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

ORDER PO-1830

Appeal PA-000010-1

Ministry of the Environment

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NATURE OF THE APPEAL:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Environment (the Ministry). The request was for access to any and all information relating to the appellant's complaint file. The appellant's complaint was lodged with one of the Ministry's Drive Clean offices.

The Ministry disclosed all of the records it initially identified as responsive to the request. The Ministry advised the appellant that no other records exist.

The appellant appealed the Ministry's decision on the basis that additional responsive records should exist. In support of this, the appellant advised that a named company which has a contract with the Ministry relating to the Drive Clean program has information relating to his complaint in its possession. The appellant also indicated his belief that the named company had sent the records in its possession to the Ministry but that the Ministry returned them unopened.

The Ministry initially took the position that the records in the possession of the named company are not within its custody or control.

During mediation, the Ministry explained to the mediator that it had "contracted out" with the named company to conduct emission testing and other services and that this arrangement was essentially a privatization agreement. The Ministry refused to provide a copy of the Agreement to the mediator indicating that it would address this issue at inquiry.

The Ministry also confirmed that the named company had sent the records to it but that it returned them to the company unopened as it believed a decision to provide information to the appellant should be made by the named company as a private business.

Also during mediation, the Ministry conducted a further search for responsive records and located additional records. In addition, during the mediation and inquiry stages of the appeal, the named company forwarded certain records to the Ministry which the Ministry retained.

The Ministry issued three further decisions in which it disclosed some of these records to the appellant and denied access to the remaining records. These decisions, dated March 10, 2000, April 14, 2000 and May 11, 2000 are not at issue in this appeal. The appellant is of the opinion, however, that further records should exist.

This office provided a Notice of Inquiry to the Ministry and the named company. The Notice raised two issues: custody or control of the records relating to the named company and reasonableness of search. Representations were received from both parties. The same Notice of Inquiry was then sent to the appellant with the complete representations of both the Ministry and the named company attached. The appellant did not submit representations in response.

PRELIMINARY MATTER:
CUSTODY OR CONTROL

Section 10(1) of the *Act* provides a right of access to records "in the custody **or** under the control of an institution" (emphasis added). Some of the records responsive to the appellant's request were not in the custody of the Ministry and the Ministry took the position that it did not have control over them. Therefore, one of the issues identified in this appeal was whether the records are "under the control" of the Ministry within the meaning of section 10(1). If they are, the right of access under section 10(1) applies.

The named company takes the position that all information in its possession which is collected through the provision of services under its agreement with the Ministry are paid for by the Ministry and are thus the Ministry's "property". In this regard, the named company states:

> [The named company] provides a number of services, including covert audits, under its QA/QC (Drive Clean Quality Assurance/Quality Control) Agreement with the [Ministry]...
>
> The Agreement with the Ministry recognizes [the named company's] ownership of the Program Materials developed by [the named company] for the provision of the QA/QC's and further covenants to hold all such Program Materials in the strictest confidence. However, the information, collected through the provision of services under the Agreement, are paid for by the Ministry and as such is the property of the [Ministry].
>
> Since the Ministry is the owner of the information collected by [the named company], the decision on whether or not to release such information lies with the [Ministry]. The only restriction on this ownership and ability to make decision on the release of information is the need to protect the confidentiality of [the named company's] Program Materials and thus avoid a breach of contract.
>
> In order to facilitate the ability of the Ministry to release the information, [the named company] has provided the Ministry a summary of the covert audit and the findings in question, under the original Request and this Appeal. The summary does not in any way jeopardize the confidentiality of the [named company] covert process but it does provide a complete and accurate listing of all weaknesses found during the audit in question.

In response to the custody or control issue as set out in the Notice of Inquiry, the Ministry states:

> The Ministry received the records from [the call centre] and [the named company].
>
> As a result, it is the Ministry's position that we can make a decision with respect to access.

> [The appellant] was provided with the entire [call centre] records on April 14, 2000 and the entire [named company] records on May 11, 2000 except for the Covert Audit report which was denied (see decision letter of April 14, 2000).
>
> In terms of the Covert Audit report, [the named company] prepared a summary of the deficiencies found with the [named] Drive Clean Facility and this has also been provided to [the appellant].
>
> Since the contractors provided the records to the Ministry, the questions raised in issue B (custody and/or control) no longer require our response.

