



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2798

Appeal PA07-370

Office of the Public Guardian and Trustee



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

This order addresses records related to the municipal tax sales process. This process is set out in Part XI of the *Municipal Act, 2001*, which is entitled “Sale of Land for Tax Arrears”.

Under section 373(1) of the *Municipal Act, 2001*, a municipality may register a tax arrears certificate against title to land where realty taxes have not been paid for two years. Certain people who have an interest in the land must be notified of the registration of the tax arrears certificate (section 374(1)). The amount owing is called the “cancellation price.” If the cancellation price is paid within one year following the registration of the certificate, the certificate is cancelled (section 375(1)). However, if the cancellation price remains unpaid at the end of the one-year period following the date of the registration of the tax arrears certificate, the municipality may offer the land for sale by public auction or public tender (section 379(1)). Notice of the sale is given to the same individuals who were notified of the registration of the tax arrears certificate pursuant to section 374(1)).

When a property is sold for non-payment of taxes pursuant to section 379(1), the proceeds of the sale that remain after the municipality has subtracted the cancellation price, are paid into the Superior Court of Justice together with a statement of facts. The statement of facts must outline whether the land was vested in the Crown at the time the tax certificate was registered, identify the date the payment is being made and include a notice that any person claiming entitlement to the proceeds of sale must apply to the court within one year of the payment into court (section 380(2)).

Under section 380(3), within 60 days after making a payment into Court, the municipality shall send a copy of the statement to the Public Guardian and Trustee, as well as to the people who were notified of the registration of the tax arrears certificate and of the public sale.

Any person claiming entitlement to any of the proceeds of the sale may apply within one year for payment out of court of the amount to which the person is entitled (section 380(4)). After one year has passed from the day the payment was made into court, the Court determines all of the entitlements to receive payments out of the proceeds of the sale (section 380(5)).

If no one makes an application under section 380(4) within the one-year period, in other words, if no one claims entitlement to any of the proceeds of sale, the amount paid into court is deemed to be forfeited (section 380(6)). If the land to which the proceeds of sale relate was vested in the Crown at the time of the registration of the tax arrears certificate was vested in the Crown because of an escheat or forfeiture under the *Business Corporations Act* or the *Corporations Act*, the amount paid into court forfeits to the Public Guardian and Trustee. In any other case, the amount paid into Court forfeits to the municipality. Once the money has forfeited to either the Public Guardian and Trustee or the municipality, under section 380(7), the entity to which it has forfeited may apply to the Superior Court of Justice for payment of the amount that was paid into Court.

NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (the OPGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to

property owners whose property was sold for non-payment of taxes and where such funds were paid to the OPGT. The request specifically read:

Under the *Freedom of Information Act* please be so kind as to provide us with copies of documentation relating to payments made to the Public Guardian and Trustee, which contain the name of the property owner, the address of the property in question and the occupation, place of death and date of death, date of birth, place of birth, age, marital status and name of the father of the deceased persons where available, for property owners whose property was sold for non-payment of taxes and where such funds were paid to the Public Guardian and Trustee and where the whereabouts of the property owner are unknown and remains unknown as of the date of your response; and where the whereabouts of the closest next-of-kin of the deceased is unknown and where the present value of the amount received is greater than eighty thousand dollars, and where the Public Guardian and Trustee has not received any communications from any person(s) claiming to be a beneficiary.

Please note the above information is requested for payments made on or after January 1, 2000 up to the date of your response.

The OPGT issued a decision letter denying access to the records on the basis that they fall outside of the scope of the *Act*. The decision stated in part:

Please note that proceeds of municipal tax sales are paid into the Court so they are held by the Accountant of the Superior Court of Justice. As such the records you are requesting are wholly subject to the direction of the Justices of the Superior Court of Justice and subsequently outside the scope of the *Freedom of Information and Protection of Privacy Act*.

The requester, now the appellant, appealed the decision.

During mediation, the OPGT provided this office with a sample of the records. The sample consists of two forms: *Form 5, Payment into Court – Statement of Facts* and *Form 12, Payment into Court – Statement of Facts*.

As further mediation was not possible, the file was referred to the adjudication stage of the appeal process for an inquiry under the *Act*.

