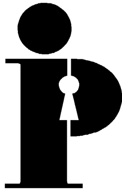

ORDER PO-1873

Appeal PA-990274-1

Ministry of the Solicitor General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Solicitor General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain records from the Ontario Fire Marshal's Office (the OFM) relating to carbon monoxide detectors (CO detectors).

Specifically, the request reads as follows:

> Please provide 1998, 1999 records from the [OFM's] office for Application One and Two on:
>
> Application One
>
> • the quality and effectiveness of [CO] detectors in Ontario, and those that meet CSA [Canadian Standards Association] standards/suggested standards/meet Health Canada indoor air quality guidelines, those CO detectors that are better at addressing and meeting all these differing standards/requirements, those CO detectors that are useless or of poor quality, and whether CO detectors should require display warning levels, and alarm hazardous levels and better technology for consumer use.
>
> • the effectiveness and need for other cities to adopt bylaws like Toronto has for mandatory installation of [CO] detectors.
>
> • the solutions for buildings with combustion products like cars, stove, with attached garages, furnaces that would complement use of CO detectors (eg. better ventilation etc)
>
> • Problems experienced with fire departments being called too often to check on CO detector complaints in Canada, given different levels or standards of detection in Canada than the US, any idea of costs and frequencies of such call, including in Toronto where such detectors are mandatory, and remedies suggested or advocated by the [OFM]
>
> • Communications with gas companies, CO detector companies about their concerns re CO detector standards and use, and customer abuse or too frequent complaints; and how authentic or necessary consumer concerns/complaints on CO detectors are.
>
> Application Two
>
> • assessments/comments of the tests on CO detectors and their defective rates conducted by [a named individual] for W5 and Seneca College and any investigations of his company ([a named company] I believe is the company name) or checks done or run on [the named individual] and his background; and reviews, reactions to W5, CTV or other media stories on CO detectors.

- assessments/comments done of US tests of CO detectors, including those done by the Gas Research Organization or other groups and on the recall stand taken by the US Consumer Product Safety Commission for certain CO detectors, and on differences in Canada/US in terms of more sources of CO in the US given, for instance, more indoor gas heaters and gas barbecue cookers/stoves and less requirements there for outdoor ventilation of buildings in building codes.

In turn, the Ministry assigned file number 99-0383 to Application One and file number 99-0385 to Application Two.

Subsequently, the appellant wrote back to the Ministry and added the following to request 99-0385:

- 1998, 1999 testing and testing findings of [CO] detectors commissioned by or done by the [OFM], including testing by the Underwriters Labs, either done in Canada or USA; Fire Marshal's summary of tests and assessment of tests done; and plans for the release of such test results or records or reasons why test results are not being released as yet; and the costs and terms of reference of such testing.

The appellant later wrote another letter to the Ministry with respect to request 99-0385 clarifying that the records which he wishes to be considered are:

- the 1999 Underwriters Labs (Canada and US) [CO] detectors tests, test results, presentations, telephone, E mail, other communications or records about these tests, [OFM] memos, participation re these 1999 tests, their assessment, summaries of these tests an failure rates, findings of [CO] detectors commissioned by or done by the [OFM], including testing by the Underwriters Labs, either done in Canada or USA, costs and terms of [OFM] involvement (including using or involvement of [named individual] and his notes, memos), plans for the release of such test results or records or reasons why test results are not being released as yet.

- The 1998, 1999 probing, checking, and investigation of [a named individual], his background or his company, [named company], given his [CO] detectors testing for W5 and Seneca College. The issue is whether FMO was behind or knew of such investigations and has records on this. A direct response on whether said records are available is needed.

The Ministry responded by extending the time for processing both requests. The appellant appealed the Ministry's decision to extend the time with respect to request 99-0383. Appeal PA-990185-1 was opened to deal with that matter.
Appeal PA-990185-1 was later resolved in mediation. As part of the resolution, at the request of the Ministry, the appellant agreed to transfer the first paragraph of request 99-0383 over to request 99-0385. Accordingly, request 99-0385 now includes the first paragraph of request 99-0383.

Subsequently, the Ministry issued the following decisions with respect to requests 99-0383 and 99-0385.

Request 99-0383

The Ministry advised the appellant that no responsive records were identified.

Request 99-0385

The Ministry identified 35 pages of records responsive to this request and in turn notified five third parties whose interests might be affected (the affected parties) by the request. Of the five affected parties, three parties advised the Ministry that they had no objections to the disclosure of a number of responsive records. The remaining two affected parties responded to the Ministry and objected to the disclosure of a number of the records.

Subsequently, the Ministry issued its decision to the appellant and disclosed pages 1-14 of the responsive records. The Ministry denied access to the remainder of the records, pages 15-35, pursuant to sections 17(1)(a), (b) and (c) (third party information) of the *Act*.

In this decision, the Ministry also advised the appellant of its position that records maintained by the Fire Marshal's Public Fire Safety Council (the Council) are not in the custody or under the control of the Ministry. The Ministry went on to indicate that it has not undertaken a search for any responsive records which may be in the custody or under the control of the Council.

The appellant appealed both of the Ministry's decisions. Appeals PA-990273-1 (request 99-0383) and PA-990274-1 (request 99-0385) were opened.

During the course of mediation, the parties agreed that Appeal PA-990273-1 be held in abeyance pending the outcome of Appeal PA-990274-1 with respect to the issue of custody or control of records maintained by the Council. Accordingly, Appeal PA-990273-1 is not being considered in this order.

Further, the appellant advised the Mediator that he is not pursuing access to pages 19-28 of the records at issue in Appeal PA-990274-1. Accordingly, these pages are no longer at issue in this appeal.
Also during mediation, the Mediator contacted Underwriters' Laboratories of Canada (ULC) to determine whether it would consent to disclosure of one of the records at issue. This record (pages 29 - 35) contains the handwritten observations of an OFM employee who attended at the testing of CO detectors by ULC. ULC advised the Mediator that it has no objection to the release of pages 29 - 35. The Mediator forwarded ULC's response to the Ministry. At the time the Notice of Inquiry was sent to the Ministry, it had not revisited its decision regarding these pages.

During mediation, the appellant raised the possible application of the "public interest override" in section 23 of the *Act*. The appellant also takes issue with the Ministry's position that records maintained by the Council are not in the custody or under the control of the Ministry.

Further, the appellant believes that certain records created by ULC relating to the testing of CO detectors in 1999 are under the control of the Ministry, and therefore, should be subject to the *Act*. The Ministry and ULC disagree with this position.

Finally, the appellant takes the position that the Ministry should have undertaken a search for any responsive records which may be in the custody of the Council. Moreover, the appellant believes that additional records responsive to all parts of his request should exist.

The Ministry takes the position that the issue of reasonableness of search should not be addressed in this appeal until the issue of custody or control has been resolved.

In the Notice of Inquiry that I initially sent to the Ministry, the Council, ULC and CSA, I indicated that I agree with the Ministry's position that it should not be required to conduct a search for any records which are currently in **the custody of** the ULC or the Council if these records are maintained separately from the OFM's records until I have made a decision on custody or control of such records. However, I also stated that the Ministry would be required to conduct a search within its own records system for any records that were created by, or that it may have received from, either of these two bodies and which could be in the custody of the Ministry. This would include any records that are in the custody of the OFM's office. It was not clear that the Ministry had done so. Moreover, the appellant believes, generally, that more records should exist. Therefore, I included the reasonableness of search as an issue in this appeal.

In the event that I find that the records from the Council and/or ULC are within the Ministry's custody and/or control, I will order the Ministry to conduct a further search for responsive records. The Ministry's subsequent decision in that regard would be appealable to this office.

I received submissions from all four parties.

After the Notice of Inquiry was sent to it, the Ministry reconsidered its decision regarding access to pages 29 - 35. In light of the fact that ULC did not object to their disclosure, the Ministry issued a further access decision in which it granted access to these pages. The Ministry also provided the appellant with additional information which was prepared by the author of these pages in order to assist him in interpreting the observations contained in them as well as a copy of a letter which it had recently received from ULC containing a summary of the status of ULC testing of CO detectors from February 1999 to the present. Accordingly, pages 29 - 35 are no longer at issue in this appeal.
Subsequent to the submission of its representations, the Ministry issued a further access decision, indicating that, as a result of the Notice of Inquiry, it conducted a further, more expansive search for responsive records up to June 30, 1999 and as a result, 125 pages of additional records were located. The newly located records consist of e-mails, notes and memoranda, minutes of meetings, correspondence, news release, Questions and Answers, reports, position statement, newspaper articles and other documents. The Ministry issued a decision to the appellant dated July 31, 2000 in which partial access to these records was granted. The appellant was given 30 days to appeal the Ministry's decision on access to these newly found records. The records referred to in this decision are not at issue in the current appeal. However, the fact that more records were located as a result of this further search addresses, at least in part, the issue of the reasonableness of the Ministry's search for records responsive to the appellant's request.

