



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2127

Appeal PA-020034-1

Ministry of Agriculture and Food



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NATURE OF THE APPEAL:

The appellant, a representative of a non-profit animal protection group, submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Agriculture, Food and Rural Affairs (now the Ministry of Agriculture and Food) (the Ministry) for access to:

1. . . . [R]ecords [of] all pound inspections of all pound facilities throughout Metropolitan Toronto for the last five years, from 1996 to the present date, inclusive.
2. . . . [A]ll correspondence relating to the provision of animal care, control and pound services in Metropolitan Toronto for the last five years, from 1996 to the present date, inclusive.
3. . . . [F]ull information on which Metro Toronto pounds send animals to research facilities, and complete records of number of Toronto pounds for the last five years, from 1996 to the present date, inclusive. (We require all specifics including but not necessarily limited to dates, age, sex, breed, the eventual use and disposition of pound animals, to which research facilities the animals were sent in each instance, the stated purpose of the research to be carried out and copies of the requisition forms).

In response, the Ministry stated:

The ministry will search for records relating to item 1. As provided by section 25 of the [*Act*], items 2 and 3 of your request have been forwarded to the City of Toronto as that institution may have custody and control of records.

The Ministry later wrote to the appellant as follows:

The records that respond to [item 1 of] your request are Pound Inspection Reports for the period August 20, 1996 to September 28, 1999 (16 pages). Access is available to the records and a copy is enclosed. There were no inspection reports for the year 2000 and 2001.

The appellant then appealed the Ministry's decision to this office, taking the position that the Ministry had not identified all of the records responsive to the request, and that the Ministry has custody and/or control of records responsive to items 2 and 3 of the request.

Mediation was not successful in resolving all of the issues in the appeal so the matter was streamed to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the issues in the appeal to the Ministry, which provided representations in response. I then sent the Notice of Inquiry, together with a copy of the Ministry's representations to the appellant, who provided representations in response. I later sent the appellant a copy of my recently issued Order PO-2103, which dealt with the issue of custody

or control of pound records, and asked him to provide representations on its applicability in this appeal. The appellant provided representations in response.

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”. The right of access will not apply if the records are neither in the Ministry’s custody nor under its control.

The Ministry takes the position that it does not have custody of records responsive to items 2 and 3, and that any responsive records would be in the custody of the City of Toronto and/or municipal pounds.

Under this heading, I will determine whether any item 2 and 3 records, held by the City of Toronto and/or municipal pounds, would be “under the control” of the Ministry. Below, under the heading “Reasonable Search”, I will decide whether or not the Ministry has conducted a reasonable search for records in its custody responsive to items 2 and 3.

In Order PO-2103, the appellant (not the same appellant as in this case) made a request to the Ministry for access to records held by a specific municipal pound. The pound in question was a private business providing pound services by contract to several municipalities. After conducting a detailed analysis of the various factual and legal circumstances, I concluded as follows:

The legal framework under the [*Animals for Research Act (ARA)*] and the majority of the other factors discussed above all point to the conclusion that pound records are 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*.

The appellant submits the following with respect to Order PO-2103:

[Order PO-2103] concludes in part that: “. . . Despite the submissions, the law and the evidence before me establish that the Ministry does not control these records . . .” (pg. 12).

Therefore, . . . the determinations and the final Order could only have been formulated based upon the evidence before the Information and Privacy Commissioner at the time.

We would respectfully submit that in our specific case, we have provided the Information and Privacy Commissioner with new information for your consideration . . .

. . . A significant portion of the [ARA], its administration and enforcement by the Ministry is designed to oversee and regulate the operation of pounds in Ontario . . . [T]he Ministry exercises absolute discretion over the [ARA] and therefore has right of control and access to pound records . . .

In the section [in Order PO-2103] dealing with Authority to regulate use or dispose of records where the Information and Privacy Commissioner states: “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.” (pg. 9). We believe that neither the law, nor the evidence provided supports these conclusions.

