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

ORDER PO-2103

Appeal PA-020025-1

Ministry of Agriculture, Food and Rural Affairs

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BACKGROUND:

The *Animals for Research Act* (*ARA*) governs the use of animals for research in Ontario. The *ARA* is designed to meet the needs of medical research while at the same time ensuring, as far as possible, the comfort and well-being of animals used in research. The *ARA* is administered by the Ministry of Agriculture and Food (the Ministry).

The *ARA* permits only three sources of animals for research: registered research facilities; municipal pounds; and supply facilities.

Municipal pounds generally operate under the authority of by-laws made under the *Municipal Act*. [see section 210(1)-(13)]. Some municipal pounds are owned and operated by the municipality, while in other cases a private business operates the pound on behalf of the municipality, pursuant to a contract. The *ARA* and its regulations govern various aspects of the operation of pounds, including the standard of care for animals and the keeping of records.

Under sections 20(4)(a) and (b), where a pound operator has impounded a dog or cat with an identification tag, the operator must notify the Ontario Society for the Prevention of Cruelty to Animals (OSPCA) and take reasonable steps to find its owner. Under section 20(5), the pound must not destroy or permit to be destroyed an impounded dog or cat, until a specified redemption period has expired. Once the redemption period has expired, the pound may (among other things) sell the animal to a research facility [section 20(6)(c)] or destroy it [section 20(7)].

Under the *ARA* and its regulations, a pound has a duty to maintain detailed records of every animal it holds and to preserve the records for a specified period [section 20(12) of the *ARA* and section 10 of Ontario Regulation 23].

A breach of most provisions of the *ARA* constitutes an offence and is punishable by a fine or imprisonment [section 21].

For enforcement purposes, inspectors appointed by the Minister of Agriculture and Food may enter and inspect a pound, and demand the production of pound records [section 18].

In 2001, the Ministry charged two operators of a pound (the pound) with offences under the *ARA* as a result of an incident in which a family dog was impounded, sold to a research facility and destroyed. Each was charged with failing to notify the OSPCA that an impounded dog had an identification tag [section 20(4)(a)] and, under section 20, failing to honour the three-day redemption period. Both operators pleaded guilty, and were fined and convicted in 2002.

NATURE OF THE APPEAL:

The appellant, a non-profit animal protection group, submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry for access to records held by the pound for the period from October 2000 to October 2001. The pound in question was a private business providing pound services by contract to several municipalities.

The Ministry responded to the request as follows:

> Records maintained by pounds are not in the custody or under the control of the ministry. However, two pound cards obtained by the ministry for an investigation respond to your request.
>
> Access to these records is denied under section 14(1)(a) and (b) of the *Act*.
>
> . . . . .
>
> Section 14(1)(a) and (b) apply because disclosure of the records would interfere with a law enforcement matter and investigation.

The appellant appealed the Ministry's decision to this office. In its letter, the appellant provided extensive submissions in support of the appeal. This letter has been provided to the Ministry.

During the mediation stage of the appeal, the Ministry agreed to release the two pound cards for which it had claimed exemption under section 14(1)(a) and (b) of the *Act*. These records are therefore no longer at issue, and I will not refer to them further. Accordingly, the sole remaining issue to be dealt with in this order is whether records in the possession of the pound are in the Ministry's custody or control within the meaning of section 10(1) of the *Act*.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry, which provided representations in response. I then sent a Notice of Inquiry, together with the Ministry's representations, to the appellant, who in turn submitted representations.

DISCUSSION:

CONTROL OF THE RECORDS

Introduction

Section 10(1) of the *Act* provides a right of access to records "in the custody or *under the control of* an institution" (emphasis added). The records that remain at issue are not in the custody of the Ministry. Therefore, the sole issue in this appeal is whether the records are "under the control" of the Ministry within the meaning of section 10(1). If so, the right of access under section 10(1) applies.

In the Notice of Inquiry, I asked the parties to provide representations in response to the following questions regarding the "control" issue under section 10(1). I also made reference to various authorities under each question, where appropriate:

1. Does the Ministry have a statutory power or duty to carry out the activity that resulted in the creation of the records? [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? [*Ontario (Criminal Code Review Board)*]

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

4. Are the [municipality] and/or the pounds agents of the Ministry for the purposes of the activity in question? If so, what is the scope of that agency, and does 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.)]