I sent the same Notice of Inquiry to the appellant along with the complete representations of the Ministry, the Council and ULC and the non-confidential portions of CSA's representations. The appellant was asked to review all of these representations and to respond to the issues set out in the Notice.

The appellant was asked to specifically address the fact that the Ministry had located more records in responding to the reasonable search issue. Further, if the appellant accepts the explanations given by any party with respect to any issue in this appeal, he was asked to so indicate in his representations.

The appellant submitted representations in response. He also indicated that he wishes all of his previous correspondence with this office to be considered by me in arriving at a decision in this matter. In responding to the records remaining at issue in this appeal, the appellant does not address the application of section 17 to them, but rather, focuses on the application of the issues relating to custody or control and the public interest override in section 23.

After reviewing the submissions of all parties, and in particular, the representations concerning the application of section 17 to the records, I decided it was not necessary to seek representations in reply as the appellant's representations did not specifically address the section 17 issue, and, in light of my dispositions, I did not require a response from the other parties on the remaining issues.

RECORDS:

The records in the Ministry's custody which it identified as responsive to request 99-0385 total 35 pages and consist of letters, an internal memo, demonstration data and notes. Of these records, only pages 15 to 18 remain at issue. They consist of four letters between the OFM and CSA and have been withheld on the basis of section 17(1) of the *Act*.

Before turning to the application of section 17(1) to the records at issue, I will determine whether the Ministry has custody and/or control over any other records which may be in the possession of ULC or the Council.

DISCUSSION:

ARE RESPONSIVE RECORDS IN THE CUSTODY OF THE COUNCIL OR OF ULC SUBJECT TO THE ACCESS PROVISIONS OF THE ACT?

Section 10(1) of the *Act* provides a right of access to records "in the custody or under the control of an institution." In order to meet the requirements of subsection 10(1) of the *Act*, the record in question must be "...in the custody or under the control of an institution..." (emphasis added). Only one of these criteria need be satisfied (Order 41). The Ministry argues that the Council's records are not in its custody or under its control. The Ministry and ULC also dispute the appellant's position that certain records of ULC are under the Ministry's control.

In the Notice of Inquiry, I asked the Ministry, the Council and ULC to provide representations in response to the following questions regarding section 10(1). These questions expand upon a list of indicia of custody

and/or control originally identified by former Commissioner Sidney Linden in Order 120. I also made reference to other authorities under each question, where appropriate.

1. Does the Ministry have a statutory power or duty to carry out the activity which resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner*) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), affirmed (1999), 47 O.R. (3d) 201 (C.A.)].

2. Was any record created by an officer or employee of the institution?

3. Is the activity in question a "core", "central" or "basic" function of the Ministry? [Order P-912]

4. Are there any provisions in any contracts between the Ministry and the Council/ULC, in relation to the activity which resulted in the creation of the records, which expressly or by implication give the Ministry the right to possess or otherwise control the records? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner*), [1999] B.C.J. No. 198 (S.C.)]

5. Was there an understanding or agreement between the Ministry and the Council/ULC or any other party that the records were not to be disclosed to the Ministry? [Order M-165]

6. Who paid for the creation of the records? [Order M-506]

7. What use did the creator intend to make of the records?

8. Was the Council/ULC an agent of the Ministry for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the Ministry to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

9. What is the customary practice of the Ministry in relation to possession or control of records of this nature, in similar circumstances?

10. Does the Ministry have the authority to regulate the records' use?

11. Does the Ministry have the authority to dispose of the records?

12. What is the customary practice of the Council/ULC and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?

13. To what extent did the Ministry use or rely or intend to use or rely on the records? [Order P-120]

14. Who owns the records? [Order M-315]

15. Has the Council/ULC refused to provide the Ministry with a copy of the records and, if so, to what extent, if any, should this affect the determination of the control issue?

16. Who has physical possession of the records? Does the Ministry have possession of the records, either because they have been voluntarily provided by the Council/ULC or pursuant to a mandatory statutory or employment requirement? Does the Ministry have a right to possession of the records?

17. 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?

18. How closely is the record integrated with other records held by the institution?

As noted by Senior Adjudicator David Goodis in Order MO-1251:

> These questions reflect a purposive approach to the "control" question under section 4(1). A similar approach has been adopted in Ontario and other access to information regimes. In *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, the Court of Appeal for Ontario (at p. 6, para. 34) adopted the following passage from the Federal Court of Appeal judgment in *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 at 244-245:

The notion of control referred to in subsection 4(1) of the *Access to Information Act* ... is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

> The Federal Court of Appeal continued (at p. 245):

> It is, in my view, as much the duty of courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the *Act* or otherwise circumventing the intention of the legislature as "[i]t is the duty of boards and courts", as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the *Canadian Human Rights Act* ... "to give s. 3 a liberal and purposive construction, without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature" ... It is not in the power of this court to cut down the broad meaning of the word "control" as there is nothing in the *Act* which indicates that the word should not be given its broad meaning ... On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the *Act* to government information ...

In this appeal, it will be necessary in particular to consider the following issues, each of which could provide a basis for concluding that responsive records in the possession of the Council and/or ULC are under the custody and/or control of the Ministry, and therefore subject to the *Act*:

- are ULC or the Council part of the Ministry?
- are any records of ULC or the Council intermingled with the Ministry's or the OFM's records in such a way as to bring them within the custody of the Ministry?
- is there any basis, contractual or otherwise, for concluding that the Ministry has control over responsive records in the custody of ULC or the Council?

Before proceeding with this analysis, it will be helpful to describe the roles of the OFM, the Council and ULC in relation to the Ministry, because they are of crucial importance in assessing all of these issues.

The Office of the Fire Marshal

The Ministry states:

> The [OFM] is part of the Public Safety Division of the Ministry. The primary role of the OFM is to minimize the loss of life and property in Ontario from fire. The OFM provides support to municipalities and fire departments in the areas of public education, fire prevention, fire protection, training and fire investigation. The OFM is a source of expert advice within the Ontario Government with respect to standards and legislation relating to fire prevention and protection. The OFM is responsible for the administration of the *Fire Protection and Prevention Act* (the *FPPA*) and the *Ontario Fire Code*, which is a regulation under the *FPPA* setting out fire safet
> requirements for all buildings and premises in Ontario. The OFM is also mandated to make recommendations for the provision of adequate levels of fire safety for buildings and premises within the province.

This description is in accord with the provisions of the *FPPA*.

Fire Marshal's Public Fire Safety Council

The Council is established under Part XI of the *FPPA* as a corporation without share capital. According to the Ministry and the Council, the Council was granted charitable status in 1998. The primary mandate of the Council is set out in section 61 of the *FPPA*:

> The objects of the Council are,
>
> (a) to promote fire safety throughout the province;
>
> (b) to produce and distribute materials for public education with respect to fire safety;
>
> (c) to provide or endorse training, education and fire prevention activities;
>
> (d) to facilitate and co-ordinate the public exchange of information and ideas on matters of fire safety;
>
> (e) to solicit; receive, manage and distribute money and other property to support the objects described in clauses (a), (b), (c) and (d);
>
> (f) to enter into partnerships and agreements with persons or organizations in the private sector or with public bodies or organizations to further the objects described in clauses (a), (b), (c), (d) and (e); and
>
> (g) to advise the Fire Marshal on matters of fire safety.

Sections 60(2) and 62 set out the composition of the membership of the Council which includes the Fire Marshal/Deputy Fire Marshal as Chair, members who are appointed by the Fire Marshal and a board of directors appointed from the membership by the Minister on the recommendation of the Fire Marshal. The Ministry notes that the membership of the Council is diverse and includes representatives from fire services, businesses, government, health and safety organizations, the media and the public. The Ministry indicates that the Council is involved with unique sponsorships and partnerships with other organizations interested in public safety and that it raises funds for its activities through fundraising and partnerships.

The powers of the Council are set out in sections 63(1) and (2) of the *FPPA*. The board of directors for the Council has the power to enter into agreements with other organizations that have similar mandates or interests, to endorse products contributing to public safety and to independently manage the funds of the Council.