I began my inquiry by sending a Notice of Inquiry setting out the facts and issues to the OPGT. The OPGT responded with representations advising that it has no records which are responsive to the appellant's request. Given that the Accountant of the Superior Court of Justice (whose duties were placed under the operations of the Public Guardian and Trustee by statute in 1997) receives copies of the court documents and proceeds of sale under the *Municipal Act, 2001*, the Office of the Accountant prepared the representations on behalf of the OPGT. I then sent the

Notice of Inquiry to the appellant, together with a copy of the representations submitted by the OPGT. The appellant provided representations in response. As the appellant's representations raised issues to which I believed that the OPGT should be given an opportunity to respond, I provided the appellant's representations to the OPGT, seeking representations in reply. The OPGT provided reply representations, again prepared by the Office of the Accountant.

Following the receipt of reply representations, I required further clarification about the role of the OPGT and the Accountant in the process relating to the sale of land for tax arrears purposes under Part XI of the *Municipal Act, 2001*, I sent a letter to the OPGT requesting answers to a number of specific questions. The OPGT provided a response. I will consider the OPGT's answers to those questions as part of its representations in this appeal, together with its original representations and its reply submissions.

RECORDS:

The records at issue describe the proceeds of municipal tax sales for property owners whose property was sold for non-payment of taxes and whose whereabouts are unknown.

The OPGT submits that it has no records that are responsive to the request but that its Corporations Program receives copies of statements relating to tax sales, issued by municipalities and filed with the Superior Court of Justice. In this appeal, I will determine whether these copies of statements are responsive to the appellant's request.

The OPGT also submits that the Accountant of the Superior Court of Justice receives copies of court documents and proceeds of sale under the *Municipal Act, 2001*. As noted above, the role of the Accountant was placed under the operations of the Public Guardian and Trustee by statute in 1997. The OPGT, through representations prepared by the Office of the Accountant, takes the position that these records are not within its custody or control.

DISCUSSION:

RESPONSIVENESS OF RECORDS

In the circumstances of this request, the OPGT states that it does not have any records that are responsive to the appellant's request because no money resulting from a tax sale of land owned by individuals is paid to the OPGT by the municipality in which the property is located. However, the OPGT acknowledges that its Corporations Program receives copies of statements issued by municipalities relating to tax sales. These records indicate whether or not the property was vested in the Crown at the time of the registration of the tax arrears certificate on title to the property. During mediation, the OPGT provided this office with examples of such statements. Accordingly, I will first determine whether the statements relating to tax sales received by the OPGT from municipalities are responsive to the appellant's request.

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. The section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

.
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The OPGT explains that its Corporations Program receives copies of statements issued by municipalities in compliance with section 380(3) of the *Municipal Act, 2001* for the purposes of identifying property which was vested in the Crown at the time of the registration of the tax arrears certificate because of an escheat or forfeiture under the *Business Corporations Act* or the *Corporations Act*. The OPGT further explains that in order for property to have vested in the Crown, the former owner of the property must have been a corporation, incorporated under the *Business Corporations Act* or the *Corporations Act*, and that the corporation must have been dissolved for failure to comply with provincial legislation.

The OPGT submits that it has no statutory duty with respect to the copies of these statements and that it retains only those relating to municipal tax sales where it may have an interest in the proceeds. It explains that under section 380(6)(a) of the *Municipal Act, 2001*, if no person claiming entitlement to the proceeds of the sale makes an application to the Court under section 380(4), the amount paid into Court is deemed to be forfeited to the OPGT if, at the time of the registration of the tax arrears certificate, the property was vested in the Crown. Under section 380(7) of the *Municipal Act, 2001*, the OPGT has a right to apply for the payment out of Court of any funds that are forfeited to it under section 380(6)(a). The OPGT submits that funds forfeited to it under section 380(6)(a) are the property of the OPGT and cannot be claimed by any other person.

The OPGT explains that the statements that it receives from municipalities in compliance with sections 380(3) are not responsive to the appellant's request because the property owners identified on the statements that it retains are corporations and not individuals. It submits that the appellant's request specifically seeks access to records relating to individuals, not dissolved corporations. Additionally, the OPGT submits that the appellant's request is for information related to "property owners whose property was sold for non-payment of taxes and where such funds were paid to the Public Guardian and Trustee." It submits that the information its Corporations Program receives in relation to tax sales are only statements, and that the OPGT does not receive any funds from the sale of such lands from the municipality, unless the landowner was a corporation.

