



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1947-F

Appeal PA-000129-1

Ministry of Citizenship



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is my final order with respect to the outstanding issues from Order PO-1897-I.

BACKGROUND:

The requester (now the appellant) had sought access to "all reports, correspondence, and/or briefing notes originating from or received by Tourism Minister Cam Jackson relating to municipal restructuring over the past two years, 1998 and 1999". Subsequently, the request was clarified and the appellant (a journalist with a newspaper) confirmed that copies of correspondence addressed to other individuals and not Minister Jackson were not to be included.

The Ministry of Tourism (MOT) (which became the Ministry of Tourism, Culture and Recreation in February, 2001) conducted a search in response to the request. By its decision letter and attached "Index of Records", it indicated that it had located 21 records. It provided access to some of the records, with severances, and denied access to the rest. The appellant appealed the MOT's decision to deny access to some of the records in their entirety.

During the course of mediation, some issues were narrowed or clarified. The MOT took the position that the records in dispute are not in its custody or under its control within the meaning of section 10(1) of the *Act*. The appellant disagreed, and also asserted that the Ministry had failed to conduct a reasonable search for records responsive to her request. The appellant believed that there should be more records than those identified on the issue of municipal restructuring, given that she requested records for a two-year period, and given that Minister Jackson is the Member of Provincial Parliament (MPP) for Burlington and also a Cabinet representative for the Hamilton-Wentworth and Halton areas. The MOT'S position was that the scope of the appellant's request was limited to Minister Jackson's role as Minister of Tourism and did not relate to any additional roles he may or may not play within Cabinet.

In Order PO-1897-I, I determined that the MOT, by then known as the Ministry of Tourism, Culture and Recreation (MOTCR) unilaterally narrowed the scope of the request and I ordered it to conduct a further search. Specifically, I ordered it to conduct a search for records in accordance with the plain meaning of the request, which covers records of the Minister received or sent in any capacity. I deferred a decision on the question of whether the Ministry has custody and control of the records at issue until the results of a further search were known.

In that decision, I also noted that Minister Jackson is no longer the Minister of Tourism, and raised the possible application of section 25(1) of the *Act* (transfer of a request).

Following my order, several events occurred. The appellant was informed that the request was transferred to the Ministry of Citizenship (MOC) because Minister Jackson had been appointed Minister of Citizenship on February 8, 2001. A further search for responsive records was conducted. Information about this search was provided to the appellant, and an affidavit providing details of this search was forwarded to me.

The affidavit provided by the Ministry was sent to the appellant, who was invited to make representations on the outstanding issues in the appeal. The appellant has provided no further representations on the appeal, beyond those submitted initially.

DISCUSSION:

PRELIMINARY MATTER:

Following the issuance of my interim order, I also received a letter from the former Freedom of Information Coordinator (the FOIC) with the Ministry of Tourism. In this letter, the former FOIC requests that I reconsider my finding in the interim order that the Ministry of Tourism had unilaterally narrowed the scope of the appellant's request, and "clarify that the Ministry did not narrow the scope of the search to exclude records relating to other roles of the Minister unrelated to Tourism." The basis of the request is that there was a misunderstanding about the scope of the original search for records. This correspondence was also shared with the appellant, who has not sent any response to it.

Essentially, the former FOIC submits that the position of the Ministry of Tourism in relation to the issue of the scope of the request was misunderstood, leading to my finding that it had unilaterally narrowed the scope of that request.

Neither the Ministry of Tourism, Culture and Recreation nor the Ministry of Citizenship has taken issue with the direction to conduct a further search, and as I have indicated above, a further search was conducted by the latter ministry.

On my review, I am satisfied that there was a reasonable basis in the material that was before me at the time of the interim order for the findings that I made in that order. However, having regard to the submissions made to me more recently, it does appear that a lack of clarity in some of those materials has led to an inadvertent misunderstanding on my part as to some of the facts of this appeal. I am satisfied that had I understood the institution's position in the way it had intended, I would not have found that it had "unilaterally and without justification narrowed the scope of the appellant's request." That finding, and that part of the interim order, is therefore flawed, and I clarify my finding accordingly.