Section 67(1) of the *FPPA* provides that the board of directors of the Council may employ or contract for the services of any individual it considers necessary for the functioning of the Council. Section 67(2) specifies that these individuals are not Crown employees within the meaning of the *Public Service Act*.

The Ministry and the Council both note that the Council is not designated as an institution under the *Act*.

Underwriters' Laboratories of Canada

The Ministry notes, as confirmed by public documents released from ULC, that this organization is:

> ... a safety, certification, testing, quality registration and standards development organization. ULC is a not-for-profit organization accredited by the Standards Council of Canada under the National Standards System and affiliated with Underwriters Laboratories Inc. in the United States. ULC is concerned with the protection of life and property and has a strong public safety mandate. In its testing laboratories, ULC investigates devices and materials for safety and effectiveness or for benefit in crime prevention. ULC also provides technical product information to inspection authorities.

The Ministry also notes that ULC is not designated as an institution under the *Act*.

Are ULC and the Council a part of the Ministry?

If either ULC or the Council is a part of the Ministry, then the Ministry will have custody and/or control of any records in the custody and/or control of that body. The definition of "institution" at section 2(1) of the *Act* states:

"institution" means,

> (a) a ministry of the Government of Ontario, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

The appellant does not suggest that ULC is a part of the Ministry, nor that it is designated as an institution (which it is not). Moreover, it is apparent from the description of this organization above that it is not connected to the Ministry in any way. Accordingly, I find that ULC is not a part of or connected to the Ministry in such a way that the Ministry can be found to have custody of its records.

With respect to the Council (which is also not designated as an institution by regulation), the appellant states as follows in his letter of appeal:

> I disagree that the Fire Marshal dons a completely non-regulatory role under public pieces of legislation like the Ontario Fire Code and Fire Protection and Prevention Act and can remove part of his functioning from FOI coverage by chairing a Public Fire Safety Council. [The Fire Marshal] initiated the CO detector testing in question and received the results and there is some summary of results but not the necessary raw data results. Simply because his office only assisted in the testing does not then make his office immune and not able to publicly review and release test results for public safety under his mandate.

After being given the opportunity to review the representations from the Ministry and the Council on this issue, the appellant did not make specific submissions on whether the Ministry has custody or control of the Council's records. Rather, he states:

> The Solicitor General Ministry's backing up of its Fire Marshal and his positions is to be expected and suspect, including their coy knowledge that sought after records "may" be put separately in the Safety Council's hands, and not their "responsible" hands or requested responsibly by them.
>
> ...
>
> ... The Ministry did not bother to seek out Fire Safety Council records as a third party as these records presumably are not "borderline" but invisible under the Fire Marshal's Council hat.

Both the Council and the Ministry state that the Council is not part of the OFM and that it operates independently with its own by-laws, policies and procedures. The Council describes its role in its annual report under the heading "Organization Profile":

> With the introduction of the [*FPPA*], the Council was established as a non-profit corporation without share capital, under the law (Part XI, Section 60). This required the Council to put into place an organizational structure that would serve its members and meet the responsibilities of its new official status. Working at arm's length from government, the Council has the unique ability to raise and disseminate funds, form partnerships and selectively endorse programs and products. The Council now operates under a structure that includes a Chair, two Vice-Chairs, an Executive Committee, a Board of Directors and five Standing Committees. The Council can also take advantage of technical and administrative support from the Office of the Fire Marshal.

In its representations, the Council adds:

> The business affairs are controlled and managed by the Council members. To facilitate this, the Council maintains and operates a separate financial system to manage the financial affairs of the Council, prepares Income Tax Returns for Revenue Canada, and an outside chartered accountant firm has been contracted for auditing purposes. The Council's revenue is maintained in a bank account with a local credit union and funds are disbursed only with the approval of Council members. The Council has its own stationary and registered logo.

The Council notes that the Fire Marshal or Deputy Fire Marshal is the Chair of the Council pursuant to section 62(4) of the *FPPA*. In addition, section 68 of the *FPPA* states:

> The Office of the Fire Marshal may, on request, provide administrative, technical or expert advice or assistance to the Council.

Both the Ministry and the Council confirm that the Council's Co-ordinator is an OFM employee. In particular, the Ministry indicates that the Council's Co-ordinator is an OFM employee who is exclusively assigned to the Council on a full time basis pursuant to section 68 of the *FPPA*.

There are clearly links between the OFM and the Council in that the Fire Marshal is the chair of the board of directors, its members are appointed by or on the advice of the Fire Marshal, and the Council may use and rely on OFM staff to provide support or advice. There are also indications that the Council is accountable to the Ministry through the submission of annual and other reports as required by the Minister (section 71).

However, the provisions of Part XI must be read together and the Legislature's intention determined on that basis, if possible.

In considering the various provisions of Part XI, most specifically:

- sections 60 (1) and (2), 62(1) and 65 concerning the establishment of the Council as a corporation with all affairs managed by a board of directors, including the passing of by-laws;
- section 61 which sets out the objects of the Council;
- section 63(1) which establishes the powers of the Council;
- sections 64(1) and 66(2) relating to the Council's use of money and property, its ability to borrow on its own credit and to invest funds that are not immediately required; and
- section 67 which provides that the Council may employ or contract for the services of any person it considers necessary and that such persons are not Crown employees within the meaning of the *Public Service Act*.

it is apparent that the Legislature's intention was to create a body separate and apart from the OFM, admittedly with a similar general role, that being fire prevention and public education, but with a different mandate and objectives. The Council is not a regulatory body. Its purpose is to promote fire prevention and public education by taking steps beyond the mandate of the Fire Marshal himself. The intention to make the Council self-reliant and autonomous is clear from the legislation. In this regard, the Council notes that the use of OFM staff is an interim measure until it is able to become self-supporting.

In *Walmsley v. Ontario (Attorney General)*, (1997) 34 O.R. (3d) 611, the Ontario Court of Appeal considered whether the Judicial Appointments Advisory Committee could be considered part of the Ministry of the Attorney General. In finding that the Committee was not part of the Ministry, the Court stated:

> The [Assistant Commissioner's] finding of control was based in part on the conclusion that the committee could be said to be a part of the Ministry. With respect, I disagree. Individual committee members were not employees of the Ministry. Even if they were in

> some respects agents of the Ministry, that is not enough to make them part of the Ministry. If it were, any agency of a ministry would automatically be subject to the Act and s. 2(1)(b), designating specified agencies to come within the Act, would be superfluous. Nor could the nature of the work of the committee have made its members part of the Ministry. Nothing in the definition in s. 2(1)(a) suggests this. Nor would the legislature have intended that simply by giving independent advice to the Attorney General individuals would be subjected to the access provisions and recordkeeping obligations of the Act. Hence, in my view, the records in question could not be said to have come within s. 10(1) on the basis that individual committee members were part of the Ministry. They were not.

Based on the provisions of Part XI of the *FPPA*, and on the Council's approach to its role as described in its annual report, I am satisfied that the Council is a separate body acting at arm's length from the Ministry, and in particular, the OFM. Moreover, while the circumstances in this case are not identical to *Walmsley*, in my view, they are sufficiently analogous to lead me to conclude that the Council should not be considered a part of the Ministry for the purposes of the *Act*. Accordingly, I find that the Ministry does not have custody or control over the Council's records on that basis.

Are any records of the ULC or the Council intermingled with the Ministry's or the OFM's records in such a way as to bring them within the custody of the Ministry?

In Order P-239, former Commissioner Tom Wright considered whether records in the possession of the Ministry of Government Services, but prepared by the Ombudsman (which is not an institution under the *Act*), were subject to the *Act*.

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.
>
> ...
>
> I agree that bare possession does not amount to custody for the purposes of the *Act*. In my view, there must be some right to deal with the records and some responsibility for their care and protection.

In Order P-267, Assistant Commissioner Tom Mitchinson considered whether political records in the office of the Premier were within the custody of an institution. He found that the contents of the records did not relate to the institution's mandate and functions, but rather to the political responsibilities of the Office of the Premier in supporting the Premier as party leader. However, he concluded that the records were within the institution's custody because of the manner in which they had been intermingled with the institution's other records, and because of the authority exercised over them by an employee:

> ... these records have been integrated into the operations of the institution in a manner which constitutes custody under the *Act*. [It is acknowledged] that no special steps were taken to separate the storage and maintenance of these records from other documents relating to his employment with the institution, and it would appear that these records were integrated with other files held by the institution. In my view, [the employee of the institution] assumed responsibility for the care of these records, and had control over their use.
>
> In these circumstances, I am of the view that the institution has more than mere possession of the records. Therefore, I am satisfied that the institution has custody of the records for the purposes of the *Act*.

