



Information and Privacy  
Commissioner/Ontario

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

## **ORDER P-794**

Appeals P-9400333, P-9400334, P-9400335, P-9400336 and  
P-9400341

Ministry of Education and Training



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Téléc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEALS:**

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of Education and Training (the Ministry) for copies of records relating to the tenders called for the operation of jobsOntario training programs in Middlesex, Norfolk, Perth, Elgin and Oxford counties. His request, described in greater detail below, was treated as five separate requests by the Ministry. The requester is an unsuccessful tenderer for an employment training program to be operated with jobsOntario funding.

The specific requests were as follows:

1. The number of jobsOntario tenders issued by the Counties of Middlesex, Norfolk, Perth, Elgin and Oxford for the period of January 1, 1993 to March 31, 1994.
2. Mailing lists of potential submitters as well as the advertisements soliciting submissions for the above tenders.
3. Lists of successful tenderers (bids included) for all the tenders awarded between the above dates.
4. The number of selection committees in which a named individual was involved, where Fanshawe College was one of the successful bidders.
5. Lists of names of those on the selection committees for each of the tenders in question.

In its first decision letter, covering all five requests, the Ministry advised that the three brokers responsible for jobsOntario in the counties of Perth, Middlesex and Oxford were private non-profit organizations which are not institutions for the purposes of the Freedom of Information and Protection of Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act. It also stated that it had passed on the requests to the respective brokers on an informal basis, rather than as a formal transfer under the Acts.

With regard to Norfolk County, the Ministry advised that the broker is the Regional Municipality of Haldimand-Norfolk, which is an institution under the Municipal Act. Therefore, in accordance with section 25(2) of the Act, it formally transferred that part of the request to the Regional Municipality.

For Elgin County, the Ministry stated that the broker is Fanshawe College, which is an institution within the meaning of the Provincial Act. The request was transferred under section 25(2) of the Act to Fanshawe College.

In a second decision letter, the Ministry stated that the information requested for the Counties of Middlesex, Norfolk, Perth, Elgin and Oxford did not exist within the Ministry for the purposes of the Act. A third decision letter was subsequently issued, amending the second decision letter, stating that the records

requested for the Counties of Middlesex, Perth and Oxford were not in the custody or under the control of the Ministry within the meaning of the Act.

The requester appealed the Ministry's decision to transfer the requests. He further indicates his belief that all of the records he seeks are in the possession of the Ministry. As the records and issues in each request are related, this order will dispose of the issues raised in all five appeals.

This order does not deal with the issue of access to the records which may be responsive to the requests, rather, it addresses the following procedural issues:

1. Whether the Ministry was entitled under section 25 of the Act to transfer parts of the request to the Regional Municipality of Haldimand-Norfolk and Fanshawe College; and
2. whether the records requested pertaining to Perth, Middlesex and Oxford counties are in the custody or under the control of the Ministry pursuant to section 10(1) of the Act.

A Notice of Inquiry was provided to the parties to the appeals and representations were received from the Ministry and the appellant.

### **NATURE OF THE jobsONTARIO TRAINING PROGRAM**

The Ministry indicates that the jobsOntario Training program is delivered by a variety of organizations which operate as brokers who have entered into contracts with the Ministry. These agreements provide that the Ministry will reimburse the broker for eligible costs incurred in operating the program. Under the guidelines and the terms of the contract, the broker is free to enter into fee for service agreements with other organizations for specific services such as training or the development of training plans. The approval of the Ministry is not required for such agreements, nor is any specific reporting required unless there is a potential conflict of interest.

### **DISCUSSION:**

#### **TRANSFER OF REQUESTS TO THE REGIONAL MUNICIPALITY OF HALDIMAND-NORFOLK AND FANSHAWE COLLEGE**

In its representations, the Ministry indicates that the three brokers responsible for jobsOntario in the counties of Perth, Middlesex and Oxford are Family Services Perth-Huron, the London Unemployment Help Centre and the South West Centre for Community Programme Development, respectively. These agencies are not institutions for the purposes of the Provincial or Municipal Acts and, accordingly, the appellant's request could not be formally transferred to these agencies under the Act.

The issue of the transferring of requests deals only with the transfers to the Regional Municipality of Haldimand-Norfolk and Fanshawe College, which are institutions under the Municipal and Provincial Acts, respectively.

Section 25(2) of the Act states:

Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

Section 25(2) gives the head of an institution the discretion to transfer a request and, if necessary, the record to another institution where the head considers that the other institution has a greater interest in the records.

Section 25(3) of the Act further defines what a "greater interest" means:

For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,

- (a) the record was originally produced in or for the other institution; or
- (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.

Section 25(3)(a) recognizes that, regardless of whether an institution has possession of a record, another institution may have a "greater interest" in that record if it was the institution which originally produced the record or the institution for which the record was originally produced.

