



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

ORDER P-1199

Appeal P-9500764

Ministry of Northern Development and Mines



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NATURE OF THE APPEAL:

The Ministry of Northern Development and Mines (the Ministry) received a ten-part request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a specific funding application made to the Ministry's Northern Ontario Training Opportunities Program (NORTOP) by the Red Lake and Golden Economic Development Corporation (the Corporation).

The Ministry located and identified records in its custody responsive to Part 2 of the request and granted access to them in their entirety. The Ministry also advised the requester that it did not have custody of or exercise control over records responsive to Parts 1, 3, 4, 5, 7, 8, 9 and 10 of the request as they are held by the Corporation. Finally, the requester was informed by the Ministry that no records exist responsive to Part 6 beyond those provided in response to Part 2.

The requester, now the appellant, appealed the Ministry's decision on the basis that records responsive to Part 6 of his request should exist and that, under section 10(1) of the Act, the Ministry exercises the requisite degree of control over the Corporation's records responsive to the other parts of the request because it provides funding to the Corporation.

During the mediation of the appeal, the Appeals Officer clarified that the records which were disclosed to the appellant were responsive to both Parts 1 and 2 of his request.

A Notice of Inquiry was provided to the appellant, the Ministry and the Corporation. Representations were received from the Ministry and the Corporation. The issues which will be addressed in this order are:

1. Whether the Ministry conducted a reasonable search for records responsive to the request; and
2. Whether the Ministry exercises "control" over the records of the Corporation within the meaning of section 10(1) of the Act.

DISCUSSION:

REASONABLENESS OF SEARCH

The Ministry has provided detailed evidence of the nature and extent of the searches undertaken for records responsive to the requests at its Kenora and Red Lake offices. It has provided affidavits from the Co-ordinator of the NORTOP for the northwest region in Kenora and the Ministry's Northern Development Officer at Red Lake in which each of these individuals describe the searches undertaken and the records which were located and disclosed to the appellant.

The appellant maintains that additional records should exist but has not provided any evidence to demonstrate the reason for this belief.

Where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that no 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 record requested does not exist. However, in my view, in order 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 responsive records.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

I have considered the representations of the Ministry and I am satisfied that the searches conducted by the Ministry for records responsive to the appellant's requests were reasonable in the circumstances. This portion of the appeal is, accordingly, dismissed.

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 all of the Corporation's files relating to the specified NORTOP funding application within the meaning of section 10(1) of the Act.

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.

The Corporation and the Ministry describe the nature of the Corporation and its relationship to the Ministry in detail. The Corporation is a non-profit charitable corporation created by Letters Patent pursuant to the Corporations Act in 1985. The Ministry submits that the Corporation is a completely separate legal entity from the Ministry and the relationship between them is entirely at arms-length. The Ministry further submits that the Corporation has received funding under NORTOP which grants the Ministry the right of access to certain information held by the Corporation for audit and accountability purposes only. It argues that its right of access to records held by the Corporation is limited to records which are relevant to an audit or to ensure that the Corporation has used the grant money in accordance with the terms of its contract with the Ministry.

In the present appeal, the Ministry provided funding to the Corporation under the NORTOP and thereby acquired certain limited rights of access to the Corporation's records to ensure financial accountability and for audit purposes relating to the disbursement of the grant money. This right of access to the Corporation's records does not, however, extend to the type of records sought by the appellant in Parts 3, 4, 5, 7, 8, 9 and 10 of his request. Records responsive to these parts of the request do not relate to the audit function nor would they assist the Ministry in a review of the accountability of the Corporation's use of the grants provided by the Ministry.

In my view, the conclusion reached in Order P-1069 by Inquiry Officer Mumtaz Jiwan has direct application to the present situation. In that order, Inquiry Officer Jiwan addressed the situation where a Ministry provides funding to an arms-length entity and enjoys a limited right of access to certain types of records for the purpose of requiring financial accountability for the funds which it provided. She found that in those circumstances, the funding body does not exercise control over all of the arms-length entity's records for the purposes of section 10(1) of the Act.

In the circumstances of the present appeal, I find that the Ministry does not exercise the requisite degree of control under section 10(1) over records held by the Corporation beyond those which relate to the Ministry's ability to audit and hold the Corporation accountable for the funding which was provided under the NORTOP.

ORDER:

I uphold the Ministry's decision and dismiss the appeal.

Original signed by: _____

Donald Hale
Inquiry Officer

_____ June 4, 1996