



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-271**

**Appeal M-9300007**

**Simcoe County District Health Unit**



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# ORDER

## BACKGROUND:

The Simcoe County District Health Unit (the Health Unit) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for all records in the custody of the institution relating to the requester's complaint to the College of Physicians and Surgeons of Ontario (the College) regarding the testing of drinking water at a particular location.

The Health Unit responded that it could not provide access to the information relating to the complaint because "the records do not exist in our files". The Health Unit also indicated that the requester had already obtained a copy of the records that he was seeking from another source.

The appellant subsequently narrowed the scope of his appeal to two letters, dated October 30 and November 3, 1992. These pieces of correspondence were authored by the Health Unit's Medical Officer of Health (the MOH) and were directed to the College.

The October 30th letter provides information about a water quality test undertaken by a government inspector and clarifies the respective roles of the provincial government and the Health Unit with respect to water sampling and analysis. This letter also makes reference to enclosures which were provided to the College. The November 3rd correspondence explains that the first letter was submitted on behalf of both the MOH and the Associate Medical Officer of Health.

The Health Unit has advised the Commissioner's office that, while these letters do in fact exist, they are neither in the custody nor control of the institution.

The mediation of this appeal was not successful and notice that an inquiry was being conducted to review the decision of the Health Unit was sent to the appellant, the Health Unit and to the MOH as an affected person to the appeal. Representations were received from all parties. In his representations, the MOH confirmed that he had retained copies of these letters in his personal files.

## PRELIMINARY ISSUE:

In his representations, the appellant confirmed that he had already received, from another source, copies of the two letters at issue in this appeal. The appellant noted, however, that these letters do not contain the enclosures referred to in the November 3rd correspondence. The appellant then indicated that he wished to proceed with his appeal in order to request that a correction be made to certain of his personal information which is found in the letters. He further submits that, unless a preliminary ruling is made that the Health Unit has custody or control of the correspondence, he will be unable to assert this statutory right.

In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner's office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful purpose. In addition, appeals of this nature consume the scarce resources of institutions and impede the ability of the

Commissioner's office to deal with the files of other appellants.

The circumstances surrounding this appeal and the relationship between the appellant and the Health Unit are somewhat unique. First, the two parties have been involved in a number of appeals involving records similar to the ones at issue in this case. In my view, the issuance of a binding order on this subject may reduce the need for such proceedings in the future.

Second, I accept that, in order for an individual to request that his or her personal information be corrected under section 36(2)(a) of the Act, the institution to whom this application is directed must acknowledge that it has custody of the document in question. The fact that such a request has been made in the present case would represent a second reason for addressing the custody or control issue. My underlying assumption is that the appellant has a bona fide intention to proceed with this request.

Based, therefore, on the somewhat unusual facts of this case, I have decided to proceed with this appeal.

### **Custody and Control**

The sole issue to be determined in this appeal is whether the two letters written by the MOH and the enclosures are in the custody and/or control of the Health Unit.

Section 4(1) of the Act introduces the concepts of custody and control. This provision states that:

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 part falls within one of the exemptions under sections 6 to 15.

In Order 120, former Commissioner Sidney B. Linden indicated that the concepts of custody and control should be given a broad and liberal interpretation in order to give effect to the purposes and principles of the Act. The Commissioner then proceeded to outline an approach for determining whether specific records fell within the custody or control of an institution:

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 a institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

This approach has been followed in many subsequent orders (see, for example, Orders P-239, P-271, P-326, P-396, P-505, M-59, M-152 and M-165). In each case, the issue of custody and/or control has been decided based on the particular facts of the case, the factors outlined in Order 120 and the related considerations which have been articulated in these orders. Similarly, this appeal must be decided on the  
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basis of its particular facts.

In its representations, the Health Unit submits that, although the records were created by a senior person employed by the agency, they are not in the custody of the Health Unit. This is the case because the letters represent "private correspondence" authored in response to a complaint filed with the College. More particularly, the Health Unit claims that it does not have control of the two letters because:

... the Health Unit does not report to the College and it is our understanding that the actions questioned were of a professional nature not related to the doctors roles as Medical Officers of Health.

The Health Unit admits, however, that it is unaware of the precise nature of the complaint as "the College corresponded directly with the [Medical Officers of Health]." The institution further indicates that the letters are not subject to its retention and disposal schedules, and are not "integrated with other records held by the Health Unit for any subsequent action or decisions".

In his representations, the MOH endorses the position of the Health Unit and claims that the records involve a private and confidential matter involving him as a physician licensed by the College, and not as Medical Officer of Health. He states that the Health Unit does not interfere with or monitor the personal or professional lives of Health Unit employees "unless it relates to that person's employment at the Health Unit." He further contends that the fact that "he is employed by the Health Unit is coincidental to any personal and confidential correspondence he may engage in, related to his professional activity," even though it may have been created on equipment owned by the Health Unit. He adds that the correspondence is stored in personal files kept at his home and copies are not kept at the office.

