



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

# **ORDER P-1017**

## **Appeal P-9500148**

### **Ministry of Municipal Affairs and Housing**



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## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Housing (now the Ministry of Municipal Affairs and Housing) (the Ministry) received a request for the names of all individuals who accessed the Ministry offices on the third floor of 777 Bay Street by using their elevator pass card, or all individuals using the pass card, on May 23 and 28, 1994, and after office hours on September 19, 1994. The Ministry indicated that it did not have custody or control of the requested information. The requester appealed this decision.

A Notice of Inquiry was provided to the Ministry, the appellant and the Property Manager of the office building. Representations were received from all parties.

## **DISCUSSION:**

### **CUSTODY OR CONTROL OF RECORDS**

The sole issue in this appeal is whether the Ministry has custody or control of a record responsive to the request 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 an approach for determining whether specific records fell within the custody or control of an institution, which involved a consideration of all aspects of the creation, maintenance and use of particular records. I agree with former Commissioner Linden's approach, and have used it to examine the facts of this particular appeal.

The owners of the building have implemented a system which tracks entry into the building via elevator during non-business hours (i.e. after 6:00 pm and before 7:30 am and all day weekends and holidays). The information the appellant is seeking access to is maintained on computer disk, from which printouts can be produced. The record itself does not indicate which floor of the building was accessed, but shows which card holders used the elevators and when the elevator was used. Each access card is programmed to permit access only to certain floors. The record is created by a private security company and maintained by the owners of the building, not the Ministry.

The Ministry submits that the record should be characterized as a document belonging to a private company (the owners of the building) which was created by the private company on its own initiative in connection with the management of its business affairs. In my view, the record is not related solely to the business affairs of the owners of the building. The owners of the building implement a security system for a number of reasons, including as an incentive to attract tenants with a need for security. The Ministry has an

obligation to the people of Ontario to manage its own business affairs responsibly, including instituting controls which will safeguard its investment in moveable assets. Therefore, security requirements are a legitimate concern for it as well.

The Property Manager submits that he can produce the information in response to a written request from an authorized representative of the Ministry and will release it to the Ministry on that basis. The Ministry submits that it has the privilege but not the right to obtain the record in question, and that the willingness of a third party to provide a record to an institution is not determinative of the issue of custody or control.

In my view, whether this entitlement is referred to as a right or a privilege, the Ministry is able to obtain this information. The Ministry is not required to provide the Property Manager with a reason for requesting the information and there is no limit to the frequency of such requests. It appears that all that is required for the Ministry to obtain the record is for it to identify which individuals have the Ministry's authorization to obtain the record, and for one of these individuals to ask.

The Ministry submits that it is not currently, nor has it ever been, in possession of such a record. However, in a letter to the appellant, the Deputy Minister indicated that he had determined that none of the staff mentioned by the appellant had used the elevators at a time correlating to the appellant's request. The only way such a determination could be made would be if the Deputy Minister had relied on the record maintained by the Property Manager.

The Ministry submits that it does not regulate use of the record, however the appellant herself has tried unsuccessfully to obtain the record directly from the Property Manager. The Property Manager informed her that the information is only available to the individuals authorized by the Ministry to request it. In these circumstances, it is apparent to me that the Ministry is exercising a measure of control over this record.

While none of these factors alone are determinative of the issue of control, when viewed together I find that the Ministry does have the requisite degree of control over the record to bring it within the scope of the Act.

## **ORDER:**

1. I order the Ministry to request a copy of the record responsive to the request from the Property Manager within fifteen (15) days of the date of this order.
2. I order the Ministry to issue a decision under the Act to the appellant regarding the record(s) which it obtains from the Property Manager pursuant to Provision 1 within ten (10) days of the date of receipt of the records from the Property Manager.
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 2.

Original signed by: \_\_\_\_\_

Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ October 10, 1995