de facto intrusion into these records by the institution. But that does not bring the records within the "control" of the institution as these words are used in section 12(1)(b) of the Act. What is contemplated is control in any form so long as it is exercised in a lawful fashion. It is inconceivable that the Privacy Act could compel a government institution to intrude into the records of a third party in breach of that person's right to privacy in order to satisfy the privacy rights of others.[27]

[107] In my view, there are crucial differences in the records in *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)* and the case at hand. For instance, it should be noted that section 12(1)(b) the *Privacy Act*[28] states that records must be "under the control of a government institution". Custody or possession would not be sufficient. As such, this case does not appear to be helpful to the City.

[108] Further, in *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, it appears that the Canada Labour Relations Board (CLRB) did not have possession of the record until the access request had been made and the Board Member handed over personal notes to the CLRB Privacy Officer upon request. The decision states:

> **24** The respondent and intervenors reject the applicant's contention that the fact the CLRB produced the members' notes for review by the Privacy officer is conclusive of the CLRB's control over the Notes. They argue that the applicant should not be able to rely upon the production of the notes for review because the Commissioner had agreed that the review would be conducted on a "without prejudice" basis.[33] Furthermore, they submit that in light of the evidence to the effect **that Board members maintain responsibility for the care and safe-keeping of their personal notes, the only basis upon which the personal notes could have been produced was with the consent of the Board members in order to cooperate with the Commissioner's investigation.**[29]
>
> [emphasis added]

[27] 2000 CanLII 15487 (F.C.A.)
[28] *Privacy Act*, R.S.C. 1985, c. P-21
[29] *Supra* note 27 at [24]

[109] In the case of the City, it had possession of the record since its creation. Furthermore, it appears that the City employee who created the record may have been required to do so as an employment requirement. In *Canada (Privacy Commissioner)* v. *Canada (Labour Relations Board)*, CLRB argues that the Board Member who created the record was not required to do so as outlined;

> **25** The respondent and interveners argue **that the members' notes cannot be characterized as information generated in the course of performing an administrative function or their official duties, as the evidence shows that there was no official requirement on the part of the members to take notes.** They submit that the issue of whether documents were created during the course of carrying out an official duty is not relevant to determine whether the government institution has control over them. As quasi-judicial decision makers, the members are required to maintain complete independence over their decision-making process, and must maintain exclusive control over their hearing notes to achieve this independence. In oral argument, the respondent relied on the arguments of the PSSRB that the Act should not impinge on the right to privacy of officers or employees of the government; personal private notes, such as those in the present case, are the private affairs of their creators, and not subject to the control of the institution or release under access requests.[30]
>
> [emphasis added]

[110] Finally, the record in our case is an official report and not personal notes as in the above noted decision.

[111] In its letter of June 29, 2010, the City incorporates *British Columbia (Ministry of Small Business, Tourism and Culture et al)* v. *British Columbia (Information and Privacy Commissioner)* [31] into its arguments as follows:

> In the case of *British Columbia (Ministry of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 1494 (B.C.S.C.), the court quashed an order by the Information and Privacy Commissioner requiring production of a diary written by the employee of the Liquor Distribution Branch of the Ministry of Small Business, Tourism and Culture (the "LDB") while on the job. The diary was not used to prepare Branch incident reports or the store log.

[30] *Supra* note 27 at [25]
[31] 2000 BCSC 929 (CanLII)

> In making its decision, the Court found that the LDB was a public body and the Act applied to all records of the LDB in its custody or under its control. *The Court found that a public body must have immediate charge and control of records, beyond them just being located on their premises, including some legal responsibility for their safe keeping, care, production or preservation and the legal right to obtain a copy, for the record to be deemed in their custody or under their control.* In considering whether the diary was a record in the custody or under the control of the LDB within the meaning of the Act, the Court found that the determinative factor was whether the diary was created by the employee in fulfilment of any employment duty. In this case, the diary was not used for any purpose related to employment with LDB. The LDB had no authority to regulate or control her use or her disposition of the diary. The Court concluded that the diary had never been in the custody or in the control of LDB, nor did the LDB ever have the right to compel its production. As such, the diary was not a record within the scope of the Act.

[112] As stated earlier it appears that the alleged agreement for the City employees to perform services for SPS would be between the City and SPS, not between the individual employees and SPS. Unlike the record created by the LDB employee, it appears that the City of Saskatoon employee would have been required to create the record as a job requirement.

[113] Finally, the City relies on *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*[32] and relates it to SPS' autonomy with the City. Its letter of June 29, 2010 states:

> In addition, we point you to the case of *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, [2009] B.C.J. No. 2145 (B.C.S.C.). In that case, Simon Fraser University ("SFU") made an application for judicial review of a disclosure order. The records in question were documents in the possession of the SFU Industry Liaison Office and were related to SFU spin-off companies. SFU initially took the position that the records were in its custody or control. After consultation with interested third parties, it disclosed some records but then reviewed remaining records and took the position that the balance were not within its control or custody and not subject to disclosure. The disputed records related to the subsidiary's minority shareholding in one of the spin-off companies. The Court quashed the order, finding that the Office of the Information and Privacy Commissioner had erred in ignoring the fact that the subsidiary was not a public sector entity and was thus required to comply with a different legislative scheme under the Personal Information Protection Act. The Court indicated that it was inappropriate to find that the records were under the control of two different organizations subject to separate legal regimes respecting privacy.