As I have indicated, the ministries have not, however, asked for reconsideration of my direction to conduct a further search and have indeed provided me with evidence about a further search. There is no purpose therefore in revisiting that direction, and I will now consider whether the Ministry to whom this request has been transferred has conducted a reasonable search for responsive records, as required by section 24 of the *Act*.

REASONABLE SEARCH:

I have set out in my interim order the legal framework for this issue, and it is not necessary to repeat it here.

The newspaper articles submitted by the appellant rely on unidentified sources to describe some of Minister Jackson's actions on municipal restructuring. Although the information is second-hand, it raised a question about the possible existence of more records. Some of the records themselves also raised a question about the possible existence of more records, since they

demonstrate that discussions on the issue of municipal restructuring were taking place within different areas of the government, including within Cabinet, and involving Minister Jackson.

The Ministry has provided an affidavit of the executive assistant to Minister Jackson, now the Minister of Citizenship. She states that as a result of the interim order, she conducted or caused to be conducted a search of the Minister's office at 400 University Avenue, 6th floor. She further states, among other things:

The search was for all records relating to municipal restructuring, sent or received by the Minister in 1998 and 1999, and all records of the Minister were searched, including those arising from any role he may have played within Cabinet. The search included all computer records, voice mail, notebooks and files of each office and filing cabinets in the Minister's office.

The search did not extend to any Ministry branches at this location as we have been at the Ministry of Citizenship for only two-and-a-half months and have not had any communication on the relevant issue.

No further records responsive to the request were located.

Having regard to the evidence in this affidavit, and the material before me, I am satisfied that the Ministry has conducted a reasonable search. In effect, the specific evidence as to the search and how it was conducted has answered any general questions raised about the possible existence of more records. I find that the two Ministries which have been involved in responding to this request have conducted a reasonable search for records responsive to the request.

I will accordingly turn to consider the other issue outstanding as a result of my interim order, whether the records in dispute were in the custody or under the control of the Ministry of Tourism.

CUSTODY OR CONTROL:

I have described the records in dispute in my prior order.

Record 13 is an "Action Sheet" which appears to contain information about a contact from a member of the public. The form was completed on November 18, 1998.

Records 16 to 20 are memos from a named individual to Minister Jackson.

Record 21 is titled "Municipal Restructuring: Caucus Briefing".

For ease of discussion, "Ministry", as used below, refers to the Ministry of Tourism.

The Ministry takes the position that these records are constituency records and not government records and are therefore not within its custody or control.

Section 10(1) provides a general right of access to a record that is “in the custody or under the control of an institution”. Under the *Act*, an “institution” is defined as:

- (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;

It is clear from the wording of section 10(1) that in order to be subject to an access request under the *Act*, a record must either be in the custody **or** under the control of an institution (see, for example, Orders M-1078 or P-1397). Further, the *Act* will apply to information in the custody or under the control of an institution notwithstanding that it was created by a third party. (Orders P-239, P-1001 and MO-1225).

Prior orders of the Commissioner have recognized that a purposive approach must be taken to “custody or control” questions under section 10(1) [see Orders MO-1237 and MO-1251, dealing with the municipal equivalent to section 10(1)]. Consistent with the purposive approach, it has been found that bare possession does not amount to custody, absent some right to deal with the records and some responsibility for their care and protection (Order P-239). In another order, “custody or control” has been found despite lack of possession where the relationship between an institution and the party in possession of the records lead to a conclusion that the institution has a “right of ownership and possession” of the records (Order MO-1237).

In Order 120, former Commissioner Sidney B. Linden outlined what he felt was the proper approach to determining whether specific records fell within the custody or control of an institution:

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the *Act*, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

In Order PO-1873, Adjudicator Laurel Cropley expanded on the list of factors which might be relevant to this sort of inquiry. Some of the additional considerations, or restatements of the considerations in Order 120, which may be relevant to this appeal are:

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

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

In the Ministry's representations, it is submitted, in general, that the records do not relate to the portfolio responsibility of the Minister of Tourism or the mandate or the function of the Ministry of Tourism. They relate, rather, to the Minister's constituency matters dealing with municipal restructuring which are unrelated to tourism or the powers or duties of the Ministry. Citing excerpts from the *Ministry of Tourism and Recreation Act*, it is submitted that this *Act* does not contain any powers, duties or objectives relating to municipal restructuring.