In its April 14, 2000 decision letter, the Ministry stated:

> After contacting the two third parties with respect to additional records located involving your complaint, it is my decision to provide full access to the records located involving your complaint, it is my decision to provide full access to the records that the Call Centre sent to the [Ministry] ... It is also my decision to deny access to the covert audit report for the [named] facility. This action is taken in accordance with sections 14(1)(c), (g), (l) as well as sections 17(1)(a) and (c) of the Act as disclosure would reveal how [the named company] provides its services and could be used to circumvent the audit process.

In its May 11, 2000 decision letter, the Ministry stated:

> After contacting [the named company], the Ministry received their entire file with respect to the complaint that you initiated during the summer of 1999. It is the Ministry's decision to provide you with the additional information without severances.

It would appear from the named company's perspective that the records responsive to the request do fall within the Ministry's control. Although the Ministry originally took the view that it does not have control over these records, it ultimately accepted them from the named company and made a decision on access with respect to them. As I noted above, the *Act* only requires that the records be in the custody **or** control of the Ministry in order for it to apply to them.

Taken together, these submissions and correspondence clearly acknowledge that the Ministry now has custody of all records directly related to the appellant's complaint and that it has issued a decision regarding access to them. On this basis, it is not necessary to address whether records responsive to the request are in the control of the Ministry in this order.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that further records do not 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 further records do 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 records responsive to the request.

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

The appellant's primary concern regarding the Ministry's decision relates to the custody/control issue, that is, he believes more records exist in the offices of the named company. He also believes that the Drive Clean office has misfiled records relating to his complaint. The appellant suggests that further documentation may be located at the offices of the named company and in the Drive Clean office's file for the Drive Clean facility that he complained about. The appellant also believes there should be some documentation to support a statement made by the Director of the Drive Clean office that the appellant had "rejected the offer from the Drive Clean Office to mediate a resolution between himself and [the named] Drive Clean Facility".

The named company does not address whether it has additional records relating to the appellant's complaint. It simply indicates that it provided the Ministry with a summary of the covert audit and findings.

The Ministry states that its two Senior Technical Advisors are responsible for complaint issues that the contractors (the Call Centre and the named company) bring to its attention. The Ministry notes that both individuals have been employed with the Drive Clean office since the program became operational and are the most qualified individuals to search for responsive records.

The Ministry indicates that the Senior Technical Advisors conducted searches of the Ministry's files at the Drive Clean office, which included a review of their own working papers, discussions with other Drive Clean office staff and a review of the appellant's complaint file. The Senior Technical Advisors state that in conducting the search for responsive records, they asked staff whether they had spoken to the appellant and if there was a call record or a file created. They also indicated that the file room and the electronic "DCO" complaints database were searched. The Senior Technical Advisors provided a list of the staff they spoke to and the records that were located.

The Ministry indicates further that the Senior Technical Advisors contacted the Call Centre and the named company, both of whom subsequently identified or sent their records relating to the appellant's complaint to the Ministry. Two records were identified by the named company as relating to the appellant's complaint; the covert audit result and the complaint summary. The Ministry notes that the complaint summary was disclosed to the appellant and re-iterates that it issued a decision regarding the other records identified by the named company.

In its May 11, 2000 decision letter, the Ministry indicates that it received the named company's entire file with respect to the complaint all of which was disclosed to the appellant, with the exception of the Covert Audit report. The records obtained from the named company include complaint information received from the Call Centre, an incident report and notes made by an investigator with the named company. Also included in the records disclosed is the summary of the findings of the Covert Audit.

Based on the steps taken by staff of the Drive Clean office and a review of the records obtained from the named company, I am satisfied that the Ministry's search for responsive records which had been in the possession of the named company was reasonable.

One of the records from the Drive Clean office's database that was disclosed to the appellant indicates that many calls were made back and forth between the appellant, the Drive Clean office and the named company. In addition, this record indicates that the Drive Clean office could not facilitate a solution to satisfy both parties. There do not appear to be any specific records identified that clearly support these statements on the database, such as notes of telephone calls or records that relate directly to mediation efforts. However, based on the Ministry's submissions, and in particular, the statements made by the Senior Technical Advisors regarding the staff they contacted and the locations that were searched and the records which were located, I am satisfied that the steps they took in searching for responsive records in the Drive Clean office was reasonable.

Accordingly, I find that the Ministry's search for responsive records was reasonable in the circumstances.

ORDER:

This appeal is dismissed.

Original signed by: November 6, 2000
Laurel Cropley
Adjudicator