[32] 2009 BCSC 1481 (CanLII)

[114] The fact that the two organizations are different entities and subject to different access and privacy regimes is only one of the factors to determine control. However, another determination is who created the record. In *Simon Fraser University* v. *British Columbia (Information and Privacy Commissioner)*, the record was created by other entities:

> **15** Credo Interactive Inc. was originally incorporated on November 7, 1996, under the name 530755 British Columbia Ltd. ("Credo"). SFUV is a minority shareholder of Credo. The records at issue in the Inquiry are all related to SFUV's interest in Credo. The Records fall under three categories:
>
> (a) records created by Credo that came into the possession of SFUV in its capacity as a shareholder of Credo;
>
> (b) records created by Credo that came into the possession of a UILO employee in his capacity as a director of Credo; and
>
> (c) internal records created by SFUV in its capacity as a shareholder of Credo.[33]

[115] In the case of the City, its employees created the record, which is one element of control to be considered.

[116] I originally cited the minority opinion in *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 in our letter to the City in our analysis of possession as part of a quotation taken from my Report F-2008-002. The City also used arguments from the minority opinion in its submissions regarding possession.

[117] However, in this case the Federal Court held that the records were under the control of Public Works. The decision states:

> The appellant was not required to resort to the services of PWC. It could have entered into a similar agreement with any third party not subject to the Act. It chose to do business with a government institution that it knew was bound by the Act and it cannot now complain of the hardship resulting from its choice.[34]

[118] The same is true of SPS and the City. SPS must have been aware that City records were subject to LA FOIP and access to information requests. SPS could have strengthened the

[33] *Supra* note 27 at [15]
[34] [1995] CanLII 3574 2 F.C. 110 at [9]

protection of these documents by having written agreements in place with the City that addressed possession and control in the context of LA FOIP or hired a private business for human resource consulting.

Balance of probabilities

[119] The City was advised at the outset that it would bear the burden of proof in establishing that it had neither possession nor control of the record before it disposed of same. What appears not to be in dispute is that the Employment Services Branch of the City of Saskatoon undertook a harassment investigation and prepared a report as a result. The Branch did this work through its regular staff of City employees.

[120] The City however has three problems to overcome in meeting the burden of proof:

1. There is no record for our office to review and consider.
2. There was no written contract between SPS and City governing work to be done by the Employment Services Branch of the City for bodies not covered by LA FOIP such as SPS.
3. There is significant uncertainty as to the terms of the alleged verbal contract. This includes precisely what contributions were made by the City and SPS respectively in the actual preparation of the Investigation Report and in the retention of the report for the last eight years.

[121] What I have is a series of assertions by the City about who had or did not have control of the record but very little in terms of detail about the alleged unwritten contract and particularly the way that the work was done in creating the record and its subsequent storage by the City.

[122] In the final analysis, the City had to establish on a balance of probabilities that it had no possession or control of the record. It has failed to do so. The preponderance of evidence instead indicates that the City had not only physical possession but a measure of control over the document it created and stored for some eight years. The City had immediate charge and control of the record and some legal responsibility for the

safekeeping, care, protection and preservation of the record. For those reasons the City had possession of the record.

4. Did the City of Saskatoon meet its obligations under section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act?*

[123] I have already discussed in the Background section of this Report the requirements of section 7 and the response required when the City receives an access request. In this case the City provided a response to both formal requests within the prescribed 30 day period. The response was to deny access for two reasons:

1. The record belonged to SPS and not to the City; and
2. Section 16(1)(b) of LA FOIP allowed the City to deny access.

[124] This response was confusing since the City was suggesting both that LA FOIP would not apply to the record but at the same time relied on a discretionary exemption in section 16(1)(b) to deny access, and refused to provide the record to our office. Section 16(1)(b) provides as follows:

> 16(1) **Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:**
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;
>
> (**b) consultations or deliberations involving officers or employees of the local authority**;
>
> …
>
> (2) This section does not apply to a record that:
>
> (a) has been in existence for more than 25 years;
>
> (b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;
>
> (c) is the result of product or environmental testing carried out by or for a local authority, unless the testing was conducted:
>
> (i) as a service to a person, a group of persons or an organization other than the local authority, and for a fee; or
>
> (ii) as preliminary or experimental tests for the purpose of:

(A) developing methods of testing; or

(B) testing products for possible purchase;

(d) is a statistical survey;

(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or

(f) is:

(i) an instruction or guide-line issued to the officers or employees of a local authority; or

(ii) a substantive rule or statement of policy that has been adopted by a local authority for the purpose of interpreting an Act, regulation, resolution or bylaw or administering a program or activity of the local authority.

(3) A head may refuse to give access to any report, statement, memorandum, recommendation, document, information, data or record, within the meaning of section 10 of *The Evidence Act*, that, pursuant to that section, is not admissible as evidence in any legal proceeding.

[emphasis added]

[125] In its response to the Applicant, the City failed to identify a statutory reason why access was being denied other than section 16(1)(b) of LA FOIP. The City should have advised the Applicant that pursuant to section 7(2)(e) of LA FOIP, the document sought was not in the possession or control of the City and effectively the record did not exist for purposes of LA FOIP. Alternatively, it could have advised that section 5 only provides a right of access to records that are in the possession or under the control of a local authority and that the only responsive record was neither in the possession nor under control of the City.

[126] To cite two inconsistent reasons for denying access was confusing and unhelpful. I note that it was not until January 29, 2010 that the City advised that the section 16(1)(b) exemption claim by the City was being abandoned. The City Clerk advised as follows: "Section 16(1)(b) does not apply. I have no explanation as to why I put forward this argument in September 2004 and October 2005, but I agree there is no relevance to this matter."