In the circumstances of this appeal, the appellant's request was for documentation "relating to payments made to the Public Guardian and Trustee...for property owners whose property was sold for non-payment of taxes and where such funds were paid to the Public Guardian and Trustee..." Additionally, the appellant specifies that he seeks access to records which "contain the name of the property owner, the address or the property in question and the occupation, place of death and date of death, date of birth, place of birth, age, marital status and name of the father of the deceased persons where available."

In my view, the appellant's request makes it clear that he is seeking access to information about payments that relate to properties sold for non-payment of taxes that were paid to the OPGT and where the original owners of the property were individuals.

I have reviewed the two examples of the types of statements received by the OPGT's Corporations Program from municipalities in accordance with section 380(3) of the *Municipal Act, 2001*, and find that they are not responsive to the appellant's request. Not only do the statements not describe payments made to the OPGT, they relate to properties that, prior to the tax sale, were vested in the Crown because of an escheat or forfeiture under the *Business Corporations Act* or the *Corporations Act*. In other words, the records held by the OPGT's Corporations Program do not relate to property owned by individuals.

Accordingly, I find that the statements received by the OPGT's Corporations Program are not responsive to the appellant's request.

CUSTODY OR CONTROL

As noted above, the OPGT takes the position that the records responsive to the appellant's request are held by the Accountant of the Superior Court and are, accordingly, court records that fall outside of the scope of the *Act*. The issue to be decided is, therefore, whether these records are under the custody or control of the OPGT.

Section 10(1) reads:

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,

- (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 10(1) provides the public with a right of access to records that are “in the custody or under the control of an institution.” If an institution’s custody or control of a record is established, the right of access under section 4(1) applies, subject to the exceptions in paragraphs (a) and (b).

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].

Representations

The OPGT explains that because it does not receive any payments under the *Municipal Act, 2001* related to municipal tax sales of land owned by individuals, the OPGT itself has no records which are responsive to the appellant’s request. However, it explains that the Accountant receives copies of court documents and statements related to all proceeds of municipal tax sales paid into Court by municipalities pursuant to the *Municipal Act, 2001*. As a result, the OPGT explains that the Office of the Accountant prepared the representations on behalf of the OPGT. The OPGT submits that the records at issue are court records which are not under the custody or control of either the Accountant or the OPGT and therefore fall outside of the scope of the *Act*.

The OPGT submits:

The Public Guardian and Trustee and the Accountant of the Superior Court of Justice do not have “custody” or “control” of the statements provided under the *Municipal Tax Sales Act* of the funds paid into court.

The Accountant has a copy of the court document filed by the municipality, which accompanies the payment of the net proceeds into court. This is required to track the funds to a particular court proceeding and to respond to an order of the Superior Court to pay out the funds to a named recipient.

In its submissions, the OPGT identifies the following factors as relevant in support of its position that neither the OPGT nor the Accountant has “custody” or “control” of the type of records sought by the appellant:

- The records at issue are not created by the Accountant. Rather, they are created by municipalities pursuant to their statutory duty under section 380 of the *Municipal Act, 2001*, and predecessor legislation.
- The Accountant has bare, physical possession of the copies of court statements filed by municipalities under *The Municipal Act, 2001*, pursuant to the statutory requirement imposed on municipalities under that *Act*.
- Neither the OPGT nor the Accountant has a statutory power or duty with respect to the municipal tax sales’ process that resulted in the creation of the records.
- The Accountant receives a copy of the records for the sole purpose of accurately recording the receipt of the net proceeds of municipal tax sales to the credit of a particular Superior Court file number. The Accountant’s involvement is purely administrative.
- The Accountant does not have the authority to regulate the use and disposal of either the records or the proceeds. Under the *Municipal Act, 2001*, the Accountant may only pay out those proceeds upon receipt of an Order of the Superior Court of Justice.
- All of the responsive records held by the Accountant are copies of court documents, which are outside the scope of the *Act* and publicly available subject to section 137 of the *Courts of Justice Act*.
- Documents created by municipalities are not within the control of the Accountant of the Superior Court of Justice because the Accountant has only “bare” possession: *Walmsley v. Attorney General of Ontario et al.* (1997), 34 O.R. (3d) 611; [1997] O.J. No. 2485 (C.A.). The Accountant’s “bare” possession of the records does not include sufficient rights to deal with them in a manner that would amount to “custody” for the purpose of the *Act*: Order P-994.
- The Accountant is an officer of the Court: *The Public Guardian and Trustee Act*, R.S.O. 1990, c. P.51, section 5(3). With regard to money that has been paid into Court under orders of the Court, he is wholly subject to the direction of the Justices of the Court: *Roscar Investments Ltd. v. Selkirk*, [1970] O.J. No. 486 (S.C.J.). His status is similar to that of the Sheriff: Orders P-1089 and P-1151.