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

6. Were the records created by an officer or employee of the Ministry?

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

8. Does the Ministry have a right to possession of the records?

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

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

11. What impact, if any, does the *Animals for Research Act* and its regulations have on the control issue?

These questions reflect a purposive approach to the "control" question under section 10(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 …

I will address each of the above-listed questions below.

Analysis of "control" factors

1. ***Statutory powers***

The statutory framework is the starting point for any "control" analysis [*Ontario (Criminal Code Review Board)*].

The Ministry submits:

> . . . The Ministry does not have a statutory power or duty to carry out an activity that resulted in the creation of pound records. Activities that resulted in the creation of records maintained by a pound are carried out by a pound providing a service to a municipality.
>
> A pound is a private business completely distinct and separate from the Ministry. It is not part of the Ministry or an agent of the Ministry. A pound is not an "institution" as defined by section 2(1) of the [*Act*]. There is no contract or other agreement establishing a relationship between a pound and the Ministry.

The appellant submits:

> The Ministry has a statutory duty to oversee the animals-in-research system and ensure pounds operate in accordance with the legislation. The records exist because the law which the Minister enforces [requires] that they be kept.
>
> . . . [T]he Ministry relies on the assertion that a pound is a private business, when often it is not. It is either part of a municipality or an independent contractor providing public services to a municipality, in one of its two public functions. In its other public function, where it supplies animals for research and is expected to also facilitate the return of lost animals to their families and prevent them from ending up in research, it fulfils a duty established by provincial law.

The activity that resulted in the creation of the records is the operation of the pound. The pound in this case happens to be a private business. However, regardless of whether a pound is operated by a private business on behalf of a municipality, or by the municipality itself, the operation of a pound is not undertaken by the Ministry pursuant to any statutory power or duty. Rather, it appears that the operation of a pound, in this case and generally, is undertaken by or on behalf of a municipality, pursuant to a municipal by-law passed under the *Municipal Act*.

The appellant agues that the records are created as a result of "a duty established by provincial law." I agree that provincial law (the *ARA*) imposes certain duties on pounds, over and above what may be prescribed by by-law. However, this does not alter the basic premise that the source of a pound's essential powers is a municipal by-law, either directly or indirectly, by way of contract. The Ministry merely has a regulatory role in this context, and cannot be said to be the entity for which the pound carries out its activities and creates records.

This factor suggests that the Ministry does not have control of the records.

2. ***Core function***

The Ministry submits that "pounds do not carry out activities that fulfill a Ministry function or mandate." The appellant submits:

> If one takes even a cursory review of the [*ARA*], it is clear that much of it addresses the sources of animals that may be used in research in the province. The Ministry regulates and oversees the sources and this use of animals.

For essentially the same reasons as outlined under heading 1 above, I agree with the Ministry that the operation of the pound is not a "core", "central" or "basic" function of the Ministry. This factor therefore weighs against a finding of "control".

3. ***Payment***

The Ministry states that a pound operator pays for the creation of any records created by the pound and that the operator is responsible for the costs of maintaining and disposing of pound records. It states that the province does not fund pounds. The appellant does not dispute these assertions. This factor also suggests that the Ministry does not control the records.

4. ***Agency***

The Ministry submits:

> The pound named in the request is no longer in operation. Prior to shutting down the pound was under contract to provide animal control services to several municipalities…

> A pound is not an agent or agency of the Ministry. A pound is an entity completely separate from the Ministry. There is no contract or agreement establishing a relationship between a pound and the Ministry. The ministry does not licence or register pounds in Ontario.
>
> The Ministry does not have any interest in the activities carried on by pounds other than in its role as a regulator under the [*ARA*].

The appellant submits:

> It is probably not accurate to call the pound an agent of the Ministry, but nor is it just a private business which happens to be government regulated. We do not agree with the Ministry that it does not have any interest in the activities carried on by pounds other than its role as a regulator under the [*ARA*]. This source of research animals attracts the attention of two levels of government, as set out above. The municipal service addresses animal nuisances, the provincial service addresses animals in research. The [*ARA*] establishes pounds as a source of research animals and also aims to return lost pets, these both being public functions.