In Order P-994, I considered whether the Ministry of the Attorney General, in its role as administrator of records which are found in court files, had custody of them. In recognizing that the responsibility over records in a court file is divided between the Ministry of the Attorney General and the judiciary, I found that the Ministry was not involved in the creation of the records, that the records related to court proceedings as opposed to its mandate and functions, that it could only dispose of records under the direction of the judiciary and that the records were maintained separate and apart from other Ministry records. I concluded that "although the Ministry is in 'possession' of records relating to a court action in a court file, its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to 'custody' for the purposes of the *Act*". This analysis was based on a number of the indicia of custody and control first established by former Commissioner Sidney B. Linden in Order 120 (referenced above).

ULC

The Ministry states that any records exclusively held by ULC are not in its possession and, therefore, not integrated with its own records. ULC confirms that the Ministry does not have any of ULC's records in its possession (other than those already identified). I am satisfied that, except for copies that may have been provided by ULC to the Ministry, no ULC records are intermingled with the Ministry's in such a way as to bring them within the Ministry's custody. I find that they are not within the Ministry's custody for the purposes of section 10(1) of the *Act*.

The Council

The evidence presented to me does not indicate clearly whether the Council's office is contained within the OFM, although it appears that it is. The Ministry states:

> With respect to the separate offices held by the Fire Marshal of Ontario, the Ministry is aware that the Fire Marshal has ensured that records relating to the affairs of the OFM and records relating to Council activities are not integrated and are maintained separately.

Both the Ministry and the Council state that the Council's records are maintained separately from those of the OFM. In particular, the Council states:

> As stipulated in the Council's Policy and procedure, Reference #1, Clause 5.02: "No person, other than a member of the Council shall be provided with any Council records other than in accordance with the provisions of this policy" OFM does not have access to the records. In accordance with this policy, the Fire Marshal does not maintain any original records pertaining to the business of the Council. The only records the Fire Marshal does maintain, is a record of the Council members' appointment letters issued by the Minister.

The Council acknowledges that the Fire Marshal, as chair of the Council, created some of the records. The Council indicates that other records were created by the Council's Secretary-Treasurer and the Council Co-ordinator.

The Ministry confirms that one or more of these individuals may have created responsive records. The Ministry notes that all of these individuals are employed by the Ministry but states that "the work they undertake on behalf of the Council is not in their capacity as Ministry employees and does not relate to Ministry business". In this regard, the Ministry reiterates that pursuant to section 68 of the *FPPA*, the OFM may provide support to the Council and that such staff are assigned exclusively on a full time basis to provide support to the Council. The Council maintains that as it becomes more financially self-sufficient, the support activity provided by the OFM will decrease.

The Council confirms that all of its records are in the Council's possession and that no officer or employee of the Ministry holds them (in their capacity as an OFM employee in any event). The Council states that it did not provide the records to the Ministry for the purpose of the appeal because they are the property of the Council and not subject to the *Act*. The Council reiterates that the records are in the control of the Council Co-ordinator in her capacity as Council support and not as an OFM employee. The Council notes that the role of the Council Co-ordinator is to act as a liaison to the Council members, provide assistance, administer and co-ordinate the activities of the Council. As part of the administration function, the Co-ordinator physically maintains and controls Council records. As I indicated above, the Council states that its records are kept in a separate location within the Co-ordinator's office and are not integrated with Ministry records in any manner. The Council specifically notes that the Fire Marshal does not maintain any original records pertaining to the business of the Council.

The Ministry confirms that the Council's records are maintained in a separate office that is designated for Council use only.

Even if the Council records that are maintained in the Co-ordinator's office are housed on OFM premises, I am satisfied that they are held separate and apart from OFM records. The mere fact that they may be on OFM premises is not sufficient to bring them within its custody. I accept that the staff of the OFM has no right, ability or need to handle these records.

This situation is entirely different from the circumstances in Order P-267. In my view, there is no basis here for concluding that the Council's records are intermingled with the OFM's in such a way as to bring them

within the custody of the Ministry. I find that the records which are maintained by the Council are not within the Ministry's custody for the purposes of section 10(1) of the *Act*.

That being said, this conclusion does not extend to copies of Council records which might exist outside of the Council's custody. I note that the Council makes a number of references to "original" records in its submissions. It may be that some Council records are copies of records originating from the OFM. It may also be that the OFM has some records or copies of Council records, for example, correspondence between the two bodies or requests for or sharing of information between the Council and the OFM and/or Fire Marshal in his capacity as Fire Marshal as opposed to Chair of the Council. Accordingly, to the extent that copies of any records in the custody of the Council also exist in the OFM, they would fall within the custody and/or control of the Ministry and, therefore, would be subject to the *Act* (see: Order P-994).

Is there any basis, contractual or otherwise, for concluding that the Ministry has control over responsive records in the custody of the ULC or the Council?

The evidence relating to the issue of control in the circumstances of this case relates to a number of the questions I asked in the Notice of Inquiry, as outlined above, and I will conduct my analysis accordingly.

6. ***Statutory powers and core functions***

In *Ontario (Criminal Code Review Board) v. Doe* (1999), 47 O.R. (3d) 201, the Ontario Court of Appeal held that the backup tapes of Criminal Code Review Board proceedings, made by a court reporter, were part of the "record" that the Board was required to keep under the provisions of the *Criminal Code*. For this and other reasons, the Court concluded that the tape was under the Board's control for the purposes of section 10(1).

The Ministry states that it does not have a statutory power or duty to carry out the activity that may have resulted in the creation of either Council or ULC records. In this regard, the Ministry states that the OFM does not have regulatory authority under the *FPPA* to mandate the installation or maintenance of CO detectors, nor does it have a mandate to test devices such as CO detectors to
Canadian standards. The Ministry notes that testing devices is the responsibility of accredited testing agencies such as ULC and the CSA.

The Ministry states further that the appellant's access request focuses on the testing of CO detectors and related issues and submits that the testing and evaluation of these products is not a core or central function of the Ministry.

In contrast, the Ministry, supported by the Council, takes the position that issues relating to CO detectors fall within the mandate of the Council to "promote public safety awareness".

The Ministry notes, however, that while the primary focus of the OFM is fire prevention and protection, "fire protection services" as defined in the *FPPA* is broadly worded and includes fire suppression, fire prevention, fire safety education, communication, training of persons involved in the provision of fire protection services, rescue and emergency services and the delivery of all those services. The Ministry

notes further that under section 9(1)(a) of the *FPPA*, the Fire Marshal has the power to monitor, review and advise municipalities respecting the provision of fire protection services and to make recommendations to municipal councils for improving the efficiency and effectiveness of those services. The Ministry states that the OFM might have been involved in this issue insofar as the use and effectiveness of CO detectors is a public safety issue relating to the provision of rescue and emergency services.

ULC agrees that testing and report writing (relating to CO detectors) is not a core function of the Ministry. ULC affirms, however, that it forms one of its core functions.

Sections 9 (1) and (2) of the *FPPA* set out the powers and duties of the Fire Marshal.
(1) The Fire Marshal has the power,

> (a) to monitor, review and advise municipalities respecting the provision of fire protection services and to make recommendations to municipal councils for improving the efficiency and effectiveness of those services;
>
> (b) to issue directives to assistants to the Fire Marshal respecting matters relating to this Act and the regulations;
>
> (c) to advise and assist ministries and agencies of government respecting fire protection services and related matters;
>
> (d) to issue guidelines to municipalities respecting fire protection services and related matters;
>
> (e) to co-operate with any body or person interested in developing and promoting the principles and practices of fire protection services;
>
> (f) to issue long service awards to persons involved in the provision of fire protection services; and
>
> (g) to exercise such other powers as may be assigned under this Act or as may be necessary to perform any duty assigned under this Act.
>
> (2) It is the duty of the Fire Marshal,
>
> (a) to investigate the cause, origin and circumstances of any fire or of any explosion or condition that in the opinion of the Fire Marshal might have caused a fire, explosion, loss of life or damage to property;
>
> (b) to advise municipalities in the interpretation and enforcement of this Act and the regulations;

> (c) to provide information and advice on fire safety matters and fire protection matters by means of public meetings, newspaper articles, publications, electronic media and exhibitions and otherwise as the Fire Marshal considers advisable;
>
> (d) to develop training programs and evaluation systems for persons involved in the provision of fire protection services and to provide programs to improve practices relating to fire protection services;
>
> (e) to maintain and operate a central fire college;

(f) to keep a record of every fire reported to the Fire Marshal with the facts, statistics and circumstances that are required under this Act;

> (g) to develop and maintain statistical records and conduct studies in respect of fire protection services; and
>
> (h) to perform such other duties as may be assigned to the Fire Marshal under this Act.