The appellant submits:

The records pertaining to municipal tax sales received from a municipality are created by the Accountant of the Superior Court of Justice (the "Accountant"), in order to "be able to match the court order with the corresponding funds" as per the Affidavit of ...the Accountant....

The OPGT Submission acknowledged that the original source of information of funds held by the Accountant are either from the Superior Court of Justice, or from various municipalities, pursuant to *The Municipal Act, 2001* and predecessor legislation, and that the records of both these types of bodies may be "available from the "Superior Court pursuant to section 137(1) of the *Courts of Justice Act.*" Therefore the subject matter of the information requested is already available through the [Act].

The OPGT in their Submission dated 14 March 2008 (the "OPGT Submission"), and the affidavit of the Accountant, dated 13 March 2008, both acknowledge that the role of the Accountant was placed under the operations of the OPGT by statute in 1997, and is operational within the Toronto Regional Office of the Public Guardian and Trustee.

The Accountant receives funds resulting from a municipality's net proceeds of a tax sale where the location of the claimant of the net funds is either known or unknown.

The content of the records pertaining to unclaimed funds held by the Accountant is related to the OPGT's mandate and functions, one of which is to administer the estates of deceased persons who die without a will in Ontario, some of whose heirs are either unknown or un-located, thus resulting in unclaimed funds.

Both the Accountant and the OPGT, under which the Accountant operates, receive unclaimed funds and create records pertaining to these funds.

In previous matters the Information and Privacy Commissioner (the "IPC") has ruled that basic information of unclaimed funds should be made available for the benefit of unknown heirs.

The activity of maintaining records of funds received by the Accountant is a basic, core and central function of the Accountant, who is under the auspices of the OPGT.

The OPGT's activity of maintaining records of funds under its care are also a basic, core, and central function of the OPGT.

Regardless of whether or not the Accountant's records are currently maintained separately from the other records of the OPGT, due to the differing sources of funds (as noted by both the OPGT Submission and the Accountant's affidavit of 13 March 2008), the OPGT Submission acknowledged that the OPGT supervises the investment of funds held by the Accountant, and therefore the OPGT has, or should have, access to records held by the Accountant.

The appellant concludes his representations by stating:

Throughout Ontario there are hundreds of municipalities which collect such overpayments (or unclaimed funds) and which remit these unclaimed funds to the Accountant and/or directly to the OPGT. Therefore the Accountant, operating under the auspices of the OPGT, is in control of records pertaining to these unclaimed funds.

On reply, the OPGT submits:

The Accountant has no unclaimed funds, since all money held by the Accountant from municipal tax sales is payable pursuant to an Order of the Superior Court of Justice. The *Municipal Tax Sales Act* requires that the net proceeds of sale be paid into court in all circumstances, not because the owners cannot be located, but to enable the Superior Court to determine the priority of entitlement to those funds as between the former owner and any mortgagees, lien claimants or execution creditors.

The Accountant routinely pays out the proceeds of municipal tax sales as directly by Order of the Superior Court of Justice. The Accountant of the Superior Court of Justice and the OPGT have no duty to locate the former owners of the properties sold for tax arrears and no assistance is required to locate them, as the statutory process operates effectively to determine the persons entitled to the proceeds of sale, which is not restricted to the former owners. The Accountant does not require the assistance of the Appellant to perform its statutory functions.