[127] As noted earlier, in the section 7 responses from the City to the Applicant, the Applicant was not notified of her right to request a review from our office as required by section 7(3) of LA FOIP. These responses were dated September 13, 2004 and October 31, 2005.

[128] In its letter of January 29, 2010 the City Clerk advised that, "I agree that I should have advised the applicant, in my letters of September 2004 and October 2005, of her right to appeal."

[129] That position however appears to have been reversed when the City Solicitor's office wrote on June 29, 2010 and advised:

> As indicated in the head's letter to your office dated November 3, 2005, notice was not provided because the request did not fall within the provisions of the Act as the request was in respect of records of the Saskatoon Police Service (the "SPS"), which is a separate entity and not subject to the Act.

[130] This latter response from the City assigns too little weight to the rights of the Applicant, and the fact that our oversight office may interpret the provision differently from the City.

[131] Furthermore, the Applicant's requests are subject to LA FOIP because they were made in the prescribed form. Sections 38 and 39 of LA FOIP state:

> **38(1) Where:**
>
> **(a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 36;**
>
> (b) a head fails to respond to an application for access to a record within the required time; or
>
> (c) an applicant requests a correction of personal information pursuant to clause 31(1)(a) and the correction is not made;
>
> the applicant may apply in the prescribed form and manner to the commissioner for a review of the matter.
>
> (2) An applicant may make an application pursuant to subsection (1) within one year after being given written notice of the decision of the head or of the expiration of the time mentioned in clause (1)(b).

> (3) A third party may apply in the prescribed form and manner to the commissioner for a review of a decision pursuant to section 36 to give access to a record that affects the interest of the third party.
>
> (4) A third party may make an application pursuant to subsection (3) within 20 days after being given notice of the decision.
>
> **39(1) Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 38, the commissioner shall review the matter.**
>
> [emphasis added]

[132] As the Applicant made her requests in the prescribed form, the Commissioner has the power to review the City's claim that the record does not exist (as not in its possession or control) or whether LA FOIP applies at all. Accordingly, the City should have advised the Applicant of her right to request a review from our office.

5. Has the record been archived for the purposes of section 3(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act*?

[133] The City raised a new issue in its letter of June 29, 2010, that the record had been archived by SPS in the City of Saskatoon Archives. This was not raised at the time of the City's section 7 response to the Applicant. In fact, the City raised it very late in this Review. The City wrote:

> Further, [the Solicitor for SPS] correctly indicates that even if these files could be said to be "in the custody" of the City, they would fall within the exception set out at Clause 3(1)(c) of the Act because the investigations were concluded and the files were closed and archived when the FOI request was made.

[134] Upon review of SPS' letter dated April 19, 2010, the lawyer for SPS stated:

> **I understand**, and appreciate, the fact that your offices arranged for archival storage of these matters in view of potential conflicts of interests that may have arisen should the Saskatoon Police Service have continued to store these same records. As you are aware, any such potential perceived conflict of interest would have arisen as a result of [the Applicant's] civil action against employees (both sworn and civilian) of the Saskatoon Police Service.

> The Saskatoon Police Service no longer requires that you maintain archival storage of the 2002 and 2003 Harassment Complaint Investigation findings and related materials. Would you therefore kindly return those to us in their entirety at your very earliest convenience?
>
> [emphasis added]

[135] Section 3(1)(c) of LA FOIP reads as follows:

> 3(1) This Act does not apply to:
>
> …
>
> (c) material that is placed **in the custody of a local authority by or on behalf of persons or organizations other than the local authority for archival purposes.**
>
> [emphasis added]

[136] It appears that the City is, at this late date, attempting to raise a new issue. The fact that the City raised this issue at this late date is prejudicial to the Applicant. In its correspondence with the Applicant or my office prior to June 29, 2010, the City failed to mention, or even suggest, the possibility that the record had been placed in the City's Archive. The word archive does not even appear in any document from the City prior to June 23, 2010. It is also noted that even though SPS had raised the issue of the archive with the City in its letter of April 19, 2010, the City did not raise the issue with our office in its letter of May 6, 2010. This all seems to indicate that the alleged agreement between the City and SPS regarding this record is non-comprehensive, at best. The City asserts that it is simply storing the record for SPS, while SPS asserts that the record was placed in the City's archives. If the City had a written agreement with SPS, the City could have been certain of the alleged understanding regarding the record. At very least, the City should have clarified its understanding about the alleged agreement before answering the Applicant's original request.

[137] Although raised late in the process, as section 3(1)(c) of LA FOIP is a preliminary issue, I must consider this claim nonetheless.

[138] In the various submissions and materials from the City, there is the occasional reference to the harassment investigation report being kept or archived with the City. These references appeared well before the City raised the issue of section 3(1)(c) of LA FOIP. I take it that use of "archived" is as a general term synonymous with storage or retention. The reference to archive in section 3(1)(c) however uses 'archive' in a more formal sense. That approach would best align with section 10 of *The Evidence Act* and the modern principle of statutory interpretation.[35] Since laws such as LA FOIP have been characterized by the Supreme Court of Canada as quasi-constitutional laws that feature paramountcy provisions, any exclusion from LA FOIP should be interpreted narrowly not liberally.