In its representations, the Ministry submits that section 25(3)(a) applies as some responsive records were created by or for the brokers participating in the jobsOntario Training program and not by or for the Ministry. Although the Ministry indicates that it may have some of the information, it submits that the information was not created or collected by it. Finally, the Ministry submits that it had the discretion under section 25(2) to forward the request to the brokers which are institutions as they have a greater interest in the records.

The Ministry has provided me with a copy of a standard agreement with a broker, the jobsOntario Training Rules of Practice, and copies of its letters to those brokers not covered by the Municipal or Provincial Acts requesting, at their discretion, that they provide the Ministry with the information sought by the requester. The evidence before me indicates that the brokers operate independently of the Ministry and are solely

responsible for the implementation of the jobsOntario agreement which they have entered into with the Ministry. Following my independent review of the representations of the parties, and the evidence before me, I am of the view that the Regional Municipality of Haldimand-Norfolk and Fanshawe College have a greater interest in the records for the purposes of section 25(3) of the Act.

I am further satisfied that the head, in considering the relationship between the Ministry and the brokers, properly exercised his discretion in transferring the requests under section 25(2) of the Act.

### **CUSTODY OR CONTROL OF RECORDS RELATING TO PERTH, MIDDLESEX AND OXFORD COUNTIES**

I must also determine whether the records requested pertaining to the tenders called for the operation of the jobsOntario training programs in Perth, Middlesex and Oxford counties are in the custody or under the control of the Ministry pursuant to section 10(1) of the Act.

Section 10(1) of the Act states:

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 Order 120, former Commissioner Sidney B. Linden stated 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 the following 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. 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, these appeals must be decided on the basis of their particular facts.

In its representations, the Ministry submits the following in response to the criteria referred to in Order 120:

1. An officer or employee of the Ministry's jobsOntario Training did not create the requested records.
2. If any part of the record would be available to jobsOntario Training, it would be for monitoring purposes for the reimbursement of eligible costs, particularly if there is any potential conflict of interest.
3. If any part of the records are in the possession of jobsOntario Training, it would have to be confirmed with the creator of the records, the broker, that the information is accurate and up to date; if some information has been provided by a broker it would be on an intermittent basis and, therefore, the timeliness and accuracy of segments of information are not under the control of jobsOntario Training.
4. No employee of jobsOntario Training is involved in creating the records.

5. jobsOntario Training has the right to request that part of the records be provided to it, in exceptional circumstances, ie. if there are allegations of misuse of funds or if there is a potential conflict of interest, the broker may have to provide part of the requested records to jobsOntario Training.
6. If records exist, they exist in the custody and under the control of the broker and would relate to the broker's operations.
7. jobsOntario Training has no right of regulation of use of the records.
8. jobsOntario Training does not rely on such records.
9. In reference to Part 3 of the appellant's request, the Ministry submits that any part of the information which may exist in the jobsOntario Training data base would require a computer search on a specific topic that is not an ordinary one performed by jobsOntario Training. Any information that is within the jobsOntario data base does not fulfil all details of the request, and it would have to be confirmed with the broker that any such information is accurate and up to date.
10. jobsOntario Training has no authority to dispose of such records.
11. jobsOntario Training may have bare possession of some information that may form part of the records responsive to Part 3 of the appellant's request, but has no right to deal with it and has no responsibility for its care and protection.

The Ministry has also provided an affidavit from the Manager, Finance and Administration of jobsOntario Training which states that none of the requested records are in its custody or control. However, the affidavit suggests that, with respect to Part 3 of the appellant's request, the Ministry may have some part of the information requested, but that it may only be accessed by a computer search which would result in the separation of this information from the rest of the data base. It further states that the broker would be the originator of the records responsive to Part 3 of the appellant's request and would have custody and control of them.

Section 10(1) states that a right of access exists to records in the custody **or** under the control of the institution. An institution does not require both custody and control of the records for this right of access to survive.

Based on the evidence before me, I conclude that the records which are the subject of Parts 1, 2, 4 and 5 of the appellant's request are not within the custody or control of the Ministry for the purposes of the Act. However, the Ministry has advised it does have in its possession some of the information which is responsive to Part 3 of the appellant's request. I find, therefore, that for the purposes of the Act, it has custody of records which relate to Part 3 of the request. I will, accordingly, require it to issue a new

decision letter indicating whether it will disclose this information to the requester. As the Ministry has acknowledged that the information may require a computer search, it may include a fee estimate with its decision.

**ORDER:**

1. I order the Ministry to provide the appellant with a new decision letter regarding access to information in its possession which relates to Part 3 of the appellant's request within fifteen (15) days of the date of this order.
2. I uphold the decision of the Ministry with respect to Parts 1, 2, 4 and 5 of the appellant's request.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the decision letter which is provided to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ November 15, 1994