I agree with both parties that a pound cannot be considered an agent of the Ministry. For the reasons set out above, I do not accept that the "public" nature of a pound's function means that it is the Ministry that carries out the function, or on whose behalf it is carried out. This factor suggests that the Ministry does not have control of the records.

5. ***Ownership***

The Ministry and the appellant both submit that the operator of the pound owns the records, and I agree. This factor again suggests that the records are not under the Ministry's control.

6. ***Creation of the records***

The Ministry submits that the records were not created by any of its officers or employees, while the appellant argues that "they were created by the pound at the behest of the Ministry and for the Ministry's purposes."

This factor does not support a finding of control, since the records clearly were not created by any of the Ministry's officers or employees.

7. ***Use of the records***

The Ministry submits:

> Pound operators create records maintained by a pound. Operators are required by the [*ARA*] to maintain certain records about impounded animals for a period of at

> least two years. Any other use of the records in the operation of a pound is outside the Ministry's involvement.

The appellant submits:

> In this appeal, [the appellant] does not seek access to the pound's business or financial records, or any other records it may choose to keep for its own purposes. [We seek] only the records related to animals, which are kept because the [*ARA*] and the regulations require that they be kept.

It would appear that the pound operator would have intended to use the records both for the purpose of fulfilling its record-keeping duties under the *ARA*, as well as for the purpose of the day-to-day operation of the pound. In my view, these potential uses are not persuasive either way on the "control" issue.

8. ***Right of possession***

The Ministry states:

> The Ministry's right to have access to the records is limited to inspection powers authorized by the [*ARA*], sections 18(1) and 18(3). An inspector may demand production of records only for the purpose of carrying out his or her duties under the [*ARA*], which are limited to the administration and enforcement of the Act. Procedures to demand records for an investigation are stipulated in sections 18(6), (7) and (8) of the [*ARA*]. The Ministry may not lawfully use or disclose any records that are produced in response to such a demand, for any other purpose.
>
> During a routine inspection an inspector will check the pound records to determine if the required records are being kept and to check if the requirements outlined in the [*ARA*] are being met. Inspectors do not copy pound records or remove pound records during routine pound inspections.

The appellant argues that the Ministry clearly does have the right to possess the records in question:

> . . . Section 10(2) of Regulation 23 establishes that the pound operator must maintain a record of every animal in the pound, with twelve specific details, for two years. Section 18(3)(c) of the [*ARA*] allows inspectors to, among other things, "demand the production of furnishing by the owner or custodian thereof of any books, records, documents or of extracts therefrom relating to animals that are (i) in a pound, or (ii) s/he believes on reasonable and probable grounds are used or intended to be used in research".
>
> The fact that the records are permitted to be kept on site, rather than in government storage facilities, does not change the nature of this requirement. In its Representations, the [Ministry] stresses that it prefers cooperative enforcement

> of the legislation, which involves an element of trust, as opposed to a more adversarial approach, which might well require records to be turned over as a matter of course.
>
> Given the six-month limitation period for provincial offences, the two year requirement for the preservation of records clearly addresses a government interest in the information stored in these records beyond the possibility of enforcement of a particular infraction.

I agree that pursuant to its statutory inspection powers, the Ministry may demand the production of pound records and, in that sense, the Ministry has a right to possess the records. In my view, this limited right does not lead to the conclusion that the Ministry in any generalized way has the right to possess the records as would be the case, for example, where an agent is carrying out a statutory function on the Ministry's behalf [see, for instance, my Order MO-1251]. The opposite view would lead to an absurdity, suggesting for example that the Ontario Human Rights Commission has control over all records in Ontario, simply because pursuant to its powers it may seize records held by anyone in the province, as long as certain conditions are met. In my view, there is a qualitative difference between an organization's powers to possess records pursuant to its regulatory mandate, and its powers to possess records for other reasons, such as the fact that it owns them or they were created on its behalf.