[139] Official archives such as those of a municipality or a province generally require that a formal agreement be executed by the donor and the archive authority. These formal agreements generally transfer ownership of the records from the donor to the archives. I note that the City of Saskatoon Archives currently has a form entitled *City of Saskatoon Archives Donor Agreement*. The signatories to the agreement are described as the "donor" and "the Archives". The first two paragraphs of the document are as follows:

> Introduction:
> The Donor owns certain materials of historical value. The Donor has agreed to give these materials to the Archives for its historical collection. The Archives has agreed to accept these materials upon certain conditions. This document is that agreement.
>
> Donation:
> The Donor gives to the Archives all the materials listed in Schedule "A" of this Agreement (see attached). The Donor also gives to the Archives any copyrights that the Donor has in the materials, along with the rights to reproduce, adapt, publish, perform or publicly display the materials.[36]

[140] This raises a number of questions given the recent claim by the City that section 3(1)(c) of LA FOIP justifies the City's actions in disposing of the record. Why has the City not provided documentation that would have reflected the terms of the archiving arrangement alleged to have been achieved in 2002? Was this Donor Agreement or a similar

[35] *Supra* note 2 at [21]; *Saskatchewan FOIP FOLIO* (February 2007) at p. 2, available online under the *Newsletter* tab; and *Helpful Tips* at p. 9, available online at: www.oipc.sk.ca under *Resources* tab.
[36] *City of Saskatoon Archives Donor Agreement* was "utilized by the City Archives in 2002".

document executed by SPS and the Archives and when? If not, why not? Given the provisions in the Donor Agreement that transfer property from the donor to the Archives, on what basis was the record transferred to the SPS in 2010? It is a curious argument that is raised now by the City – that the City delivered the record to the SPS in early 2010 after the records had been archived with the City since 2002. That would suggest that the ownership, and presumably the control, of the record would have been transferred to the City Archives in 2002 and that would effectively extinguish whatever control the SPS would have in the record. In that case the decision to deliver the record to the SPS in 2010 would have been a free and voluntary decision of the City and not an action in some fashion dictated by the SPS since it would have had its interest extinguished in 2002 at the time it allegedly archived the record with the City.

[141] There have been few decisions by other Information and Privacy Commissioners pertaining to the archives of a public body. I have found two decisions from the Alberta and British Columbia Commissioners respectively that are helpful.

Record must be located in archive

[142] One factor in determining if LA FOIP does not apply to a record pursuant to section 3(1)(c) is if the record was physically located in the archives of the local authority. The BC IPC found this to be the case in Order F08-01 where it states:

> [94] **3.8 Are the Records Outside FIPPA's Scope Under s. 3(1)(g) of the Act?**—Credo argued that the records are also excluded from FIPPA's scope by s. 3(1)(g), which states that FIPPA does not apply to "material placed in the archives of a public body by or for a person or agency other than a public body."
>
> [95] **In its reply submission, SFU states that the records have not been placed in SFU's archives but instead are located in the premises occupied by the UILO at SFU. Given that the records are not located in SFU's archives, I find that s. 3(1)(g) does not apply.** [37]
>
> [emphasis added]

[37] BC IPC Investigative Report F08-01 at [94]-[95] available online at http://www.oipc.bc.ca/orders/2008/OrderF08-01.pdf

[143] I note that this Order came under judicial review and the Court ruled the Commissioner erred in his interpretation of section 3(1) and 4(1) of the FOIP. The City cited this court case *(Simon Fraser University v. British Columbia (Information and Privacy Commissioner)* as part of its argument surrounding possession and control. It is referenced earlier in this analysis. However, the case does not appear to dispute the Commissioner's analysis of section 3(1)(g) of BC's FOIP.[38]

[144] In the case of the record, the City stated in its letter of June 29, 2010 that:

> In her affidavit, [a former City employee] attests that:… closed SPS harassment investigation files were kept or archived in a locked "harassment" file cabinet in the bottom drawer, separate from harassment investigation files pertaining to City employees.

[145] Clearly the record in question was not located in the City's Archives and it appears may have been stored in the area where other harassment records were kept albeit in a separate locked drawer. However, the City has not given any representation surrounding its Archive. As mentioned earlier, the burden of proof is borne by the City.

There should be written agreements for records placed in archives

[146] Section 19 of *The Archives Act, 2004* states:

> 19(1) Subject to subsections (2) and (3), the Legislative Assembly Service, any officer of the Legislative Assembly who has custody or control of public records and every government institution must preserve the public records that are in the custody or under the control of that service, person or government institution until those public records are:
>
> (a) transferred to the Archives Board pursuant to this Act; or
>
> (b) destroyed pursuant to this Act.
>
> (2) Cabinet records and the public records of the Office of the Executive Council are to be transferred to the Archives Board:

[38] *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93 (as amended)

> (a) pursuant to a **written agreement** between the Archives Board and the Premier in office when the agreement is signed; and
>
> (b) in accordance with an approved records schedule.
>
> (3) Ministerial records are to be transferred to the Archives Board:
>
> (a) pursuant to a **written agreement** between the Archives Board and the member of the Executive Council to whose office those records pertain; and
>
> (b) in accordance with an approved records schedule.
>
> (4) Records of a member of the Executive Council of the type described in subclauses 2(h)(i) and (ii) are the private property of the member and may be disposed of in any manner that the member considers appropriate.
>
> (5) Without restricting the generality of subsection (4), the member may offer the records mentioned in that subsection to the Archives Board for permanent preservation pursuant to a **written agreement** between the Archives Board and that member. [39]
>
> [emphasis added]

[147] As a consequence of that provision, Saskatchewan government institutions must have written agreements regarding material transferred to the Archives. There does not appear to be a similar statutory requirement for third parties depositing records in a municipal archive.