The Ministry submits that Record 13 was created by the Minister's constituency office, for his use as a member of the Legislature. Records 16 to 20 were created by the Minister's Constituency Assistant (Acting) for the use of the Minister in respect of his role as member of the Legislature dealing with constituency matters related to municipal restructuring in the Hamilton-Wentworth area. Record 21 was created by the Ministry of Municipal Affairs for use by the caucus in respect of municipal restructuring issues. It is submitted, in general, that none of these records was created for the benefit of the Ministry or for the portfolio responsibilities of the then Minister of Tourism.

It is said that the records were not created pursuant to a mandatory, statutory or employment requirement of the Ministry. They were not created by the employee for the purpose of his duties as an employee of the Ministry nor were they created for any purpose of or relied upon by the Ministry. It is submitted that the records were generated in the Minister's capacity as a member of the Legislature. As such, they are the Minister's personal records and are not subject to or identified as records required to be retained by the Ministry's records retention schedule and may be disposed of as the Minister sees fit. In this respect, the Ministry attaches two documents, a *Records Retention Schedule* and *Information Bulletin #4: Guideline for the Disposition of Ministers' Records and the Records of Political Staff*, published on the web site of the office of Archives of Ontario. The Ministry submits that it has no authority to or interest in regulating the use of the records because the records do not relate to the mandate, purpose or function of the Ministry.

It is acknowledged that the records are located on the physical premises of the Ministry. However, it is submitted that the Ministry does not have the right to possession of records dealing with constituency issues. These records were kept in separate files relating only to constituency matters in the Acting Constituency Assistant's Office and were not integrated with other records held by the Ministry. The Ministry relies on, among others, Order M-813, in which it was found that constituency records of a City Councillor were not within the custody or control of a City, regardless of the fact that they may have been received by the Councillor at an office at City Hall.

The appellant has submitted, on the issue of custody or control, that the records in issue are "clearly in the Ministry's custody, because they exist in Ministry offices."

Findings

The representations of the Ministry support a conclusion that the records in dispute are not in the “custody or control” of the Ministry. My findings with respect to the factors listed above are:

The records were not created by either officers or employees of the Ministry, in their capacity as officers or employees of the Ministry. One (Record 13) was created by employees in the Minister’s Constituency Office. Records 16 to 20 were created by the Minister’s Acting Constituency Assistant. This individual may also be an employee of the Ministry, since the representations state that the records were not created by “the employee for the purpose of his duties as an employee of the Ministry”. It is therefore possible that this employee fulfills a dual role, one of which is to assist the Minister in relation to constituency matters. It has been recognized by this office that employees of an institution may sometimes participate in other activities beyond their roles as employees of the institution (see Order P-267, discussed below). On the basis of the Ministry’s representations, I accept that in authoring Records 16 to 20, this individual was not acting in his capacity as an employee of the Ministry. On the basis of the Ministry’s representations, I find that Record 21 was authored by the Ministry of Municipal Affairs and Housing, and not by the Ministry of Tourism.

I accept that the records were intended for use by the *Minister* in relation to matters not within the mandate of the Ministry, and they have not been relied on or used by the Ministry. On my reading of it, Record 13 was created as a result of a contact from a constituent about municipal restructuring and suggests the content of a response. Records 16 to 20 were created to assist the Minister in dealing with his constituency over the issue of municipal restructuring in the Hamilton-Wentworth area. In these records, the Minister is advised of developments in the process of that restructuring and the opinions or positions of other persons or entities. They also contain advice from the Acting Constituency Assistant on a communications strategy on the issue.

