



**Information and Privacy  
Commissioner/Ontario**  
**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

## **ORDER P-271**

**Appeals 900109, 900347 and 900584**

**Algonquin College of Applied Arts and Technology**



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## O R D E R

### BACKGROUND :

On March 2, 1990, the requester, who had been a student at Algonquin College of Applied Arts and Technology (the "institution"), submitted a request under the Freedom of Information and Protection of Privacy Act ("the Act"). This request ("Request 1") was for access to records relating to an incident which occurred at the institution, and records relating to other activities at the institution in which he had an interest. Request 1 was received in this office on March 8, 1990, and forwarded to the institution. The institution responded to the requester on April 6, 1990. Full access was granted to some of the requested records, and section 19 of the Act was claimed by the institution as the basis for denying access to other records, either in whole or in part. The institution also indicated that some records did not exist, and asked for clarification of other portions of the request.

On May 22, 1990, the requester made another request to the institution ("Request 2"). In Request 2, he sought access to a complete copy of the 1989 interim report of the Ombudsman associated with the institution (the "College Ombudsman"). The institution responded on June 22, 1990, by providing a copy of the interim report in its entirety.

On July 5, 1990, the requester made a third request ("Request 3") to the institution, which was received on July 9, 1990 and responded to by the institution on August 7, 1990. Certain records were released to the requester and are not at issue. In the portions of Request 3 which were appealed, the requester sought access to all other interim reports of the College

Ombudsman (except the report which was the subject of Request 2), and all reports submitted by the head of the institution to the Office of the Information and Privacy Commissioner under section 34(1) of the Act. The institution responded by releasing the College Ombudsman's report dated February 18, 1988, and the institution's annual report to this office, dated January 19, 1990.

The requester appealed the head's decisions in response to all three requests. The appeals were based on the appellant's objection to exemptions claimed by the institution, and also on his belief that additional records existed which were responsive to his requests. Because the parties are the same and the subject matter and issues are closely related, the three appeals are being dealt with together in this Order.

In accordance with the usual practice, the appeals were assigned to an Appeals Officer, who contacted the institution's Freedom of Information and Privacy Co-ordinator in order to obtain copies of the requested records and investigate the circumstances of the appeals. The Appeals Officer also contacted the appellant to obtain information concerning the portions of Request 1 for which the institution had sought clarification.

On September 12, 1990, after receiving correspondence from the appellant explaining Request 1, the Appeals Officer wrote to the institution's solicitor, clarifying the nature of the records sought by the appellant. The institution wrote to the appellant on November 27, 1990, expanding on its response to the request and disclosing some additional records. In that letter, the institution also advised the appellant that access to some

additional records and portions of records was being denied on the basis of the exemptions provided by sections 19 and 21 of the Act.

Because the appellant believed additional records existed which were responsive to the requests, a Compliance Investigator from this office attended at the institution's premises for five days and conducted an investigation to determine if any additional responsive records could be located. Prior to the commencement of this investigation, the institution and the appellant were provided with Notices of Inquiry, advising the parties that the appeals had proceeded to the inquiry stage.

During the compliance investigation, a number of additional records were identified as being responsive to the appellant's requests. Copies of these records were forwarded to the institution for a decision as to whether they should be released to the appellant.

At the same time, an Appeals Officer's Report was sent to the parties, outlining the issues raised in the appeals and inviting representations. Representations were received from the appellant and the institution, and I have taken them into account in reaching my decisions in this Order.

On September 13, 1991, the institution issued its decision with respect to the records located during the compliance investigation, and disclosed them to the appellant, subject to a number of severances relating to the personal information of persons other than the appellant, under sections 21 and 49(b) of the Act. At the same time, the institution withdrew its claim for exemption under section 19, and disclosed all of the

records and portions of records which had previously been withheld under this section. The reason for withdrawing the exemption, as outlined by the institution in a letter to the appellant, was that the claim was no longer felt to be necessary, and the institution wanted to disclose as much information as possible to the appellant. On January 14, 1992, an additional record was disclosed to the appellant, with severances under section 21 for the personal information of others.

The appellant is in agreement that he has received copies of all records which have been identified by the institution and/or the Compliance Investigator as being responsive to his requests. The remaining severances made to these records contain personal information which is properly exempt under sections 21 and 49(b) of the Act, and the appellant has accepted the appropriateness of all such severances.

During the course of processing these appeals, it became clear that the College Ombudsman had records in his possession which were responsive to Request 1, which the institution had not included within the scope of its response to the appellant. In addition, the Appeals Officer became aware that one of the appellant's reasons for appealing the decision regarding Request 2 was to obtain information about other students contained in background materials relating to situations mentioned in the College Ombudsman's 1989 interim report. The reason these additional records were excluded from the scope of Requests 1 and 2 is that the institution and the College Ombudsman both take the position that the College Ombudsman is an independent entity, and his records are not in the custody or under the control of the institution for the purposes of the Act.