Section 12 of the *FPPA* provides that the Minister may make regulations establishing a fire code for Ontario,

> ... governing fire safety standards for equipment, systems, buildings, structures, land and premises, including among other things:
>
> > (k) respecting the qualifications and training of persons servicing, maintaining, testing or repairing fire protection devices, equipment or systems and the licensing of such persons.

Neither the *FPPA* nor the Ontario Fire Code make specific reference to the OFM's role in the installation, monitoring or testing of CO detectors.

A number of provisions of the Ontario Building Code refer to the requirements for the installation of residential CO detectors as conforming with CAN/CGA-6.19. In a letter from the Standards Council of Canada (the SCC) to the OFM dated March 11, 1999 (which was disclosed to the appellant), the SCC advises the OFM that the National Standard of Canada for residential CO detectors is CAN/CGA-6.19-M93 and that only accredited Standards Development Organizations (such as ULC) are recognized by the SCC as being responsible for amending these standards.

Although the mandate of the OFM appears to address issues relating to fire safety, the provisions in sections 9(1) and (2) of the *FPPA* are, in my view, sufficiently broad to capture issues relating to carbon monoxide emissions within this mandate. In particular, as the Ministry notes, the Fire Marshal has the power to advise and assist ministries and agencies and to issue guidelines to municipalities with respect to "fire protection services and related matters" (sections 9(1)(c) and (d)). In my view, the link between carbon monoxide

emissions and fire and/or combustible materials is sufficiently direct to render carbon monoxide detection a "related matter" in relation to fire protection services.

Moreover, section 9(2)(a) of the *FPPA* provides that the Fire Marshal has a duty to investigate the cause, origin and circumstances of any fire or of any explosion **or condition that in the opinion of the Fire Marshal might have caused** a fire, explosion, **loss of life** or damage to property.

The records which have been disclosed to the appellant include a number of public documents prepared by the OFM relating to carbon monoxide emissions and CO detectors such as communiques on carbon monoxide awareness and technical information sheets, and questions and answers relating to CO detectors. In addition, issues relating to CO detectors have been included in a number of OFM executive committee meetings and internal OFM documentation indicates that the OFM was requested to, and, in fact did, investigate issues relating to CO detectors.

It is interesting to note that section 61 of the *FPPA* (set out above), which establishes the objects of the Council, refers only to matters relating to "fire" safety, education and prevention. It is arguable that the mandate of the Council is more restricted than that of the OFM with respect to matters related to fire safety. It is apparent, however, from the Council's annual report, that it views its mandate as pertaining to public safety issues generally. For example, the Council has established programs such as "Alarmed for Life", which promotes the use of smoke alarms and CO detectors and has broadened its scope to include public education regarding life safety skills to prevent childhood hazards such as drowning and poisoning.

In my view, the Ministry's position that the OFM does not have a statutory power or duty to carry out the activity that may have resulted in the creation of records relating to carbon monoxide emissions and detection is not supported by the legislation or the facts. Taken together, the evidence supports a finding that issues relating to carbon monoxide emissions fall within the overall mandate of the OFM. Therefore, I find that in involving itself in the issues surrounding the effectiveness of CO detectors, the OFM did so as part of its overall mandate relating to fire protection services and related matters.

That being said, however, based on the Ministry's representations and my review of the *FPPA*, the Ontario Fire Code and other information referred to above, I accept that the Ministry has neither a specific statutory power nor a duty to carry out the testing of CO detectors.

2. ***Creation, payment for and intended use of the record***

ULC states that all records related to the testing of the CO detectors were created by its employees. The Ministry confirms that it is not aware of any records created by Ministry staff being in ULC's custody.

The Ministry acknowledges that it purchased a number of the sample CO detectors that were used during the testing, but states that it was not charged a fee by ULC in respect to the testing of CO detectors undertaken in February, 1999. ULC confirms that it paid for the creation of the records.

The Ministry submits that any records created by ULC were created, and presumably used, as part of its mandate to test and certify such devices.

ULC confirms that it intended to use the records for ascertaining continued compliance of the product with the Standard as well as for taking corrective action in the event that failures of products were noted. ULC indicates that corrective action was, in fact taken in the case of specific CO detectors.
The appellant clearly believes that the records were created by ULC. It is apparent that Ministry staff attended the testing. However, the OFM employee's notes were retained by the employee and have now been provided to the appellant.

I am satisfied that the records in its custody were created by ULC. I am also satisfied that any involvement of ULC in the creation of records relating to CO detectors was, at least in part, motivated by its own interests in maintaining compliance of a product it had previously certified with the appropriate standard and that it intended that the records be used for this purpose. Although I accept that a corollary purpose may have been to respond to a request made by the OFM relating to this same issue, I find that such a response was consistent with its generally co-operative relationship with the OFM but is not an indicator that the Ministry was, thereafter, entitled to obtain the records. While I accept that the purchase of sample CO detectors to be tested could be viewed as establishing an interest by the Ministry in the results of the testing, when taken together with the other information regarding the relationship between the OFM and ULC, and the Ministry's and OFM's lack of specific mandate relating to the testing of CO detectors, I find that this is of very little weight in the final determination on the issue of control over the records.

The Ministry submits that any responsive records held by the Council in relation to the issue of CO detectors would have been created as part of the Council's mandate to promote public safety awareness. The Council indicates that it allowed a smoke alarm and CO detector manufacturer to use the Council logo on smoke alarms and CO detectors. It indicates further that a television program challenged the effectiveness of the product and the Council's involvement with it, which resulted in confusion and concerns being expressed by the public in regards to their safety. The
Council states that, because it is involved with various safety products, and in view of the fact that its role entails education and promotion of public safety awareness, it responded to the issues that were raised during this broadcast.

I find that the Council intended to use any records created by it for the purpose of fulfilling its own public safety and awareness mandate and because it had a vested interest in ensuring that a product which it appeared to endorse through the use of its logo conformed to appropriate safety standards.

As far as payment for the creation of Council records is concerned, both the Ministry and the Council submit that this question is not applicable to any records in the custody of the Council. With respect to the testing of CO detectors, the Council states that it does not have any such records in its custody. I accept the positions taken by the Ministry and the Council on this point.

3. ***Ownership, customary practice in relation to possession, authority to use and dispose of records***

The Ministry states that as an institution subject to the *Act,* it undertook a search for responsive records within its custody or control regarding the testing of CO detectors and related issues. The Ministry takes

the position that any records in the custody of the Council are owned by the Council and that in this particular case, any records in the custody of ULC relating to testing belong to ULC. The Ministry states further that it does not have the right to regulate the use or disposal of records in the custody of the Council, nor does it have the authority to regulate the use or disposal of ULC records in the circumstances of the testing done by ULC in this instance.

The Ministry states that it is aware that the Council has its own Access to Information, Record Retention and Protection of Personal Information Code which contains policies and procedures respecting the collection, disclosure, use, retention and disposal of Council records. The Ministry believes that it is likely that ULC has similar policies and procedures.

ULC states that its customary practice with respect to records of the nature of those at issue in this appeal is that it is the sole owner of the records. ULC contrasts situations where it independently investigates, such as is the case in this appeal, and those cases where it undertakes to certify a particular manufacturer's product. In the latter case, ULC states that any records jointly become the property of ULC and the manufacturer of the product. Finally, ULC takes the position that none of these records are subject to the *Act* and will only be released upon the request of the product manufacturer.

The Council states that it owns any records in its possession and asserts that the Ministry does not have the authority to regulate the records' use as the Council is independent from the OFM and is regulated by its members in accordance with the *FPPA*.

The Council states that, in accordance with its Policy and Procedure, Reference #001, Access to Information, its records are maintained in a separate office and controlled by the Council Co-ordinator. The Council confirms that its use and disposal of records are governed by this policy and procedure. The Council stresses that the OFM does not have access to these records, although it acknowledges that some OFM employees may have working files relating to Council business as part of the support they provide (pursuant to section 68 of the *FPPA*). However, the Council states that "all OFM employees are directed to maintain all working Council files separate from Ministry records and Council records are not integrated with Ministry records.

