



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

ORDER PO-2385

Appeal PA-030142-4

Ministry of Community and Social Services



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NATURE OF THE APPEAL:

The Ministry of Community and Social Services, formerly the Ministry of Community, Family and Children's Services, (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act (the Act)* for the following information:

Copies of all correspondence in MCFCS possession related to an "Operational Review" of Ottawa Valley Autistic Homes [the OVAH] conducted by a named consulting company or any other relationship between Ottawa Valley Autistic Homes, MCFCS and or the named consulting company.

The requested correspondence includes, but is not limited to: Letters; Internal memos; Records of telephone conversations; E-Mails; Contracts; Interim, draft and/or final report.

Initially, the requester, now the appellant, appealed to the Commissioner's office on the basis that the Ministry was in a "deemed refusal" situation by not responding with a decision letter within the 30-day statutory time period set out in Section 26 of the *Act*. This office opened Appeal Number PA-030142-1. The Ministry responded with a decision letter stating the following:

Access to the record is being denied, as section 22 of the Act allows the Ministry to refuse to disclose a record where, it is likely that the record or the information contained in the record will be published by the Ministry within 90 days.

The appellant appealed the Ministry's decision on the basis that the decision letter only referred to part of the request. The Commissioner's office opened Appeal Number PA-030142-2.

During the mediation stage of that appeal, the mediator clarified with the appellant that the Ministry's decision failed to address the second part of his request. The Ministry issued a supplementary decision letter stating that access was denied to those records responsive to the second part of the request pursuant to section 14(2)(b) of the *Act* (law enforcement report).

In Order PO-2229 I determined that section 14(2)(b) had no application to the records at issue but applied the mandatory exemptions in sections 21(1) (invasion of privacy) and 17(1) (third party information) to the records. I ordered the Ministry to disclose to the appellant certain records relating to the provision of consulting services to the Ministry, with the exception of those portions of Record 1 containing the home telephone number of an identifiable individual. Following a reconsideration request by the Ministry, I also found that access to certain credit card numbers included on pages 7 and 9 of Record 1 and page 16 of Record 7 should also be denied on the basis that it fell within the mandatory exemption in section 21(1).

The appellant followed with another appeal in which he took the position that additional records responsive to his original request ought to exist. As a result, this office opened Appeal Number PA-030142-3. Specifically, the appellant stated that he had become aware that additional records should exist after reviewing the records that were released to him through Order PO-

2229. He also stated that he had not received a copy of a draft Preliminary Report which he felt ought to exist.

The sole issue in that appeal was whether the Ministry had conducted a reasonable search for the records as required by section 24 of the *Act*. In the course of processing that appeal, and following an oral inquiry, the Ministry located some of the additional records sought by the appellant and provided the appellant with a decision letter respecting access to those records that it had located. The Ministry indicated that it was denying access to portions of a letter sent by the consultant to two individuals as it contained the personal information of another identifiable individual who was a client of OVAH and was exempt under the mandatory exemption in section 21(1). The Ministry also advised the appellant that the preliminary report and four letters/memoranda from the consultant are not within its custody or control within the meaning of section 10 of the *Act*.

The appellant appealed that decision to this office, and Appeal Number PA-030142-4 was opened. During mediation, the appellant indicated that he was not seeking access to the information withheld from disclosure under section 21(1). Accordingly, the application of this exemption is no longer at issue. The sole issue remaining for adjudication is whether the preliminary report and the four letters/memoranda sought by the appellant are within the custody or under the control of the Ministry. I sought and received the representations of the Ministry and the consultant (the affected person) initially. I shared only the representations of the Ministry with the appellant, as the affected person's submissions did not add any additional significant information to those of the Ministry. The appellant also provided me with representations in response to the Notice.

DISCUSSION:

CUSTODY OR CONTROL

The sole issue for determination in this appeal is whether the Ministry exercises the requisite degree of custody and/or control over the records sought by the appellant, which consist of a preliminary report and four letters/memoranda.

General principles

Section 10(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy*

Commissioner), [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Factors relevant to determining “custody or control”

Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or under the control of an institution, as follows [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a “core”, “central” or “basic” function of the institution? [Order P-912]
- Does the content of the record relate to the institution’s mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- 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? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record’s use and disposal? [Orders P-120, P-239]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record? [Orders P-120, P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?
- Is the individual, agency or group who or which has physical possession of the record an “institution” for the purposes of the *Act*?
- Who owns the record? [Order M-315]
- Who paid for the creation of the record? [Order M-506]
- What are the circumstances surrounding the creation, use and retention of the record?
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution 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 institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue? [Order MO-1251]

Representations of the parties

In support of its contention that it does not have custody or exercise the requisite degree of control over the records sought by the appellant, the Ministry submits that:

. . . [it] contracted with a consultant in the Ottawa area to manage the Operational Review [which is the subject of the records]. This consultant, in turn, sub-contracted the work of the Operational Review to three independent consultants, who were responsible for certain aspects of the Review.

The three areas of responsibility encompassed, generally: financial matters, under the work of one subcontractor; program delivery, under the work of a second subcontractor; and lastly, governance and accountability under the third subcontractor.

This third subcontractor was also charged with the responsibility of producing the Final Operational Review Report by incorporating the results of her work on the governance and accountability aspects of OVAH with the findings of the financial and program review work of the other two subcontractors. This third subcontractor is the affected party at issue in this appeal.