The Ministry has possession of the records. However, its possession is not under any mandatory statutory or employment requirement. Under its *Records Retention Schedule*, these are not records which fall into the description of Minister’s general files required to be kept by the Ministry. Further, *Information Bulletin #4* of the Office of Archives, which has responsibility for recorded information management, defines Ministers’ personal, political and constituency records as typically relating to the minister’s constituency business and role as a member of the Legislature, party political matters (including caucus affairs) and the private life and personal interests of the minister. This Bulletin specifies, “Ministers personal, political and constituency records are their own personal property and may be disposed of as they wish”. I find that the records in dispute are “political and constituency records” as discussed in those policies.

I accept the statements of the Ministry that the records were kept in separate files relating only to constituency matters in the Acting Constituency Assistant’s Office and were not integrated with other records held by the Ministry.

On a consideration of the factors as a whole, I am satisfied that they support a conclusion that the records in dispute are not “in the custody or under the control” of the Ministry. They were not created by its employees or officers in respect of matters within the mandate of the Ministry, or to be used by the Ministry. Although the Ministry has possession of the records, in the sense that the records were stored on its premises, they have been kept in separate files and have not been integrated with other Ministry records. Further, the Ministry’s records retention policies do not require the Ministry to take responsibility for the retention or disposal of these records. While it is possible that none of these facts would be determinative on its own, taken together, they support the position of the Ministry in relation to the issue of “custody or control”.

In considering whether records are “in the custody or under the control” of an institution under the *Act*, it is important to recognize that a Ministry is not synonymous with the individual who is the minister of the Crown presiding over that Ministry. It is true that, as has been recognized elsewhere, the Minister is the individual to whom powers are conferred in relation to the operational functions of the Ministry, and through whom responsibilities are exercised [see Order PO-1823, citing, among others, Dussault & Bourgeat, *Administrative Law: A Treatise*, 2d ed. (Toronto: Carswell, 1985)]. However, not all actions of an individual who is a Minister can be equated with actions of the Ministry. To state the most obvious case, the actions of a Minister of Tourism with respect to entirely personal matters would not ordinarily be considered actions of the Ministry of Tourism. By focusing on records in the “custody or control” of, in this case, the Ministry, the *Act* is not intended to bring within its scope all the records of the Minister presiding over that Ministry.

The factors listed above recognize that there are no exact lines or watertight compartments in deciding “custody or control” issues. The fact, for instance, that the subject matter of records is outside of the ordinary mandate of an institution is not by itself sufficient to find they are not in its “custody or under its control”. In Order P-267, for instance, Assistant Commissioner Tom Mitchinson found that certain records relating to the Liberal Party of Ontario were in the custody of the Office of the Premier, in that they had been integrated into the operations of that institution. At the same time, he recognized the distinction between political party activities and activities of an institution, noting the fact that “some employees of the Office of the Premier and the offices of other members of the Executive Council” perform political party functions in addition to their roles as employees of the institution.

In the case before me, it is asserted that constituency activities of a Minister, in relation to matters outside of the statutory mandate of an institution, are likewise distinct from his activities in relation to matters falling within that mandate. The Ministry urges me to apply the reasoning in Order M-813, dealing with records of a municipal councillor in relation to a constituent. In that decision, Adjudicator Laurel Cropley found that records sent to a councillor by one of his constituents were not in the custody or control of the City. Order M-813 is useful, in that it provides a basis for distinguishing between the actions of an elected official in constituency matters, and in governmental matters. However, it is also clear from that decision that even

records relating to constituency matters may be subject to the *Act*, if a consideration of the factors in Order 120 leads to a conclusion that they are in the custody or control of an institution.

It is unnecessary for me to decide as a general matter whether all records which can be characterized as “constituency records” will be found not to be “in the custody or under the control” of an institution for the purposes of the *Act*. In this case, a consideration of the relevant factors leads to this conclusion with respect to the specific records in dispute.

ORDER:

In conclusion, I find that the Ministry of Citizenship has made a reasonable effort to locate records responsive to the request. I also find that the records in dispute were not in the custody or under the control of the Ministry of Tourism. The appeal is accordingly dismissed.

Original signed by: _____
Sherry Liang
Adjudicator

September 13, 2001 _____