An important indicator of an institution's control over a record is an ability to dictate the manner in which the record is to be maintained. I am satisfied that the Council and ULC each own the records in their own possession and that the Ministry has no authority under statute to regulate the use and disposal of these records. In my view, these factors weigh significantly in favour of finding that the records are not within the Ministry's control.

4. ***Contract***

The provisions of any contract setting out the relationship between the parties in question may be a relevant factor on the issue of control [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)].

Both the Ministry and ULC indicate that there was no contract between them relating to the testing of CO detectors or related activities. ULC notes that if a contract is signed between it and the sponsor of a test

program, that contract entitles the sponsor to receive copies of test reports following completion of the test program. ULC attached to its representations application forms for investigation and listing and for special services. These forms detail the terms of the contract between ULC and the contracting party and describe the rights and obligations of the parties under the contract. However, ULC states that in this case there was no contract. Rather, as the Ministry notes, the testing was undertaken as agreed upon during a February 10, 1999 meeting attended by the Fire Marshal, the Deputy Fire Marshal and representatives from ULC.

ULC states further that it wanted to conduct the tests to satisfy itself that CO detectors met the requirements of the Canadian National Standard. In this regard, ULC states that it has an obligation as a certification organization to validate that such products certified by it continue to meet the requirements of the Standard to which they are certified.

The appellant's primary focus in his representations is on records that were created by and presumably are in the custody of the ULC. The appellant states that he cannot understand how records in the custody of ULC could not be under the control of the Ministry in circumstances where:

> ... their Fire Marshall, a public official, clearly wanted the CO detector testing done by ULC, and requested ULC to do it, paid monies to get the equipment for it, had their employees observe the testing and report on the tests, and know the results.

The appellant takes the position that the records which were disclosed to him demonstrate a relationship between the Ministry and the ULC that would support a conclusion that the records are under the controlof the Ministry. The appellant refers to a letter from ULC to the Fire Marshal acknowledging that it agreed to do the tests as requested by the Fire Marshal and that the Fire Marshal was to select and purchase the CO detectors for ULC. The appellant contends that the presence of an OFM employee during the testing further confirms a close relationship and involvement of the OFM in the ULC tests.

The appellant submits that publicly ordered testing cannot be hidden by private interests. He submits further that it is only reasonable to conclude that in asking for ULC to conduct the tests, the OFM entered into a contract with it since ULC "rarely 'voluntarily' agrees to do testing, without industry or government's needing it".

I accept the submissions of the Ministry and ULC that a formal contract was not entered into between the OFM and ULC relating to the testing of CO detectors. Further, I have reviewed all of the responsive records, including those disclosed to the appellant. There is no indication in them that would support a finding that these two parties entered into either a written or verbal contract with respect to the testing of CO detectors. In particular, in correspondence directly related to the February 10, 1999 meeting attended by the Fire Marshal, the Deputy Fire Marshal and ULC (which was disclosed to the appellant), it is apparent that the two were involved in a “cooperative” effort rather than a contractual one.

The submissions of CSA (a similarly accredited not-for-profit organization) in relation to another issue in this appeal add further support to this conclusion. CSA notes that it is often consulted by regulatory authorities

to assist them in their work on a voluntary basis by providing information where they have it. In this regard, CSA refers to a Standard Council of Canada's document CAN-P-3 (and related versions), *National Standards System: Criteria and Procedures for Accreditation of Certification Organizations* which requires accredited organizations to maintain active and direct liaison with appropriate Canadian regulatory authorities. In my view, it is not unreasonable to expect that ULC would have similar types of contact with government authorities such as the OFM.

In my view, such an arrangement does not establish a contractual relationship between these organizations and "regulatory authorities" or other government bodies, but rather creates an atmosphere of co-operation between them, intended to serve the greater public interest.

As far as the Council is concerned, both the Ministry and the Council assert that there is neither an understanding nor agreement between them relating to activities which may have resulted in the creation of potentially responsive records that would give the Ministry the right to possess them. The Ministry reiterates that the Council is a separate and independent entity which has its own by-laws, policies and procedures. The Council contends that the only "agreement" between it and the Ministry pertains to the support provided to the Council by Ministry staff pursuant to section 68 of the *FPPA*.

I accept the submissions of the Ministry and the Council that there was no contractual or other agreement that would, either expressly or by implication, give the Ministry the right to possess or otherwise control any responsive records.

5. ***Agency at Common Law***

In Order MO-1251, Senior Adjudicator Goodis noted that:

> "Agency" is the relationship between one party (the principal) and another (the agent) whereby the latter is empowered to act on behalf of and represent the former. Agency can emerge from the express or implied consent of principal and agent [*Royal Securities Corp. v. Montreal Trust Co.*, [1967] 1 O.R. 137 (H.C.), affirmed [1967] 2 O.R. 200 (C.A.)]. Anyone doing something for another person can be an agent for that limited purpose [*Penderville Apartments Development Partnership v. Cressey Developments Corp.* (1990), 43 B.C.L.R. (2d) 57 (C.A.)]. An agent, though bound to exercise authority in accordance with all lawful instructions that may be given from time to time by the principal, is not subject in its exercise to the direct control or supervision of the principal. However, there must be some degree of control or direction of the agent by the principal [*Royal Securities Corp.*, above]. Among other things, an agent has a general duty to produce to the principal all documents in the agent's hands relating to the principal's affairs [F.M.B. Reynolds, *Bowstead on Agency*, 15th ed., (London: Sweet and Maxwell, 1985), Article 51 at p. 191; *Tim v. Lai*, [1986] B.C.J. No. 3171 at pp. 10-11 (S.C.)].

In responding to this issue, the Ministry, ULC and the Council all take the position that there was no agency relationship between the Ministry and the other two parties.

I have considered the circumstances of the issues dealt with relating to CO detectors, and the roles of these three parties as described above. I have also reviewed all of the responsive records, including those that were disclosed to the appellant. There is no evidence before me of a statutory, contractual or factual basis for concluding that either the Council or ULC were acting as agents for the Ministry in addressing this issue generally or in terms of any specific testing that was done on CO detectors. I therefore conclude that sucha relationship did not exist between the Ministry and the Council or ULC.

6. ***Reliance on the records***

The Ministry states that it has not used or relied on any records in the possession of the Council. The Council submits that this question is not applicable in the circumstances.

With respect to ULC records, the Ministry states that it has not used or relied upon any records exclusively in the possession of ULC. The Ministry notes that responsive ULC records in the possession of the Ministry have been included among the records identified as responsive to the appellant's request and acknowledges that these records are subject to the *Act*.

ULC states that, from its perspective, the Ministry did not use the records in fulfilling its mandate. On the other hand, ULC indicates that it used the records to fulfill its mandate as a certification organization in order to take appropriate action with the manufacturers of the products in question.

The records which have been located in the Ministry's offices support the claims made by these parties. It is apparent that the Ministry, in responding to this issue, used only public documents released by ULC and/or the notes made by its own staff who attended the testing. There is no evidence before me that indicates that the Ministry had or intended to use the records solely in the possession of either ULC or the Council in addressing the issue of CO detector safety.

7. ***Agreement that records not be disclosed to the Ministry***

In *Ontario (Criminal Code Review Board) v. Doe*, *supra*, the Ontario Court of Appeal found that the evidence did not disclose the precise contractual terms between the Criminal Code Review Board and its contractual partner who had possession of the record, but stated:

> .. the Board cannot avoid the access provisions of the *Act* by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the *Act*.

The Ministry states that there was no understanding or agreement between the Ministry and ULC or any other party that records relating to the testing were not to be disclosed to the Ministry. The Ministry states further that, in the interests of public safety, the OFM asked ULC to publicly release the results of the CO detector tests undertaken in February, 1999.

ULC indicates that it advised the OFM that it would release the findings of its testing to the Fire Marshal upon his request. ULC notes that no such request has been made.

I accept that there was no agreement that the records would not be disclosed to the Fire Marshal or that they must be disclosed to the Fire Marshal or in accordance with his direction. Rather, all of the evidence, including the representations of the Ministry and ULC and the records themselves, indicate that all communications between the two parties reflect the spirit of co-operation in which they addressed the concerns relating to CO detectors.