[148] The Alberta IPC recognizes that a written agreement is evidence that a record has been deposited in a local authority's archives in its Order 2000-003:

> [para 62.] The University and the Faculty Association gave evidence that the Record was deposited in the University Archives as part of separate **written agreements** between the University and the Faculty Association, and between the University and an individual affected party. [40]
>
> [emphasis added]

[149] For our purposes, when determining if LA FOIP does not apply pursuant to section 3(1)(c), it would be reasonable to expect a written agreement to be engaged regarding any records from a third party that are transferred to a local authority's archive.

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[39] *The Archives Act, 2004*, S.S. 2004, c. A-26.1

[40] AB IPC Investigative Report 2000-003 at [62], available online at http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1792

[150] As the City has stated, however, there are no written agreements between the City and SPS regarding this record.

Was the record placed in the archive by or on behalf of persons or organizations other than the local authority?

[151] In the same Alberta IPC Order 2000-003 noted earlier, the Commissioner considered whether the record was placed in the archives of the University of Calgary by a third person separate from the University.

> **3. Even if the Record is in the custody or under the control of the University, as provided by section 4(1) of the Act, is the Record excluded from the application of the Act by section 4(1)(f) (material that has been deposited in the Provincial Archives of Alberta or the archives of a public body by or for a person or entity other than a public body)?**
>
> [para 60.] The University and the Faculty Association argue that the Record is excluded from the application of the Act by section 4(1)(f).
>
> [para 61.] Section 4(1)(f) reads:
>
> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *…(f) material that has been deposited in the Provincial Archives of Alberta or the archives of a public body by or for a person or entity other than a public body;*
>
> …
>
> [para 62.] The University and the Faculty Association gave evidence that the Record was deposited in the University Archives as part of separate written agreements between the University and the Faculty Association, and between the University and an individual affected party.
>
> [para 63.] I have considered whether the University and the Faculty Association meet the requirements of the section, as follows.
>
> [para 64.] The University Archives is the archives of the University, which is a public body. The record would be "material". On the evidence, there is a deposit of that material in the University Archives.
>
> [para 65.] Has the Record been deposited "by or for" a person or entity other than a public body?
>
> [para 66.] I interpret "for" in "by or for" in section 4(1)(f) to mean "on behalf of", as discussed in Order 97-007. Although the University and the Faculty Association

argue that "for" should have a different meaning in section 4(1)(f), I see no reason to depart from the interpretation I have given to "for" when discussing "by and for" in Order 97-007.

[para 67.] The December 1997 agreement between the University and the Faculty Association says that the University will provide the affected party with confirmation that the University and the Faculty Association have deposited all copies of the Record in the sealed package in the University Archives. By this, I conclude that the Record was not deposited by or for (on behalf of) the affected party.

[para 68.] Was the Record deposited by or on behalf of the Faculty Association, which is not a public body? The agreement indicates that the Record was deposited jointly by the University and the Faculty Association. Is that the kind of deposit that section 4(1)(f) intended, in order to exclude a record from the application of the Act?

[para 69.] To decide this, I have considered the circumstances under which the Provincial Archives or the archives of a public body would accept a deposit from a person or entity other than a public body, and in what circumstances such a person or entity would deposit records in the Provincial Archives or the archives of a public body.

[para 70.] In the case of the Provincial Archives, it accepts personal documents through a private deposit agreement. The usual process for a private deposit of personal documents into the Provincial Archives is for the person and the Provincial Archives to enter into the private deposit agreement. The person and the Provincial Archives determine access restrictions. The person can give written approval to lift the restrictions or remove them. There is often a period of restricted access.

[para 71.] In this case, there is not a deposit agreement as such. Instead, there are agreements between the University and the Faculty Association, and the University and the affected party, which contain clauses to keep the Record confidential. Is that sufficient to find that the Record is excluded from the Act by section 4(1)(f)?

[para 72.] Section 4(1)(f) specifically excludes a public body. I believe the intent of section 4(1)(f) is to prevent a public body from depositing its own records and thereby removing them from the application of the Act. Therefore, it seems to me that a public body cannot be involved in the deposit except as a recipient of the record deposited. If it were otherwise, any agreement between a public body and a non-public body could be deposited in the public body's archives and be removed from the application of the Act.

[para 73.] **The Record is as much the University's record as it is the Faculty Association's. Both parties commissioned and paid for the Record.** Given that Record is partly the University's, and the circumstances in which the Record was put in the University Archives, I find that section 4(1)(f) does not apply to the Record. Consequently, the Record is not excluded from the application of the Act by section 4(1)(f).

> [para 74.] I do not find it necessary to decide whether the Record was deposited on conditions of trust. In any event, in this case, there is no evidence that the affected party or the Faculty Association imposed conditions of trust on the deposit.[41]
>
> [emphasis added]

[152] This case is similar to the case in the Alberta IPC Order in that the City appears to have possession of the record. Therefore, I cannot conclude that the record was put in the City's Archive by or on behalf of persons or organizations other than the local authority.

[153] As the record was not stored in the City's Archive, there is no written agreement regarding the archiving of the record and the City has physical possession and does have a measure of control of the record, I do not agree with the City's claim that section 3(1)(c) of LA FOIP applies in the circumstances.

