



**Information and Privacy  
Commissioner/Ontario**

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

# **FINAL ORDER P-1532**

**Appeal P-9700260**

**Ministry of the Environment**



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This is my final order to Interim Order P-1525, made pursuant to the Freedom of Information and Protection of Privacy Act (the Act).

## **BACKGROUND AND NATURE OF THE APPEAL:**

The Ministry of the Environment (the Ministry) received a request for access to records relating to a specific waste disposal site in the City of Kingston including notes, journal entries and records of conversations documented by three named Ministry employees. The Ministry granted access to the contents of the Kingston Region's approval file but indicated that there was a 1985 file which they had not been able to locate. The Ministry granted partial access to the remaining records. The Ministry denied access to the handwritten notes of two of the three named employees (the environmental officers) pursuant to the exemption provided by section 14(1). The requester appealed the denial of access.

The appellant represents the City of Kingston which is being charged by the Ministry for allegedly contaminating the environment through the waste disposal site.

During mediation, the Ministry explained that it did not have the handwritten notes of the third employee (the District Manager) because he relied on the notes of the other two employees and did not have occasion to take notes. Therefore, no other handwritten notes existed. In response to the Notice of Inquiry provided by this office to the parties, the appellant submitted photocopies of handwritten notes, dated February 26, 1997, taken by the District Manager and argued that therefore, such records must exist. The reasonableness of the Ministry's search for responsive records thus became an issue in the appeal and the parties were asked to comment.

Representations were received from the Ministry which indicated that it was no longer relying on the section 14(1) exemption to deny access to the handwritten records of the environmental officers and that it had disclosed these records directly to the appellant. Accordingly, these records were no longer at issue. Included in the Ministry's submissions on the reasonableness of its search, was a memorandum of explanation from the District Manager.

The District Manager stated that he maintains "a personal Daily Journal of meetings and telephone conversations." He stated that notes are entered every evening at home and that he considers these entries to be "personal material protected from public access even though they do record daytime workplace-related, as well as personal activities." The Ministry submitted that it had never seen this journal and that it did not have access to these notes which are maintained at the District Manager's home. This raised the issue of whether the Ministry has custody and control over these notes. In the interests of expediency and to effect an opportunity to all the parties to make submissions on this issue, I decided to address the reasonableness of the Ministry's search for records in an interim order (Order P-1525) and to address the issue of whether the Ministry has custody or control over the journal entries made by the District Manager in this final order.

Representations were received from the appellant, the Ministry and the District Manager.

## **DISCUSSION:**

### **CUSTODY OR CONTROL**

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 section 12 to 22.

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. 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:

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 for the purpose 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?

The appellant submits that the creator of the record is an employee and that the record was created to document his work-related activity. Additionally, the appellant submits that if the record contains any information related to the request, then the record is responsive to the request.

The Ministry acknowledges that the creator is an employee of the Ministry. The Ministry states that the record was created by the District Manager for personal use and that to the best of the Ministry’s knowledge, it has not relied upon the record for Ministry use. The Ministry states that

the record is not in its possession and that it has never seen the record and is unaware of its contents.

The Ministry points out that there is no requirement for such records to be held at an employee's home. On the contrary, the Ministry requires its employees to record all business-related activities in a notebook (for environmental officers or investigators) or on loose sheet paper for others. The loose sheets are sent to be filed and the notebooks are considered to be in the Ministry's custody and control at all times.

The Ministry notes that the journal was purchased by the employee and entries were made on his personal time, at his residence. The Ministry submits that it does not have a right of possession to the record, that the record is kept by the employee at his residence and that it has never been integrated with Ministry records. The Ministry submits that it has no custody or control over the record and therefore, no authority to dispose of it.

The District Manager submits that the record is a personal journal and is not under the custody and control of the Ministry. He refers to Order 120 and to the former Commissioner's comments that "... my findings do not mean that personal diaries of employees of institutions qualify as records which are governed by the Act".

The District Manager confirms that he is an employee of the Ministry. He explains that he is a professional engineer and that he has maintained a daily personal journal recording the day's activities "as a memory aid and as a personal history of [his] activities". He states that he has been using a daily journal since 1972 and prior to his employment with the Ministry.

The District Manager states that the record is kept at home in his personal possession and has never been provided to his employer, either voluntarily or pursuant to a statutory requirement. He points out that while the record does contain some work related information, such as listing meetings attended, it does not contain details of any meeting discussions. Those details are recorded and filed at the Ministry. The District Manager states that his duties do not require him to keep such a record and that the record is maintained by him as a personal journal.

The District Manager submits that the Ministry has never relied upon the record and that it does not have the right to regulate the record. He states that the record is kept at home and is not integrated with other Ministry records and that the Ministry does not have the right to dispose of the record. The District Manager states that at certain times, he has relied on some work-related entries in the record as a mnemonic or memory aid.

I have carefully reviewed the representations of all the parties and I find, after considering all the factors above together with the particular circumstances of this appeal, that the record is not in the custody or under the control of the Ministry.

With respect to the District Manager's statement that at times he does rely on some of the work-related entries in the record, I rely on the approach espoused by former Commissioner Linden in Order 120:

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 the particular record, and to decide whether “custody” or “control” has been established in the circumstances of a particular fact situation. [emphasis added]

Therefore, in considering all aspects of the creation, maintenance and use of the record, I find that in the particular circumstances of this appeal, the record is not in the custody or under the control of the Ministry.

**ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
Mumtaz Jiwan  
Inquiry Officer

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February 20, 1998