The Ministry and the Council both state, and I accept, that there was no understanding or agreement between them or any other party that the records would not be disclosed to the Ministry.

Conclusion

I found above, that the Council is not part of the Ministry, and that the records of ULC and the Council are not intermingled with those of the OFM or the Ministry, and that for these reasons the records are not in the Ministry's custody for the purposes of section 10(1).

I also find that the Ministry does not have control of records in the possession of the Council or ULC. Although I found that issues relating to carbon monoxide emissions fall within the overall mandate of the OFM under the statutory framework of the *FPPA* (point 1), there are no specific provisions which include the testing of CO detectors as falling within its mandate or core functions. Further support for this finding is grounded in the absence of a contractual or agency relationship between the Ministry and either the Council or ULC (points 4 and 5), combined with the fact that: the Council and ULC bore the expense associated with creating their records, which were created for their own independent purposes (Point 2), these records are owned by the Council and/or ULC and the Ministry has no right to control the use or disposal of them (point 3). Finally, the records themselves indicate that the Ministry did not rely on records exclusively in the possession of ULC or
the Council, but rather, the Ministry only referred to and/or acted upon public documents released from these sources (point 6).

Moreover, the Court of Appeal's statement as part of its summation in *Walmsley*, *supra*, that "... there is nothing in the [evidence before the Commissioner] that allows the conclusion that these documents were *in fact* controlled by the Ministry", is equally true in the present case.

Accordingly, I find that any records solely in the possession of ULC and the Council are not under the custody or control of the Ministry for the purposes of section 10(1) of the *Act*.

THIRD PARTY INFORMATION

As I indicated above, the Ministry claims that section 17(1) applies to exempt pages 15 to 18 of the records that are within its custody from disclosure. Section 17(1) of the *Act* reads, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to qualify for exemption under sections 17(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

To discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Orders 36, P-373].

This three-part test and the statement of what is required to discharge the burden of proof under part three of the test have been approved by the Court of Appeal for Ontario. In its decision upholding Order P-373, the court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "*detailed and convincing*" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme

> Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 at 476 (C.A.)].

The analysis set out below follows the Commissioner's traditional tests considered and found reasonable by the Court of Appeal for Ontario in *Ontario (Workers' Compensation Board)* cited above.

Part one: type of information

Both the Ministry and CSA claim that the records at issue contain technical information. In addition, the Ministry states that the information also qualifies as commercial information. Although not claimed by CSA, its submissions also allude to the commercial nature of the information.

Technical information

The Ministry submits that the records at issue reveal technical information relating to CO detectors and the process for the technical review of standards for such devices.

CSA outlines in considerable detail the structure and purpose of the organization. Similar to ULC, CSA is an independent, not-for-profit private corporation with a network of offices, partners and alliances throughout Canada, the United States and around the world. CSA states that it is "a leader in the field of standards development and the application of these standards through product certification, management systems registration, and information products".

CSA indicates that it is accredited by the SCC as both a standards development organization and a certification organization. With respect to standards development, CSA notes that its standards are developed not by CSA staff but by Technical Committees composed of members with expertise drawn from the community, using a consensus approach. CSA describes the process for standards development:

> The process usually starts when a request is made from a manufacturer, industry association, consumer group, educational institute, or government body to help with a particular safety, performance, or quality issue. CSA International's role is to facilitate the development of the standard by managing the progress of the Technical Committee in accordance with a complex and lengthy process detailed in our *CSA Policy governing standardization - Code of practice for standardization* and the accompanying *Directives and guidelines governing standardization*.

CSA also describes its role in the certification and testing of products or systems and states:

> CSA International's role as a certification organization means that we are often in possession of extremely sensitive proprietary technical and scientific information and test data belonging to our clients.

As I noted above, CSA indicates that because of its expertise in testing and standards development and in accordance with its accreditation status, it often consults with and assists regulatory authorities. CSA states that, in doing so, it strives to maintain client confidentiality and that if it cannot provide assistance to regulatory authorities on a confidential basis, it will have to reconsider the degree to which it is willing to interact voluntarily with these authorities.

With this background in mind, CSA states that the records at issue contain technical information. In this regard, it notes that "both the testing of products and the development of technical standards related to those products require highly trained technical staff with expertise in a given product field". CSA explains, in detail, the technical nature of certification activities and procedures and states:

> ... the very nature of CSA International's services involve the application of detailed and complex policies and procedures to technical problems in both testing and standards development. Our technical expertise lies in correctly applying our procedure to the problem at hand, not simply in generating test results with numbers.
>
> ...
>
> We are required to, and do, maintain staff with technical expertise in these activities to ensure that products actually entering the marketplace remain in compliance with the samples sent in for testing. One aspect of this requirement is the existence of CSA International's Audits and Investigations department, which evaluates issues in the field. This is a continuing part of the certification process and related policies and techniques.

With respect to the records themselves, CSA believes that even the mere reference to a particular testing program qualifies as technical information as it provides information regarding the application of its technical process.

Technical information is defined as:

> [I]nformation belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order P-454].

I accept that the actual work involved in the development of standards and the investigation and testing roles that CSA plays as part of its status as an accredited standards organization would, to a large extent, qualify

as technical. If the records contained a description of the processes and/or technical requirements of a standard I would accept CSA's position regarding such information.

However, Records 15 and 17 are letters from the Fire Marshal to CSA which contain, in very general terms, a request for, in the case of Record 15, an action to be taken, and with respect to Record 17, a request for information. Records 16 and 18 contain CSA's responses to the requests made in Records 16 and 18, again, in very general terms relating to the status of the matter. In and of themselves, these records do not contain any technical information. In Order PO-1707, I made the following comments on the amount of detail required for a record to be considered "technical":

> ... although the withheld portions of the records refer to activities which, if described, would qualify as "technical" information, the majority of the information at issue does not, in and of itself, describe the construction, operation or maintenance of a structure, process or thing. In my view, a mere reference to a structure, or a comment regarding an activity or result to be achieved does not provide sufficient detail of a technical nature to bring it within the definition, unless there is evidence that the reference itself would reveal or describe some technical component of the process, structure or thing.

In my view, these comments are equally applicable to the information in the records at issue. I accept that the reference to the particular testing program relates to activities which have a technical component, but the information itself is not technical in nature (Orders MO-1357, PO-1825).

As noted above, in Order PO-1707, I suggested that the unique circumstances of a particular case may result in a finding that even reference to a structure or process may sufficiently connect the name to other technical information in such a way as to bring it within the definition of technical information. This might occur where, for example, the name itself is identifiable as an integral part of a unique technical process or design in such a way as to describe with particularity a part of that process or design. That is not the case in the current appeal. In my view, revealing the name or fact of a particular testing program provides no additional information regarding the nature of the technical information that would be developed in relation to that program. On this basis, I find that the records do not contain technical information.

Commercial information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (Order P-493). Commercial information has been found to include such things as price lists, supplier and customer lists, market research surveys, economic feasibility studies, tender proposals, bid bond information and negotiation status reports (Orders 16, 41, 47, 68, 166, P-179, P-228).

The Ministry states that the records contain commercial information insofar as they relate to the accredited standards development and certification process which is a competitive industry in North America.

CSA, in referring to its role as a certification organization states:

> CSA International's role as a certification organization means that we are often in possession of extremely sensitive proprietary technical and scientific information and test data belonging to our clients. CSA International enters into a service agreement with each certification client that includes a non-disclosure agreement covering file information. Further, new CSA International employees are required to sign a non-disclosure agreement regarding handling of client information at the time they are hired. Maintaining the confidentiality of all file information is critical to CSA International's ability to operate in this field.
>
> This is especially the case given the changes in the marketplace. In previous years, the National Standards System was essentially operated on a monopoly basis, with different subject areas assigned to different standards or certification organizations. Now, CSA International directly competes in the marketplace with other standards development and certification organizations. If we are perceived in the marketplace as being unwilling or unable to maintain confidentiality of information it would affect most adversely our position in the marketplace.

If the records contained the type of certification testing information to which CSA refers, I would agree that it pertains to the commercial side of CSA's operations. However, they do not contain this type of information. Rather, they refer to CSA's role in standards development. As I noted above under the heading "Custody or Control", in a letter from the SCC to the OFM dated March 11, 1999 (which was disclosed to the appellant), the SCC advises the OFM that the National Standard of Canada for residential CO detectors is CAN/CGA-6.19-M93 and that only accredited Standards Development Organizations (such as CSA) are recognized by the SCC as being responsible for amending these standards.