6. What is the appropriate response to the City's action in divesting itself of the record in the face of our review?

[154] In my office's letters to the City dated January 19, 2010 and March 24, 2010 in which I explain and clarify our analysis based on the City's submission, I asked the City to assemble and submit the record to us.

[155] In response, I received a letter from the City dated May 6, 2010 stating that:

> I have received the attached letter dated April 19, 2010 from the Solicitor for the Saskatoon Police Service, requesting that the Human Resources Department return the Harassment Complaint Investigation findings and related material since they are property of the Saskatoon Police Service. We have done so and thus do not have physical possession of the record and are unable to provide a copy to your office for examination.

[156] SPS' letter states:

[41] *Supra* note 40 at [60]-[74]

> I can confirm that the two above referenced harassment investigations involved allegations surrounding [the Applicant's] treatment in her workplace, being the Saskatoon Police Service building, by employees of the Saskatoon Police Service. As such, the Saskatoon Police Service considers these investigations, and the resulting findings, to be property of the Saskatoon Police Service. I understand, and appreciate, the fact that your offices arranged for archival storage of these matters in view of potential conflicts of interests that may have arisen should the Saskatoon Police Service have continued to store these same records. As you are aware, any such potential perceived conflicts of interest would have arisen as a result of [the Applicant's] civil action against employees (both sworn and civilian) of the Saskatoon Police Service.
>
> The Saskatoon Police Service no longer requires that you maintain archival storage of the 2002 and 2003 Harassment Complaint Investigation findings and related materials. Would you therefore kindly return those to us in their entirety at your very earliest convenience?

[157] My office then wrote to the City on May 12, 2010 and stated:

> We require that, for purposes of our review, you obtain all of those documents that are referred to in the letter dated April 19, 2010 to you from [SPS solicitor] and forthwith provide those records with the appropriate Index of Records to this office on or before May 28, 2010.

[158] I also asked the City Clerk to provide an affidavit detailing the communications with SPS and her actions with respect to the records from the date that the City received the access request from the Applicant dated September 13, 2004 until the date the City transferred those records to the SPS.

[159] On June 30, 2010 I received the City's letter dated June 29, 2010 as well as an 11 page affidavit dated June 29, 2010 from the City Clerk (including several attachments). The City also included a 5 page affidavit dated June 23, 2010 from a former City employee who was involved in creating the record. Her affidavit focused on the creation of the record and her understanding of the alleged agreement with SPS.

Advising a third party of the access request

[160] Normally, an access request under LA FOIP is considered the personal information of the applicant and should only be disclosed to those persons in the City that had a legitimate

need to know in order to process the access request. In this case, it appears that the City could easily have responded by citing specific mandatory or discretionary exemptions that it would be relying on in denying access to all or part of the responsive record. In that circumstance, there would have been no statutory requirement or need to disclose information about the request to a third party such as SPS unless the City had determined that the record should be released.

[161] Even if I assume the agreement between the City and SPS as argued by the City, the City would have exceeded its powers as a local authority by agreeing that records would be confidential and not disclosed to our office for purposes of a review under Part VI of LA FOIP. LA FOIP is paramount in the event of a conflict with any other law by reason of section 22(1) of LA FOIP. By reason of LA FOIP, the City can only enter into agreements that certain information may be treated as confidential subject to the provisions of LA FOIP.[42]

[162] In the letter of June 29, 2010, the City stated:

> In these circumstances, the Head was obligated to advise the SPS of the FOI request for two reasons. **First, the Head was seeking further particulars of the agreement between SPS and the City.** Key ESB personnel who worked on the records were no longer in the City's employ. In addition the tone of the OIPC's communications with the Head was confrontational and indicated a reluctance to accept the City's explanation of its agreement with the SPS on these investigations. **As a result, the Head thought it prudent to request that the SPS explain its understanding of the agreement, in order to provide confirmation of the relationship to the OIPC.**
>
> Second, the agreement between the City and the SPS mandated that harassment investigation files, including the records at issue, remain confidential. The City has never had any right of possession over these files and the Head cannot purport to take possession of them in order to review them, provide an index and deliver them to the OIPC. Indeed, the Head for the City has never seen the records of reviewed them as this action would be in breach of the City's agreement with the SPS. As the Head was placed in an untenable position, **she was left with no option but to contact the SPS to advise <u>that the records may be ordered to be released</u>**.
>
> [emphasis added]

[42] *Supra* note 1, Part III

[163] The statement by the City that "…she was left with no option but to contact the SPS to advise that the records may be ordered to be released" is inaccurate. Our office has no power or mandate to issue orders or to require any local authority to release any record to an applicant. It is puzzling that the City would make such a representation to SPS that it must have known was an impossibility. The ombudsman like powers of this office distinguish it from a number of other provinces' oversight agencies and would have been well known to the City since LA FOIP was proclaimed in 1993. Not only is this office limited to reviewing the record and issuing recommendations but there is provision in LA FOIP that ensures the confidentiality of information disclosed to this office and the provision that I cannot be compelled by the court to disclose information learned in the course of my review. Once I complete our review and issue our recommendations, our file is closed and the record is returned to the local authority. The fact that such a claim would be put to the SPS suggests that there was motivation to keep the report from this office and to prevent me from viewing the record.

[164] I have stated in both our *Helpful Tips*[43] documents and in several of my Reports that when responding to access requests, public bodies must take reasonable steps to ensure that they respond openly, accurately and completely.[44] The fact that the City needed to clarify the understanding of the alleged agreement at this late date seems to indicate that this step was not taken at the outset when the City responded to the Applicant's request.