This finding is consistent with Order P-1069, in which former Adjudicator Mumtaz Jiwan found that the Ministry of Community and Social Services did not have control over records held by a Children's Aid Society, despite the fact that that ministry has regulatory authority over these societies. The former Adjudicator stated:

> . . . [T]he Ministry's right of access to the records is limited to requiring financial accountability for the funds provided to the CAS and to periodic administrative reviews for the purpose of ensuring compliance with the [*Child and Family Services Act*]. I find therefore, that the Ministry does not have control over the records held by the CAS for the purposes of section 10(1) of the *Act*.

Therefore, in the circumstances of this appeal, I have concluded that this factor does not weigh in favour of a finding that the Ministry controls the records.

9/10. ***Authority to regulate use or dispose of the records***

The Ministry submits:

> . . . There is no authority in the [*ARA*] to regulate use of pound records and the Ministry does not have any non-statutory authority to regulate the use of such records.
>
> The [*ARA*] requires that a pound operator maintain a record of impounded animals for at least two years.
>
> . . . . .

> The Ministry has no authority to dispose of the records.

The appellant submits:

> So long as the government's requirements are met and its purpose served, there is no apparent limit on other uses to which the records may be put.

In addition, the appellant agrees that the Ministry has no authority to dispose of the records.

The Ministry has a limited authority to regulate "use" of pound records, in the sense that it enforces the *ARA* record-keeping requirements. However, in all other respects the Ministry has no authority to regulate the use of the records. On balance, this factor weighs only minimally in favour of a finding that the Ministry "controls" the records.

The fact that the Ministry has no authority to dispose of the records suggests that they are not under the Ministry's control.

11. ***The ARA and its regulations***

The Ministry states:

> The [*ARA*] and the regulations give the Ministry very limited powers to even access the records in question. The [*Canadian Charter of Rights and Freedoms*] places further restrictions on the Ministry's use of these powers, including what it can do with records that it has lawfully obtained under the [*ARA*]. The Ministry has no means to compel production of records other than through use of the inspection powers under section 18 of the [*ARA*]. Both section 18 and caselaw make it clear that the Ministry cannot use these inspection powers for any purposes other than the purpose of administering and enforcing the [*ARA*] and the regulations.
>
> . . . . .
>
> . . . The fact that the Ministry has the power to compel production of information and documents for these limited purposes, does not mean that the Ministry has such control over the information and documents that they can or must be produced to satisfy an access request [under the *Act*] by a third party. If the Ministry were to use the inspection powers in section 18 of the *Act* to satisfy the [*Act*] access request it would be conducting an inspection that is not statutorily authorized and therefore unlawful. Further, the fact that the inspection is not legally authorized by statute would make the inspection unlawful and unconstitutional and the inspection itself would therefore be a breach of section 8 of the [*Charter*].

The appellant submits:

> . . . First, the Ministry makes the point that it cannot use its powers for any purposes other than to administer and enforce the [*ARA*] and the regulations. There is no denying that proposition. These specific powers which the Ministry has over the operation of pounds and the records of the animals that pass through them, are precisely what give the Ministry "control".
>
> Next the Ministry makes the point that statutory authority must be exercised in accordance with the purpose of the statute. This, too, is certainly true . . . Nothing the government is being asked to do affects a pound's business or its ability to operate, nor does it establish any constraints on one's ability to make a living. The Appellant seeks copies of documents, which exist because of a legislated requirement, on which are recorded certain very specific details of the record-keeper's performance of a public service . . .
>
> The Ministry has not pointed to a single case where the analogy it is trying to make has actually been recognized by any court. Nor is [the appellant] aware of any such cases.
>
> Most importantly, the test of whether or not there is control cannot include the question of what the government may do with records over which it does have control, because that is a separate part of test, governed by ss. 12 - 22 of the [*Act*]. Whether or not the documents may be turned over to a third party is not part of determining whether or not there is "control". One must first determine whether or not there is control, and then decided whether or not the documents may be released.
>
> . . . . .
>
> In this case, there is no underhanded scheme by which the government purports to do one thing but means to do another. It mandates that records be kept, it mandates that production of those records can be demanded. This is the question to answer in determining if it has control. Then, what it may do with those records once it has control is a question to be subjected to the test set out in ss.12 - 22 of the [*Act*].