In my view, information pertaining to CSA's role in standards development relates to its purpose as an accredited organization and may perhaps be associated with maintaining that status. I accept that there may be some commercial value in information relating to the particulars of the approach taken or details of the technical aspects of standards development. However, the records do not contain such information. In this case, the connection between its role and status in standards development and any commercial activities which CSA develops because of that role and status is too remote. Accordingly, I find that the records do not contain commercial information.

Based on my review of the submissions and the records, I find that they do not contain information that falls within the categories of information described in part one of the test. Therefore, the records do not qualify for exemption under section 17(1) of the *Act*. As no other exemptions have been claimed for these records, they should be disclosed to the appellant.

REASONABLE 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.

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

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 position

During mediation, the appellant indicated that his primary reason for raising the reasonableness of search is because he does not know if records are in the Fire Marshal's office or the Council's offices. After reviewing the additional records he received from the Ministry during the inquiry stage of the appeal, the appellant believes that they support his contention that the Fire Marshal is more involved with the CO detector testing than it admits in its representations.

The appellant states that:

> [C]learly the Ministry did not do an adequate search and delayed responding. Some further responses only came in June and July, 2000. This is most unacceptable when dealing with such public safety matters. I am particularly concerned that [a named employee's] reports (belatedly received) on the ULC tests he observed are incomplete and are just one set of summary notes. Those reports that I still want are relevant too to the <u>central</u> issue of why I have been denied the ULC CO detector test results. Without those test results, I am indeed missing the key record of all records sought.

Although delay in responding is a serious concern on the part of the appellant, it does not, in my view, reflect on the adequacy of the search conducted by the Ministry. The issue is, rather, were the steps taken by the Ministry in searching for responsive records reasonable in the circumstances? On another point, I note that the appellant has been provided with a summary of the testing conducted by ULC from January 1999 to the present in addition to the Fire Marshal's employee's notes. Although this record post-dates the time frame in the appellant's request, the Ministry decided to provide it to him in any event.

I found above that the records in the custody of the Council and ULC are not under the control of the Ministry. Therefore, the actual results of testing conducted by ULC which are in ULC's custody are not subject to the *Act*. Although I recognize that records relating to the Council are located at the Fire Marshal's premises, I found that, in the circumstances, the Fire Marshal does not have custody of them. Accordingly, these records are not subject to the *Act*. As a result, it is not necessary for me to determine whether the Ministry's search for those records that are in the custody of the Council and ULC was

reasonable as there is no requirement under the *Act* for the Ministry to conduct a search in these locations, in these circumstances.

The only issue is whether the Ministry's search for responsive records within its own records holdings was reasonable. In responding to this issue, the Ministry states:

> Following receipt of the appellant's detailed access requests, the Ministry and the appellant discussed the scope of his requests and the types of records being sought on a number of occasions including April 6, 1999, May 4, 1999, May 11, 1999, May 12, 1999, May 14, 1999, May 25, 1999 and June 8, 1999. The appellant's initial requests were received on March 31, 1999. Written clarifications from the appellant regarding request 99-0385 were received on April 6, 1999, and June 9, 1999.

The Ministry indicates that it conducted numerous consultations with experienced and knowledgeable staff in the Fire Marshal's office to determine the program areas most likely to have responsive records.

The Ministry indicates that an initial search was conducted by the Fire Marshal's office Manager of Fire Evaluation in four areas: Office of the Fire Marshal and Deputy Fire Marshal; Applied Research; Codes and Standards; and Fire Evaluation.

The Ministry states further that in response to the Notice of Inquiry, it conducted a second search for responsive records up to and including June 30, 1999 which was the date the appellant provided final written request clarification. In conducting this second search, the Ministry re-searched the original program areas and expanded the program areas to include: Fire Safety Standards; Academic Standards and Evaluation; Field Services; Ontario Fire College and OFM Internet Web Site. The searches were conducted by the Section Managers responsible for each area. A memorandum from the Deputy Fire Marshal indicates that searches through the Executive offices were conducted by himself, the Fire Marshal and their support staff and that the search included all paper and electronic files both within the office and in the storage area. The Deputy Fire Marshal also states that a search was conducted through a file in his area dealing with the Council, presumably for OFM records relating to the Council as opposed to Council records held by him in his capacity as a Council member.

I note that throughout mediation, the Ministry was asked to check and confirm at several points whether it had received the ULC test results. The Ministry confirmed that the results had not been received by the Fire Marshal's office. In a memorandum attached to the Ministry's representations, the Manager of Fire Evaluation confirmed again that the Fire Marshal's office does not have the ULC test results.

With respect to the results of tests conducted by ULC, the appellant refers to a number of news releases issued by the Fire Marshal relating to them. The appellant laments the confusion created by the fact that the Fire Marshal wears two hats: that of the Fire Marshal; and that of a member of the Council. In this regard, he states:

> From the records, it is fairly evident that [the Fire Marshal] had access to the ULC CO test results. Is it all supposed to depend on which hat he was wearing when he got them ...

The appellant does not provide any further information regarding his belief that more records should exist that is of assistance in determining this issue.

I have reviewed all of the records that the Ministry located. Based on what I have read, I do not agree that it is evident that the Fire Marshal had access to the test results. I accept that certain documents, as worded, may lead a reader to conclude that the Fire Marshal has at least seen the test results. However, when these documents are read in conjunction with the rest of the records, it is
apparent that much of the information referred to by the Fire Marshal in publicly released documents is based on other documents released to the public by ULC. Further, as the appellant is well aware, a Fire Marshal employee was present at the testing and made notes, which have now been released to him. It is not unreasonable to conclude that any additional information the Fire Marshal may have regarding these tests is derived from his own employee's notes.

Based on the Ministry's representations, I am satisfied that a full and complete search was conducted by the Fire Marshal's office for records that are or might possibly be responsive to the appellant's request. On this basis, I find that the Ministry's search for responsive records was reasonable.

ORDER:

1. The portion of the appellant's appeal relating to records held by ULC and the Council is dismissed.

2. The portion of the appellant's appeal relating to the reasonableness of the Ministry's search for responsive records is dismissed.

3. I order the Ministry to disclose Records 15, 16, 17 and 18 to the appellant by providing him with a copy of these records by April 3, 2001 but not before March 22, 2001.

4. In order to verify compliance with Provision 3, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

______________________________ February 27, 2001

Laurel Cropley
Adjudicator

POSTSCRIPT:

I found in this order that it is apparent that the Legislature's intention under Part XI of the *FPPA* was to create a body separate and apart from the OFM. While the OFM and the Council share a similar general role, that being fire prevention and public education, each body is given a different mandate and objectives. As I noted above, the Council is not a regulatory body. Its purpose is to promote fire prevention and public education by taking steps beyond the mandate of the Fire Marshal himself. While the intention to make the Council self-reliant and autonomous from the OFM is clear from the legislation, the rationale for not bringing this body within the purview of the *Act* by designating it as an institution under the *Act* is not clear.

In *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), the Williams Commission Report discussed the rationale for the adoption of a freedom of information scheme in Ontario, which includes public accountability, informed public participation, fairness in decision-making and protection of privacy. With respect to "accountability", the Williams Commission Report stated at pages 77 and 78:

Increased access to information about the operations of government would increase the ability of members of the public to hold their elected representatives accountable for the manner in which they discharge their responsibilities. In addition, the accountability of the executive branch of government to the legislature would be enhanced if members of the legislature were granted greater access to information about government.

...

Today, our governments are asked to solve increasingly diverse problems ... In an era when governments must draw upon increasing levels of public confidence and trust, it is not surprising that citizen demands for more effective means of scrutinizing public affairs are being voiced.... a reduction in government secrecy is a necessary prerequisite to the restoration of a relationship between the electorate and the government that is consonant with democratic ideals.

Indeed, this rationale underlies one of the purposes of the *Act*, as stated in section 1, which is to provide a right of access to information under the control of institutions in accordance with the principles that the information should be available to the public.

The Ministry's governmental interest in the Council is evidenced by the control it exerts over the selection of the individuals who form the board of directors, including the Fire Marshal. The Council, as a public safety organization created by statute with clear ties to the Ministry's role in fire protection and public education through the OFM, is one which, by its nature, would attract the public's interest. In my view, where public safety issues are at the heart of such an organization, the public should be entitled to inquire into the operations and records of that organization. To exclude such an organization from the purview of the *Act* is inconsistent with the larger principles of freedom of information and government accountability.