



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

ORDER P-1069

Appeals P-9500225 and P-9500339

Ministry of Community and Social Services



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NATURE OF THE APPEALS:

The Ministry of Community and Social Services (the Ministry) received two requests under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information in the requesters' Crown ward files pertaining to a specific period (1968-1969). The two requesters are sisters who are seeking access to their own personal information for the period of their Crown wardship. The Ministry identified certain court orders as responsive to the requests and granted partial access.

Access was denied to records, or portions thereof, that contained the personal information of individuals other than the requesters. The Ministry also advised the requesters that the remaining information sought may be found in the Crown ward files maintained by the Children's Aid Society, Niagara (CAS).

The requesters appealed the decisions of the Ministry on the basis that additional records should exist. The requesters also claim that the Ministry has control over CAS records and therefore, should be able to allow access to them. Two separate appeal files (P-9500225 and P-9500339) were opened. Since the institution and the issues in each file are the same and in the interests of expediency, this order will dispose of the issues in both P-9500225 and P-9500339.

The appellants have confirmed that they are not interested in pursuing access to the severed portions of the records withheld by the Ministry under section 21(1) of the Act.

Therefore, the issues that I will address in this order are firstly, whether the search for responsive records conducted by the Ministry was reasonable in the circumstances of these appeals and secondly, whether the Ministry has control over the Crown ward files maintained by the CAS.

Notices of Inquiry were provided to the appellants, the Ministry and the CAS. Representations were received from all parties.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records to which he or she is seeking and the Ministry indicates that no such records exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested record does not exist. However, in my view, to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

In approaching the reasonableness of search issues in appeal, the Commissioner's office has recognized that an appellant is rarely in a position to know that records do, in fact, exist. An appellant is therefore asked to provide his or her reasons for believing that a record should exist. At the same time, the institution is asked to provide details of the search which it has conducted.

Upon consideration of the information provided by the parties, a conclusion will be made as to whether or not the search was reasonable in the circumstances of the appeal.

The appellants submit that in accordance with the Directory of Records which lists the type of personal information records maintained by provincial ministries and their agencies, the Ministry's Crown ward files should include more than court orders. In particular, the Ministry is required to maintain copies of the medical histories of Crown wards and parents, the social history of the parents and grandparents, placement history, plan and review of care, discharge plans and termination of wardship orders. The appellants have only received copies of court orders. The appellant (P-9500339) states that the Ministry has not provided her with her Crown wardship document. The appellant (P-9500225) points out that the records pertaining to the termination of her wardship in 1971 when custody was awarded to a family member have not been located by the Ministry.

The Ministry explains that the Child Welfare Act, in effect at the time that the appellants' records were created, required the court issuing orders in child welfare cases to send copies of such orders to the Ministry. Such orders could relate to temporary care and custody or adjournments, supervision orders, society or Crown wardship orders, payment orders and other judgments affecting the welfare of the child.

By way of background, the Ministry submits that at the time that the records were created, the CAS had the rights and responsibilities of legal guardian for the purposes of the child's care, custody and control. The Ministry states that the files maintained by the CAS reflected this role and therefore, were extensive, containing legal documents, family social history, placement history and the social worker case notes.

The Ministry acknowledges that the current Directory of Records contains a detailed list of records which may be maintained in Ministry files but submits that the requirements under the previous legislation were different and therefore, the records that the Ministry created and maintained during that time, consisted mostly of court orders.

The Ministry states that records of this nature would not have been destroyed. The Ministry explains that at the time that these Crown ward files were created, they were required to be retained for 60 years. In 1987, the retention schedule was revised to 100 years. Therefore, all such files are held in the area Ministry offices until termination of the wardship, at which time the records are microfilmed and retained for 100 years. The Ministry states that all Crown ward files for the time period at issue (1968-69) are on microfilm stored in one location.

With its representations, the Ministry has provided copies of two affidavits detailing the searches that were conducted for the records in response to the two requests, the originals of which were provided to this office at the time that the appeals were filed. The Ministry has also provided an affidavit (in respect of each of P-9500225 and P-9500339), sworn by the Manager of Central Services Unit, Management Support Branch (the Manager). The Manager states that upon receipt of each request, a complete

physical search of the microfiche records was conducted. The responsive records, with some severances under section 21(1), were disclosed to each appellant.

Subsequent to the filing of the appeals, a second search for responsive records was conducted, in respect of each appeal. No additional records were found. On September 14, 1995, a third search for responsive records was conducted (in respect of each appeal) and again, no additional responsive records were located as a result of this search.

I have carefully reviewed the evidence before me together with the representations of the appellants and the Ministry and the affidavits provided by the Ministry. As indicated previously, while the Ministry does not have to prove with absolute certainty that additional records do not exist, the Ministry does have to provide me with sufficient evidence to show that a reasonable effort was made to locate records responsive to the requests. In the particular circumstances of the two appeals before me, I am satisfied with the explanations provided by the Ministry and I find that the searches conducted by the Ministry for records responsive to the requests were reasonable.