For the reasons cited above under the heading "Right of possession", I agree with the Ministry's submissions that its *ARA* record production power does not lead to the conclusion that the Ministry has control of records that may be seized pursuant to this power. I also agree with the Ministry's point that the Ministry is not in a position to assert control over a record, simply on the basis of an access request under the *Act*. Should such records actually be seized pursuant to its lawful production powers under the *ARA*, then the records would be in the custody of the Ministry and subject to the access provisions of the *Act*. This is not the case here.

Conclusion

The legal framework under the *ARA* and the majority of the other factors discussed above all point to the conclusion that pound records not in the Ministry's custody, including those in this case, are not "under the control" of the Ministry for the purposes of section 10(1) of the *Act*. The only factor which weighs in favour of a control finding is the "authority to regulate use" factor. In my view, this factor carries, at most, only moderate weight and cannot overcome the overwhelming factors weighing against a control finding in the circumstances of this case.

Therefore, I uphold the Ministry's decision that the requested records are not in the custody or under the control of the Ministry for the purpose of section 10(1) of the *Act*.

Additional matters

The appellant makes additional submissions as follows:

> Let us back up and recall the context in which this issue must be determined. [The pound whose operators were convicted], whose records are sought in this case, was involved in a well-publicized incident in September 2001. It involved . . . a family's 13-year old, lifetime companion Golden Retriever who got lost, was found and turned over to [the pound], who in turn sold him to [a research facility] to be used in research. [The dog] was ultimately found to be too old for research and the [research facility] claims that he was euthanized. The thought that one's lost companion could meet this fate deeply upset many people across Ontario. The story was covered intensively in the press and it reignited the debate about whether or not we collectively think it is right to use animals, and particularly pound animals, in research.
>
> But a society can not - and should not - be required to make responsible moral and legal decisions about controversial subjects without the relevant facts. The laws of a free and democratic society reflect this notion, such as s. 1(a) of [the *Act*], and support the premise that the people of this province are entitled to know about the nature and extent of the practices which are the subject of this inquiry. These are the principles under which the "control" issue must be decided. And it must be noted that [the *Act*] does not provide for the public release of only documents that the government has in its own possession ("custody") but also documents over which it has "control".
>
> These two terms are not distinguished from one another, so there is no reason to assume that documents in the government's "custody" are any more subject to disclosure than those which are not, but are otherwise "controlled".
>
> The comments made by former Commissioner Sidney Linden in Order 120, with respect to the terms "custody" and "control" have been cited in many decisions. His call for a broad interpretation, to give effect to the principles of the Act, is

> well-established by now. Beyond that, the Federal Court of Appeal has also indicated that in the context of federal legislation, a broad, liberal and purposive approach should be given to the interpretation of access to information legislation, and this reasoning was adopted by Ontario's Court of Appeal in *Ontario (Criminal Code Review Board) v. Doe*.
>
> . . . . .
>
> Without wishing to be repetitive, in the present inquiry, the subject is not documents which address financial accountability, but documents which go to the heart of the pound operation.
>
> . . . . .
>
> It is respectfully submitted that the broad and purposive approach to interpreting the word "control" which provincial and federal jurisprudence demands, would seem to require an answer to the following questions: First, if what the government does, in requiring certain information to be recorded and preserved, and in giving itself the power to demand production of that information, does not amount to "control" over the information, who does control this information and this aspect of pounds' activities? Second, if the public is not entitled to have this information, how is it supposed to make informed decisions about the practices which the information details?

The appellant provides well-articulated policy reasons for why the access provisions of the *Act* should apply to the requested records, and in support of a liberal approach to the control issue generally. Despite these submissions, the law and the evidence before me establish that the Ministry does not control these records. The outcome might be different in the context of a request to a municipality for similar records. Municipalities would appear to have more direct responsibility for the operation of pounds, and the accountability concerns expressed by the appellant may be more relevant in that context.

ORDER:

I uphold the Ministry's decision that the right of access under section 10(1) does not apply to the records.

Original Signed By: January 23, 2003
David Goodis
Senior Adjudicator