[Order PO-2103] states in part: “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 . . .” (pg. 5).

We believe that neither the [facts] nor the law support such a conclusion. All pounds are operated using tax dollars and the records are a part of that operation. Under the provisions of the [ARA], pounds cannot be built, modified or operated without the specific authorization and legal oversight of the Ministry. Fines, imprisonment and even loss of employment exists for offenders who contravene the [ARA]. Historically, animal control and care bylaws could not be passed and implemented by any municipality without the express legal consent of provincial legislation, such as the *Dog Licensing, Livestock and Poultry Protection Act*,

which enabled them to do so. This authority is now covered under the *Municipal Act 2001* . . .

[Order PO-2103's] concluding remarks also indicate in part: "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." (pg. 12).

As you know, we have made a request to the [Ministry] and the City of Toronto for some of the same records for a very practical reason. It has been our experience from conducting access to information requests that when two agencies have control over the same records it is a vital crosscheck to ask both agencies for the same records to verify the information. Often one agency will provide what another will not, and in some instances, will provide different records on the same issue, when in fact, the records should be identical.

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We have taken careful note of the remarks contained within [Order PO-2103] as they relate to the right of possession of records: "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." (pg. 8).

Throughout [Order PO-2103], there are also frequent references to cases and decisions relating to records relating only to people as they concern the ramifications for personal privacy issues.

While we understand the ramifications for personal privacy issues if it was accepted that taxpayers have a right of access to all records in Ontario such as tax returns, criminal records and the like – in our specific case, we are requesting access to records relating to animals, not people, and to analyze the standard of care and welfare of animals and to gauge the effectiveness of the way in which those holding a public trust discharge their duties using tax dollars . . .

. . . [T]he privacy concerns relating to people do not apply to animals.

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Records are at the very heart of an animal control and shelter operation. We have provided you with evidence that the Ministry's statutory authority to administer and enforce the [ARA] is absolute and therefore so is their control over the records.

The appellant goes on to explain why he believes it is important that the records he requested be disclosed.

The appellant has not persuaded me that I should depart from my conclusions in Order PO-2103, and the appellant has not provided me with any “new evidence” that would compel me to do so. In my view, the essential facts and regulatory framework are the same here as in the previous order. As in Order PO-2103, I am not persuaded that because the Ministry has regulatory responsibilities regarding pounds, it therefore has “control” over the pound’s records, as that term is defined in section 10(1) of the *Act*. The fact that some records responsive to the appellant’s request may be in the custody of the City of Toronto, as opposed to a pound, does not alter this conclusion. I note also that the appellant’s request to the City of Toronto is being dealt with in another appeal.

Finally, the appellant’s submissions regarding personal privacy issues do not advance his position. Personal privacy considerations were not relevant to my finding in Order PO-2103 that the Ministry does not have control of pound records, and the lack of a personal privacy issue in this case has no impact.

I conclude that any records responsive to items 2 and 3 of the appellant’s request, held by the City of Toronto and/or municipal pounds, would not be under the control of the Ministry. Therefore, the section 10(1) right of access would not apply to those records.

REASONABLE SEARCH

Introduction

The appellant takes the position that the Ministry has in its custody additional records responsive to all three parts of his request.

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the Ministry’s decision. If not, I may order further searches.

Where a requester provides sufficient detail about the records 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 responsive records. The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records.

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 exist.