When it was determined that issues existed in these appeals which could affect the interests of the College Ombudsman, the Appeals Officer wrote him a letter seeking representations on those issues. The College Ombudsman responded by providing written representations and documentary evidence.

As stated earlier, the appellant has accepted that all records found by the institution and/or the Compliance Investigator have either been disclosed in full or properly severed under sections 21 and 49(b) of the Act. These records are no longer at issue in these appeals. The remaining issues relate to the status of records held by the College Ombudsman; a determination of whether or not the various searches conducted by the institution and this office were sufficient in order to reasonably identify all records responsive to the appellant's requests; and the conduct of the institution in responding to the requests and participating in the appeals.

**ISSUES:**

The issues in these appeals are as follows:

- A. Whether records in the possession of the College Ombudsman are in the custody or under the control of the institution within the meaning of section 10(1) of the Act.
- B. Whether a reasonable search for records responsive to the requests has been carried out.
- C. Whether the institution responded to these requests and appeals in a reasonable and proper manner.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether records in the possession of the College Ombudsman are in the custody or under the control of the institution within the meaning of section 10(1) of the Act.

The records to which this issue relates consist of any responsive undisclosed records in the possession of the College Ombudsman, in respect of which a decision has not been made by the institution. Section 10(1) of the Act, which creates a general right of access to records, states as follows:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

In Interim Order 120, former Commissioner Sidney B. Linden considered the meaning of the words "within the custody or under the control of an institution" in the context of section 10(1) of the Act, and set out some general guidelines for their application at pages 10-12 of that Order, as follows:

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?



10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody and control in individual cases.

In Order P-239, Commissioner Tom Wright went on to consider the application of section 10(1) and the provisions of Order 120. At pages 6-7 of Order P-239, he made the following comments:

Some of the factors listed in Order 120 are evidence of custody, some are evidence of control and some factors are evidence of both. In my opinion, there is an intended distinction between the concepts of custody and control. An institution that has control of a record may not have the record in its custody, alternatively, an institution with custody of a record may have very limited rights of control. In order to fall under the jurisdiction of the Act an institution need have only custody or control of a record.

...

I agree that bare 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. I adopt the views of Commissioners Linden and Wright for the purposes of these appeals.

As previously noted, the College Ombudsman was identified as an affected party to this appeal and his representations were obtained on the issue of custody and control. In those representations, the College Ombudsman outlined the history of his office. He stated that the ombudsman service was first created by the College's Students Association which is not an "institution" under the Act. Subsequently, the Students Association and the institution entered into an agreement which provided for equally shared funding of the ombudsman service, and created a supervisory committee called the Ombudsman Review Committee ("the committee"). This committee has equal representation for both the Students Association and the institution. The original intent was for the Student's Association to be the corporate signatory of the College Ombudsman's contract of employment, but for the sole purpose of protecting the transferability of the pension credits accrued to the candidate who was to be appointed to the position, it was decided that the institution would sign the contract, thereby making the College Ombudsman technically an employee of the institution. The committee is also a signatory to the employment contract.

The College Ombudsman's contract of employment, a copy of which was provided with his representations, states that "... the [institution] has no control over the [College Ombudsman's] proper exercise of his mandate except for financial considerations including benefits related to his employment ...". It further states that "the [College Ombudsman] shall

execute and carry out all orders and duties as the [committee] may, from time to time, require and impose upon him". The agreement goes on to set up a reporting relationship between the College Ombudsman and the committee, and gives the committee the right to terminate the College Ombudsman's employment for cause, subject to the approval of both the institution and the Students Association.

It is clear from these provisions of the employment contract that, although the College Ombudsman is technically an employee of the institution, he and the institution do not have a traditional employer/employee relationship. The institution does not have the power to direct the manner in which the College Ombudsman carries out his mandate and functions, and has in fact assigned that right to the committee, on which it does not hold majority membership.

A copy of the College Ombudsman's terms of reference was also provided with his representations. This document was prepared by the committee, and the preamble states that "... the Ombudsman will operate in an independent and impartial manner ...". The terms of reference also require the College Ombudsman to "maintain confidential records of complaints, findings and recommendations, kept secured and accessible only to the Ombudsman". The terms of reference also specify that in addition to having the right to terminate the College Ombudsman's employment for cause, the committee is responsible for selecting a new College Ombudsman when the office becomes vacant, again subject to the approval of both the institution and the Students Association.