[165] Furthermore, I have commented on the issue of the identity of applicants many times, most notably, in my *Helpful Tips* document. It states:

> **Identity of Applicant is Protected Personal Information**
> Some public bodies/trustees have asked whether there are any rules around the identity of someone who has made an access request. You will have noticed that in our formal Reports, we refer to the 'applicant' and do not identify that person. At the initial stage of a request for access a couple of considerations apply. Our view is that a public body/trustee should not disclose the identity of the applicant to anyone who does not have a legitimate 'need to know'. A legitimate need to know relates to the specific knowledge an individual requires in order to process an access request. For

[43] Note: My office's *Helpful Tips* document was revised in September 2010 and separated in to three documents. They are available on my website at www.oipc.sk.ca.
[44] SK OIPC Reports F-2005-005; F-2004-007; F-2004-005; F-2004-003; LA-2004-001; and *Helpful Tips*.

> example, if the applicant is making an access request for their own personal information then their identity is clearly relevant when searching for records. On the other hand, if the applicant is requesting access to general information their identity would almost always be irrelevant, and few outside of the FOIP/HIPA Coordinator should have a need to know their identity.
>
> Our view is that it is improper to treat applicants differently depending on who they are or what organization they may represent. **It would also be improper to broadcast the identity of an applicant throughout a public body/trustee or to disclose the identity outside of that particular department. To avoid differential treatment, we encourage the FOIP/HIPA Coordinator to mask the applicant's identity.** This approach is consistent with direction from the Federal Court of Canada and the practices in other provinces.[45]
>
> [emphasis added]

[166] I acknowledge that the record likely contained the Applicant's personal information and it would be difficult to keep the Applicant anonymous when identifying the record to the SPS. However, the following passage from the City's June 29, 2010 letter leads me to believe that the City has performed consulting services for SPS on more than one occasion: "Although there are no written agreements between the SPS and the City respecting Human Resources consulting…" This may have allowed the City Clerk to clarify her understanding of the nature of the consulting relationship without revealing the identity of the Applicant.

Choosing to divest itself of the record by transferring it to the Saskatoon Police Service in the face of a review

[167] The City states in its letter of June 29, 2010 that:

> You will see the April 9, 2010 letter written by the Head to legal counsel for the SPS, attached as Exhibit "M" to the Affidavit of [the City Clerk]. The letter indicates that there had been an FOI request respecting SPS files. It summarized both the Head's submission to the OIPC on the issue of "custody or control of the record" and the Commissioner's response. Finally, it requested that the SPS provide a letter or an affidavit confirming that the records are SPS records.
>
> At no time, does the Head suggest that legal counsel for the SPS make a formal request for return of the SPS files. Furthermore, [the City Clerk] attests at paragraph

[45] *Supra* note 43

> 31 of her Affidavit that she did not "solicit a formal request from the SPS for the transfer of the records to the SPS".
>
> In his correspondence of April 19, 2010, which is attached as "Exhibit N" to the Affidavit of [the City Clerk], [the lawyer for SPS] indicates his job title and authority to act on behalf of the SPS… Finally, on behalf of the SPS, he requests that the files be returned to the SPS.
>
> The Head passed this request to the ESB. In accordance with the arrangement between the City and the SPS, the files were returned to the SPS. In our opinion, failure to return these files to the SPS would be an act of conversion.

[168] When SPS requested that the records be returned in response to the City's April 9, 2010 letter, the City complied which resulted in alienating the record.

[169] In our letter to the City dated May 12, 2010, my office advised the City as follows:

> We require that, for purposes of our review, you obtain all of those documents that are referred to in the letter dated April 19, 2010 to you from [the lawyer for SPS] and forthwith provide those records with the appropriate Index of Records to this office on or before May 28, 2010.

[170] That has not occurred and there has been no indication that the City has made efforts to retrieve the record.

Claiming that the records are no longer in the City's possession/Denying our office the opportunity to review the records in question and determine in our independent judgement whether they are or are not subject to LA FOIP

[171] The City stated in its letter of June 29, 2010:

> In response to these allegations, it is important to note that there has never been any determination made by the OIPC that the records in question were actually in the possession or under the control of the City**. Review of these records will do nothing to further this line of inquiry as the records themselves will not provide the OIPC with any insight into the indicia of custody and control required to make this decision.**
>
> The Head and the City have consistently stated that the records are the property of the SPS. **The SPS is *not* a third party as defined under the Act, because the records are not subject to the Act.** As indicated in the Head's correspondence to [the lawyer

> for SPS], legal counsel for the SPS, there was a FOI request made for confidential records of the SPS that were located on property of the City. **The OIPC did not appear to be accepting the Head's explanation for why these records were not subject to the Act.**
>
> [emphasis added]

[172] The City claims that reviewing the record will not help me determine if the record is in the City's possession or control and that I should accept its explanation for the matter. It is my mandate to determine if the record is in its possession or under its control. I must be certain of my analysis which cannot be done in the abstract. Therefore, I cannot take the City's word that the record will not assist me in making that determination. In any event, I earlier identified the decision of the Ontario Court of Appeal that supports my interpretation of my mandate and the need for me to view the record for purposes of determining the jurisdictional issue raised by the City.

[173] Furthermore, in her affidavit, the City Clerk claimed that she has never seen the record as follows:

> 33. Throughout this process, I have not ever seen the records.