I will now consider the second issue before me, which is whether the Ministry has control over the Crown ward files held by the CAS.

CONTROL OF THE RECORDS REQUESTED

Section 10(1) of the Act states as follow:

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. (emphasis added)

The issue which I must decide is whether the Ministry has control over the Crown ward files held by the CAS.

In Order P-239, Commissioner Tom Wright considered the issue of “control” and he stated:

In my view, the fact that there may be limits on the institution’s ability to govern the use of the records is relevant to the issue of whether the institution has control of the records, but does not preclude an institution from having custody.

In Order 120, former Commissioner Sidney B. Linden stated that the terms “custody” and “control” should be given a broad interpretation in order to give effect to the purposes and principles of the Act. I agree with former Commissioner Linden’s approach and adopt it for the purposes of this appeal. In that order, he lists a number of factors pertinent to the creation, maintenance and use of records to be considered when determining the issue of “custody” and “control” of the records. The factors relating to “control” are the following:

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?
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 function?
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?

This approach has been used 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. Similarly, this appeal must be decided on the basis of its particular facts.

The Ministry submits that it does not have control over the records kept by the CAS and that this reflects the different roles and responsibilities of the two organizations. The Ministry states that it "has a general supervisory and monitoring role over the CAS while the CAS has the rights and responsibilities of a parent for its wards' custody, care and welfare."

The Ministry states that the CAS operates under the Child and Family Services Act (previously the Child Welfare Act), its regulations and Ministry standards and guidelines and is administered by an independent Board of Directors. The CAS is a transfer payment agency in that it receives annual operating funding from the Ministry and the local municipality and is accountable to the Ministry only for the use of those funds and for the quality of the program.

The Ministry submits that the files maintained by the CAS are entirely under the control and custody of the CAS and that the CAS has complete jurisdiction over their maintenance or management including approving or refusing access to the files. The Ministry states that the CAS files are created by the CAS employees for their own use, that the contents of the files relate solely to the mandate of the CAS and that the Ministry has no knowledge or authority over the use or disposal of these records.

In its representations, the CAS states that it is a non-profit corporation governed by a Board of Directors independent of the Ministry. The CAS confirms that it is partially funded by the Ministry and that the Ministry monitors the operations of children's aid societies and conducts periodic reviews of the care and services being provided to the children in care.

The CAS states that it maintains a record for each child in its care and for every family to whom it provides service and that these records are created and maintained by the CAS for its own uses. The CAS points out that even though the Act does not apply to it, it routinely receives requests for access to its records from parents and children previously associated with the CAS. The CAS states that reasonable efforts are made to provide the information sought by way of written summaries, if requested, and since the information is often on microfiche, this often involves lengthy delays.

One of the appellants submits that a separate request for access to the Crown ward files was made directly to the CAS. The CAS advised the appellant that it was not the CAS' policy to provide access to a copy of the files. In its response, the CAS indicated that efforts would be made to respond to any specific questions or issues. The information sought was not provided to the appellant.

In their representations, the appellants state that they are now both adults trying to fill in the gaps of their early lives and that access to their Crown ward files would provide the necessary information.

The appellants submit that the CAS is funded by the Ministry and therefore, the Ministry must have control over the administration and records of the CAS. With their representations, the appellants have included copies of the Child Welfare Act, the governing legislation during the relevant period, together with amendments and copies of Crown ward administrative reviews. The appellants have also included court cases where records of children's aid societies have been allowed in evidence.

I have carefully reviewed the representations of the parties. The Ministry has addressed each of the factors listed above and submits further that its right to access the records held by the CAS is limited to ensuring compliance with the Child and Family Services Act (the CFSA) and the regulations. In my view, the Ministry's right of access to the records is limited to requiring financial accountability for the funds provided to the CAS and to periodic administrative reviews for the purpose of ensuring compliance with the CFSA. I find therefore, that the Ministry does not have control over the records held by the CAS for the purposes of section 10(1) of the Act.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

November 30, 1995

POSTSCRIPT:

Having determined that the Ministry does not have control over the requested records, I am mindful that the information to which access is sought consists of the personal information of the appellants, albeit of a sensitive nature. I am aware that children's aid societies are currently not subject to the Act. The Children's Aid Society, Niagara (the CAS) has indicated that it does receive requests for access from former service receivers and former wards and addresses them on an individual basis. I note that the records relate to events during the period that the appellants were designated Crown wards and that these two individuals are now adults. While I am appreciative of the position of the CAS and the sensitive nature of the records at issue, the CAS may wish to consider whether disclosure of records, such as the ones at issue in this appeal, would be in the best interests of the individuals who were formerly in its care.