The Ministry goes on to re-iterate that its initial contract for the conduct of the requested Operational Review, jointly entered into with the OVAH, was with the original consultant, who then retained the services of the three subcontractors described above. The Ministry points out that it has no contractual relationship with the subcontractors, including the individual who prepared the records being sought by the appellant in this appeal. It also indicated that the subcontractors are not its employees or officers.

The Ministry points out that it does not have possession of the four memoranda/letters sought by the appellant. It argues that these records fall within the ambit of section 15.3 of the contract between the Ministry and OVAH and the consultant (Record 4 in the earlier appeal) which indicates that interview notes are intended to be confidential and remain the property of the consultant. The Ministry argues that these memoranda were forwarded to members of the Board of Directors of OVAH by the Operational Review Team's lead consultant and were not copied to the Ministry.

With respect to the Preliminary Operational Review Report sought by the appellant, the Ministry states:

Record 6 under section B Report Status, states that the preliminary report is a confidential document. It goes on to state that due to concerns about leaks to the media, the Operational Review Team is concerned about the confidentiality of the

record and sets out an undertaking to limit the disclosure of the preliminary report.

The Ministry provided me with a copy of the Operational Review Team's guidelines designed to govern the manner in which the preliminary report was handled by each of its recipients. The Ministry's representations indicate that each recipient was logged and that their copies of the document were returned to the possession of the Leader of the Operational Review Team, the affected person. The recipients were not entitled to copy or circulate the document and were required to maintain its confidentiality.

The affected person confirms that this was the arrangement made for the circulation of the preliminary report amongst its recipients, and notes that all copies were returned to her office. The affected person also reiterates the statements of the Ministry concerning her role as a subcontractor in the Operational Review Team and that she was engaged as such by the main contractor retained by the Ministry and the OVAH. The affected person indicates that she continues to maintain the records pending the outcome of this appeal.

The appellant points out that Article 15.3 of the Revised Contract for Services (Record 4 in the earlier appeal) states that "the Consulting Firm agrees that all information and materials prepared for" the OVAH and the Ministry "will be their sole property" except for "interview notes" and "training materials/tools prepared by the Consulting Firm". The appellant contends that neither the memoranda and letters nor the preliminary report that he is seeking qualify as "interview notes" for the purposes of section 15.3. Accordingly, he argues that the "terms of services provided clearly stipulate that the named institution must rightfully own, possess or control the document requested, and, as such should be provided."

Findings

I have carefully reviewed the representations of the parties and the criteria described above to assist me in making a determination as to whether the Ministry has either custody or the requisite degree of control over the records. I find that the Ministry does not and never has enjoyed custody of the first group of records sought by the appellant. The four letters or memoranda were sent only to their recipients, who were members of the OVAH Board of Directors. Copies of the preliminary report were provided by the subcontractor affected person to 13 recipients who formed the Operational Review Team, some of whom were Ministry staff. I find as a fact that all of the copies of the preliminary report that were delivered to the members of the Team were returned by them to the subcontractor consultant who is the affected person in this appeal. Accordingly, I conclude that the Ministry does not presently have custody of any of the requested records.

As noted in the representations of the affected person and the Ministry, the affected person was engaged as a subcontractor by another party who was retained by the Ministry and the OVAH to conduct the review in question. The affected person's involvement was limited to the preparation of documents respecting only one aspect of the review and to serve as the Leader of Operational Review Team responsible for the study itself. I find that at no time was the affected person retained directly by the Ministry or the OVAH and that she was not, accordingly,

obligated through some contractual requirement to provide her working documents to the Ministry. These documents were, however, related to the Operational Review and were shared with members of the OVAH Board of Directors and the other members of the Operational Review Team, who apparently included representatives of the main contractor. This is a consideration favouring a finding that the records sought are not within the control of the Ministry.

In my view however, ownership in the records appears to lie not with the affected person and/or the main contractor but rather with the Ministry and the OVAH by virtue of the operation of Article 15.3 of the Revised Contract for Services. That provision clearly indicates that the information and material prepared in the course of the review is the property of the OVAH and the Ministry, with the exception of “interview notes” and “training materials/tools prepared by the Consulting Firm”. I agree with the position taken by the appellant that the four memoranda or letters and the preliminary report sought by the appellant cannot reasonably be characterized as falling within these two exceptions. As a result, I find that these records remain the property of the Ministry and the OVAH as a result of the operation of Article 15.3 of the Revised Contract for Services. The fact that the Ministry holds the property rights in the records in conjunction with the OVAH is a significant factor weighing in favour of a finding that it exercises the requisite degree of control over them in accordance with the principles expressed in the *Greater Vancouver Mental Health Service Society* decision referred to above.

Weighing these relevant factors, I find that the fact that the Ministry retains ownership over “all information and material prepared” during the course of the review, with several narrow exceptions, requires a finding that the records are within the Ministry’s control for the purposes of the *Act*. Accordingly, I conclude that the Ministry exercises the requisite degree of control over the records to allow me to make an order requiring it to make best efforts to recover the records and to provide the appellant with a decision letter regarding access to them under the *Act*.

ORDER:

1. I order the Ministry to request copies of the records sought by the appellant from the affected person within twenty-one (21) days of the date of this order.
2. Within thirty (30) days of the Ministry’s receipt of the records from the affected person, I order the Ministry to provide the appellant with a decision letter respecting access to the records in accordance with section 26 of the *Act*.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 26, 2005