[174] How would the City Clerk know that the record does not contain any indication that the record is or is not in the City's possession or control if she has not seen the record? This gives me further cause to question the City's assertion that review of these records will not provide any insight into the indicia of custody and control.

[175] When a local authority has possession of a record and then voluntarily transfers the record to a third party organization that is not subject to LA FOIP, this would normally require consideration of a request to the Attorney-General of the province to consider initiating proceedings pursuant to section 56(3) of LA FOIP. Mindful that this is the first time I have considered "in the possession or under the control of" in the context of this unique fact situation, I have determined that such a referral to the Attorney-General is not appropriate. This should be notice however that in the future I would not hesitate to make such a request of the Attorney-General if I uncover evidence of a possible

commission of an offence under LA FOIP. The refusal of a local authority to provide our office with the record and then disposing of the record is an extremely serious matter that goes to the core of our statutory mandate under LA FOIP.

[176] Since the definition of record is "a record of information in any form and includes information that is written, photographed, recorded or stored in any manner"[46], it is discouraging that the City has not addressed in any fashion whether an electronic version of the record existed at any point since the review commenced. If so, what became of the electronic version?

7. Should this review be discontinued because of the delay?

[177] The City has made representations that the delay on this 2005 file is prejudicial to the City and that this review should be terminated without any report or resolution. There is no explicit statutory authority to dismiss this review on such a basis. There is provision in section 39 of LA FOIP that permits me to refuse to conduct a review or to discontinue a review in three enumerated circumstances. Section 39 states:

> 39(1) Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 38, the commissioner shall review the matter.
>
> (2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:
>
> (a) is frivolous or vexatious
>
> (b) is not made in good faith; or
>
> (c) concerns a trivial matter.

[178] None of those three grounds in section 39(2) apply here.

Delays on this file

[179] I acknowledge that there have been delays on this file. As noted in our various Business Plans and Annual Reports on our website, .oipc.sk.ca, delays in case files have been a

[46] *Supra* note 1, section 2(j)

serious problem. I have stated that no citizen should have to wait longer than approximately five months for the resolution of a case file whether a breach of privacy allegation or a request to review a decision to deny access. There will always be some exceptions due to complexity, lack of cooperation from a public body, or unforeseeable circumstances. I recognize however that most case files should be concluded much more quickly. As for the delays on this file, there are a number of contributory factors. First, we have only three Portfolio Officers with responsibility for more than 300 active investigations and reviews, while new reviews and investigations are up 62% in the last year. This dramatic growth in public demand for reviews and investigations year over year has resulted in a significant backlog. In response I have initiated a number of measures to maximize internal efficiency and to manage the backlog. We are starting to see considerable progress. Most notably, my office has opened approximately 1090 case files since 2003 and of these more than 810 has been closed. Since we rely on cooperation and collaboration with public bodies, approximately 760 of those files were closed through mediation and information resolution. In less than 50 of those case files has it been necessary to issue a formal report. Year over year we are increasing the number of files we are closing. Consequently, it is important to recognize that to focus only on formal reports issued by our office misses the salient point. That point is a substantial improvement in transparency practices of public bodies can be achieved through informal resolution. My office has resolved and closed 92% of our files in this manner. This also leads, in our experience, to significant changes and improvements in the information practices of those bodies involved in such informal resolution. The difficulty with the suggestion of the City to close this file and not issue a report is that LA FOIP and similar laws were not created for the convenience of public bodies. They are created to empower citizens who wish access to information from local authorities. In this particular case, the Applicant wishes us to proceed with this review to conclusion. I therefore have advised the City that we are not prepared to close this file without issuing a report with our findings and recommendations.

[180] Finally, the City has contributed to the delays by:

- The apparent confusion over which record was in issue;

- Failure to advise the Applicant of her right to request a review by OIPC;
- Its affidavits that state and restate conclusions instead of providing granular detail about how the role ascribed to the SPS was manifest in this preparation of the responsive record in 2002;
- Its refusal to provide our office with the responsive record; and
- Its invocation of a discretionary exemption at the same time it was contending that the record it had prepared was not in its possession and then only abandoning that discretionary exemption on January 29, 2010.

V. FINDINGS

[181] That the City's section 7 responses dated September 13, 2004 and October 31, 2005 to the Applicant were not compliant as they did not appropriately identify the City's basis for refusal and advise of the Applicant's right to a review.

[182] That for the purposes of section 5 of LA FOIP the City had pos session of the record when the Applicant made her access requests for the record.

[183] That the record has not been archived for the purposes of section 3(1)(c) of LA FOIP.

[184] That the City transferred the record in the face of a review by OIPC to a body that is not a local authority for purposes of LA FOIP.

[185] The City has given no indication that it has made efforts to retrieve the record from SPS as this office has requested.

[186] The City revealed the identity of the Applicant to SPS when it may not have been required.

VI. RECOMMENDATIONS

[187] That the City immediately retrieve the record from SPS and provide a copy to our office or alternatively, provides us with a true electronic version of the record.

[188] That, within 30 days, the City provide a new, compliant section 7 response to the Applicant regarding this record. The response should reflect that the City has possession of the record for purposes of LA FOIP.

[189] That the City follows the *Privacy Breach Guidelines*[47] in responding to the apparent privacy breach in disclosing the personal information of the Applicant to SPS.

Dated at Regina, in the Province of Saskatchewan, this 24th day of November, 2010

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy Commissioner

[47] *Helpful Tips: Privacy Breach Guidelines*, available online at http://www.oipc.sk.ca/resources.htm