A copy of the committee's terms of reference was also provided with the College Ombudsman's representations. It states that "the committee respects the confidentiality of the Ombudsman's casework and is not in receipt of confidential information from office records that identifies individuals or groups of individuals". The representations made by both the College Ombudsman and the institution state that the creator of these records is the College Ombudsman, and that they are intended for his own use only. The College Ombudsman submits that these records are not in the physical possession of the institution, nor, as is clear from the previously quoted terms of reference, does the institution have a right of possession. The records at issue are in the sole possession of the College Ombudsman, who has his own records management system governing the retention and disposal of records under his care.

The appellant's representations set out several arguments to support his position that the undisclosed responsive records in the possession of the College Ombudsman are "in the custody or under the control of the institution". The most compelling of these is that records consisting of files and notes of the College Ombudsman relating to the appellant were disclosed by the institution in response to one of his requests. In my view, the fact that the College Ombudsman chose to surrender those particular records to the institution for disclosure to the appellant is not determinative of the issue of custody and/or control; all of the relevant facts and circumstances must be considered in deciding this issue.

The appellant makes a number of other submissions which attempt to demonstrate that the College Ombudsman is subject to the direction of the institution on matters falling within his

mandate. I have carefully considered these submissions, but I am of the view that there is insufficient evidence to support the appellant's position.

In my opinion, the employment contract and other documentary evidence submitted by the College Ombudsman with regard to his relationship with the institution provide the best evidence with respect to the issue of custody and/or control of the records in his possession. The evidence indicates that while the College Ombudsman is technically an employee of the institution, he is not subject to the direction of the institution on matters within his mandate. The institution is not entitled to possession of the records in the College Ombudsman's student files, nor can it direct the College Ombudsman as to their use or retention. In fact, the institution has formally agreed that it is precluded from any direct or indirect dealings with these files.

The fact that work-related records are found to be in the possession of a person who is an employee of an institution is a significant factor in favour of a finding that the requirements of custody and/or control under section 10(1) have been satisfied. However, in my view, such a finding cannot be made with respect to the records found in the possession of the College Ombudsman. I find that the College Ombudsman is an entity operating for all intents and purposes independently from the institution, and the records in his possession are not properly considered to be in the custody or under the control of the institution within the meaning of section 10(1) of the Act. To find otherwise, in my view, would be inconsistent with the

mandate of the College Ombudsman and his relationship with the institution and the student body.

**ISSUE B: Whether a reasonable search for records responsive to the requests has been carried out.**

During the course of processing these appeals, and in his representations, the appellant mentioned a number of records which were not identified by the institution, but in the appellant's opinion, are or should be in the institution's possession. This raises the issue of the sufficiency of the various searches that were carried out by the institution and this office in order to identify all records responsive to the appellant's requests.

When the institution received the requests, it conducted searches, identified a number of records, and notified the appellant accordingly. After the Appeals Officer succeeded in clarifying Request 1, the institution conducted a more extensive search for

responsive records, and a substantial number of additional records were located. As previously noted, all of these records were ultimately disclosed to the appellant, subject only to severances under sections 21 and 49(b) of the Act, which the appellant has accepted. With respect to Requests 2 and 3, in discussions with

the appellant, the Appeals Officer was able to narrow and clarify the nature of the records which the appellant felt had not been identified.

A Compliance Investigator from this office was sent to the institution's premises, where an investigation was conducted over a period of five full days. The scope of this investigation included the adequacy of the institution's search in response to all three requests. The Compliance Investigator interviewed seventeen employees of the institution and conducted a wide-ranging search for records. Additional records were located during the course of this investigation, and they were subsequently disclosed by the institution to the appellant, subject to severances under sections 21 and 49(b), which, again, the appellant has accepted.

On the basis of the search conducted by the institution and the compliance investigation undertaken by this office, I find that a reasonable search for records responsive to the requests has been carried out.

**ISSUE C: Whether the institution responded to these requests and appeals in a reasonable and proper manner.**

In his representations, the appellant makes a number of allegations about the manner in which the institution responded to the requests, and the institution's conduct during the appeals process.

Some of these allegations relate to the fact that the institution claimed and subsequently waived the section 19 exemption. In addition to the explanatory letter sent by the institution to the appellant on September 13, 1991, the institution also provided this office with a detailed outline of

the reasons for withdrawing its exemption claim, and I find that the actions of the institution were reasonable in the circumstances.

Some of the appellant's other allegations relate to the institution's record management practices and the time taken by the institution to process the requests and to deal with the appeals.

I have reviewed all of the appellant's allegations in detail, and, in my view, the conduct of the institution during the course of responding to the requests and participating in the appeals was not inconsistent with its responsibilities and obligations under the Act.

**ORDER:**

I uphold the head's decision that the undisclosed records in the possession of the College Ombudsman are not within the custody or under the control of the institution for the purposes of the Act.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

February 12, 1992  
\_\_\_\_\_  
Date