I accept the representations of the Health Unit and the MOH that the letters are not currently in the **custody** of the Health Unit. The first letter indicates, however, that the enclosures which are appended to this correspondence were obtained from the Health Unit's own filing system. In the absence of representations to the contrary, I must assume that the original enclosures remain in the custody of the institution.

I must now determine whether the two letters are under the **control** of the Health Unit.

In his representations, the appellant submits that the contents of the letters relate to the mandate of the Health Unit since the complaint alleges that the MOH failed to comply with section 11 of the Health Protection and Promotion Act. Section 11(1) of this statute states that:

Where a complaint is made to a Board of Health or a Medical Officer of Health that a health hazard related to occupational or environmental health exists in the Health Units served by the Board of Health or the Medical Officer of Health, the Medical Officer of Health shall notify the Ministry of the Government of Ontario that has primary responsibility  
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in the matter and, in consultation with the Ministry, the Medical Officer of Health shall investigate the complaint and determine whether the health hazard exists or does not exist.

Section 11(2) of the legislation goes on to stipulate that:

The Medical Officer of Health shall report the results of the investigation to the complainant

...

The appellant also points out that the letters were written on Health Unit stationery and that the MOH signed them in his official capacity. Based on these considerations, the appellant submits that the letters outline the position of the Health Unit and not the MOH.

In order to assess the representations provided to me, it will be necessary to consider the contents of the two letters. In the October 30th correspondence, the MOH discusses a water quality test undertaken by a government inspector and explains the role of the Ministry of the Environment and the Health Unit with respect to the testing procedures. The November 3rd letter simply states that the October 30th correspondence was sent on behalf of both the MOH and the Associate Medical Officer of Health.

I have carefully reviewed the contents of the two letters along with the representations provided to me. In the present case, a professional body, the College, has received a complaint about the conduct of an individual who is a member of that association. The individual, however, is also a senior official employed by an institution which is subject to the Act.

Where a complaint of this nature is filed, it is typically related to the actions taken or the professional competence of an individual. In these situations, the response provided by the professional would represent a personal assertion that the individual's conduct or behaviour was appropriate. In addition, there might exist only a slight or indirect connection between the nature of the complaint and the interests of the individual's employer. For the purposes of the Act, such a complaint (and any responses provided by the professional staff involved) would fall outside the mandate and functions of the institution.

In the present appeal, the two letters at issue were provided by the MOH of the Health Unit to the College. These pieces of correspondence, however, do not make reference to the nature of the complaint filed nor do they appear to respond to any of the allegations raised. Rather, they contain only background information on the subject of water quality testing in the province. On this basis, I cannot characterize these records as constituting a personal assertion by the MOH that the complaint raised against him was ill-founded. Instead, I find that the MOH responded to the College in his role as a senior official of the Health Unit rather than in his personal capacity.

Based on my review of the letters, I am also satisfied that their contents are linked to an important mandate of the Health Unit under section 11 of the Health Protection and Promotion Act, which is to investigate complaints about potential environmental hazards. In short, I find that the nexus which exists between the

contents of the letters and the functions of the Health Unit suggests that these records pertain primarily to the activities of the institution and only secondarily to the MOH in his personal or professional capacity.

I am reinforced in this conclusion by the manner in which the two correspondence were authored. Throughout the letters, the MOH makes use of the pronoun "we" rather than "I". This grammatical style implies that the MOH was responding to the College on behalf of the Health Unit and not predominantly in his personal capacity. The clarification contained in the second letter is consistent with this interpretation. Finally, in responding to the College, the MOH used stationery indicating his position with the Health Unit and signed the letters in that capacity.

While it is true that the Health Unit does not have actual possession of the letters and that these pieces of correspondence are not integrated with other records held by the institution, I do not consider these factors to be dispositive. In my view, these records ought to have been retained by the Health Unit as they relate to that agency's mandate and functions.

On the basis, therefore, that (1) the letters were created by an officer and employee of the Health Unit, (2) the contents of the letters relate directly to the institution's mandate and functions, (3) the letters purport to be written on behalf of the Health Unit and (4) these kinds of records should ordinarily be housed in a Health Unit's records retention system, I conclude that the institution should effectively exercise control over these records for the purposes of section 4(1) of the Act.

On this basis, it will be necessary for the Health Unit to obtain copies of the two letters from the MOH to re-establish formal custody over these documents. Once this step has been taken, the Health Unit will be required to issue a decision letter to indicate whether it is prepared to release the letters and the enclosures.

## **ORDER:**

1. I order the Health Unit to obtain copies of the letters authored by the Medical officer of Health dated October 30 and November 3, 1992, respectively, within ten (10) days of the date of this order.
2. I order the Health Unit to provide the appellant with a decision letter regarding access to the letters and to the enclosures, which the Health Unit already has within its custody, within thirty (30) days of the date of this order. I have enclosed with this order a copy of the IPC Practices edition entitled Drafting a Letter Refusing Access to a Record to provide the Health Unit with guidance on how to structure such a decision letter.
3. In order to verify compliance with the provisions of this order, I order the Health Unit to provide me with a copy of the decision letter referred to in provision 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Irwin Glasberg  
Assistant Commissioner

\_\_\_\_\_ February 21, 1994