Representations

During the mediation stage of the appeal, the Ministry wrote to the appellant and provided a further explanation of its decision:

You requested reports of all pound inspections of all pound facilities in Metropolitan Toronto from [1996]-2001. The records that respond to your request are 16 one-page reports for 6 pound facilities in the Toronto area. These are listed on the table below:

Pound	No. of Reports	Date of Report
East York Animal Control	3	August 20, 1996 April 7, 1998 September 9, 1998
Etobicoke Animal Control	2	June 18, 1997 March 26, 1998
Pickering, Ajax, Whitby Animal Control	2	August 8, 1997 April 2, 1998
Scarborough Animal Control	3	September 27, 1996 July 25, 1997 September 9, 1998
Toronto Humane Society	1	September 28, 1999
City of York Animal Control	5	September 17, 1996 October 31, 1996 July 28, 1997 March 10, 1998 October 30, 1998

You questioned whether the Ministry had provided full disclosure of all records of pound inspections that you requested. In response to your question, all inspection reports for pound facilities in Metropolitan Toronto for the period 1996 to November 2001 have been provided. Inspection reports for this timeframe were one page in length. The documents provided are complete.

Regarding the volume of reports, there was a change to the inspection policy in 1999 that affected the frequency of inspections. In 1999, a risk-based inspection policy for pounds was implemented. The change in frequency of inspections at pounds in Toronto from 1999-2001 reflects the implementation of this policy.

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Animal control and pound services are contracted directly by municipalities. Contracts for these services are between a pound and a municipality. The Ministry . . . is not involved. As your request was about pounds in Toronto, the City of Toronto is the institution that would have correspondence related to these services. In accordance with section 25 of the [Act] your request was transferred to Toronto.

During mediation the ministry was advised that you are seeking any correspondence about animal care, control and pound services in Toronto, not just correspondence about the contracting or provision of services. A search was conducted and one record was located that is responsive to your request. The document is a letter from the City of Toronto dated May 23, 1997. Access is available and a copy is enclosed.

In its representations in the inquiry, the Ministry submits:

When the Ministry received the request, it was forwarded to the appropriate Division and program area for a response. The program manager responsible for the [ARA] asked all animal care inspectors and the Chief Veterinary Inspector to search their file for documents responding to the request. All responsive investigation reports were held in the files of the Chief Veterinary Inspector. Files for pounds in the City of Toronto did not contain any correspondence responding to the request. The Ministry rarely receives correspondence about specific pounds so this was not unusual. No letters of complaint had been received about the pounds. Further, as the Ministry has no power to register or license pounds, the pound files do not contain routine correspondence of that nature.

Sixteen inspection reports were located for inspections conducted in 1996, 1997 and 1998. No reports existed for 1999-2001 . . .

During mediation of the Appeal, the Ministry was advised that the appellant was seeking any correspondence about animal care, control and pound services in Toronto, not just correspondence about the contracting or provision of services. Consequently, a second search for correspondence was conducted and inspectors were asked to review their files again. No correspondence was found in inspection files. At that time the Ministry also searched the central correspondence system for letters to the Minister and Deputy Minister. One document was located, a letter from the City of Toronto dated May 23, 1997. Access was provided to the appellant.

The search of the Ministry's central correspondence system confirmed that few letters are received by the Minister or Deputy Minister about specific pounds. Only one other letter about a pound was received during the five year period from 1996 to 2001.

The retention period for inspection files is 10 years.

The Ministry goes on to state that, with respect to item 3 of the request, "no records exist".

With regard to item 1, the appellant submits that there should be inspection reports for the years 2000 and 2001, and that the reports the Ministry provided are “incomplete”. Regarding item 2, the appellant submits simply that more correspondence should exist.

The appellant’s argument regarding item 3 is based on the theory that the Ministry has control over City and/or municipal pound records. I have disposed of this issue above.

The Ministry has provided sufficiently detailed and reasoned representations to persuade me that it has conducted a reasonable search for records that respond to all aspects of the appellant’s request, apart from any responsive records that may be in the custody of the City of Toronto and/or municipal pounds. The appellant has not provided me with a sufficient basis to conclude that additional records exist, or that the records provided are somehow incomplete.

I therefore conclude that the Ministry has conducted a reasonable search for responsive records.

ORDER:

I uphold the Ministry’s decision.

Original Signed By: _____ March 18, 2003
David Goodis
Senior Adjudicator