Analysis and finding

In Order P-994, Adjudicator Laurel Cropley found that the Ministry of the Attorney General did not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the *Act*. In that order, Adjudicator Cropley reached the following conclusions:

- (1) the *Act* does not define a class of records called "court records", nor are records in this category expressly excluded from the *Act* by any of its provisions;

- (2) the question of whether a “court record” comes within the scope of the *Act* must therefore be determined based on the general principles enunciated in the *Act*, and in particular, the principle enunciated in section 10(1) to the effect that a record must be in the custody **or** under the control of an institution in order to fall within the scope of the *Act*;
- (3) courts are not “institutions” under the *Act*, and, based on the constitutional separation of the judiciary from the other branches of government, courts are not part of any Ministry;
- (4) by virtue of the *Courts of Justice Act* and the common law, courts have a right to supervise and protect their own records (i.e. records which are directly related to a court’s adjudicative function);
- (5) records of the type at issue in Order P-944 (i.e. “informations”) found within a court file are in possession of the Ministry but it is only a bare possession, and they are not under the Ministry’s control;
- (6) based on Order P-239, “bare possession” does not amount to custody for the purposes of the *Act*; rather, there must be “some right to deal with the records ...”;
- (7) as a result of points (5) and (6), neither custody nor control were established for “informations” found in court files, and they fall outside of the scope of the *Act*; and
- (8) copies of such records which exist independently of a “court file” may be within the custody or control of an institution and, in that event, would be subject to the *Act*

The reasoning applied by Adjudicator Cropley in Order P-994 was subsequently followed by Senior Adjudicator John Higgins in Order P-1089. In Order P-1089 Senior Adjudicator Higgins found that writs of seizure and sale issued by the Court and subsequently filed with sheriffs’ offices were not subject to the *Act*. He identified the following findings as relevant to his determination of the matter:

- (1) in issuing and dealing with writs of seizure and sale, the Registrar and the Sheriff act as officers of the Court;
- (2) writs of seizure and sale result from judgments of a court and remain under the court’s overriding supervision while in the possession of the Sheriff;
- (3) despite the Ministry’s administrative involvement with writs of seizure and sale, including the manner in which searches for them are conducted by

members of the public, the Ministry does not have sufficient powers relating to the acquisition, retention and disposal of writs of seizure and sale by the sheriff to give it “control” over such writs in the hands of the Sheriff;

- (4) the Ministry’s possession of writs of seizure and sale in the hand of the Sheriff is a “bare” possession, and does not include sufficient rights to deal with them to amount to “custody” for the purpose of the *Act*;
- (5) accordingly, the Ministry does not have custody or control of writs of seizure and sale in the hands of the Sheriff and I find that they fall outside of the scope of the *Act*.

I agree with Senior Adjudicator Higgins’ findings and find that there are relevant in the present appeal.

I have carefully considered the parties’ representations and the particular circumstances of this appeal. Although I acknowledge that the Accountant has possession of statements filed by the municipality, which accompany payments of the proceeds of municipal tax sales into Court, I find that they are not under his “custody” or “control” for the purposes of section 10(1) of the *Act*.

Specifically, I accept that with respect to the statements received relating to the proceeds of municipal tax sales, the Accountant clearly acts solely as an officer of the Court. Although, as the depository for all monies paid into Court, the Office of the Accountant receives statements filed with the Court relating to the proceeds of municipal tax sales, the Accountant’s rights with respect to the use of such records are purely administrative in nature. The Accountant has no authority to do anything more than file the records and secure the funds until the Court makes an order to have all or part of the money paid out to an entitled individual.

In my view, although the Accountant is in possession of records responsive to the appellant’s request, it amounts to “bare” possession as he does not have sufficient powers to give him “custody” or “control” for the purposes of the *Act*. I find that the Accountant’s limited ability to use, maintain, dispose of and disseminate the records outside of orders issued by the Court does not amount to “custody”. Nor do I find, on the evidence before me, that there are sufficient indicia of “control” over these records by the Accountant, as they are court records which remain under the Court’s overriding supervision while in his possession. I conclude, therefore, that the records at issue are court records that are under the custody or control of neither the Accountant nor the OPGT for the purposes of section 10(1) of the *Act*. Accordingly, there is no right of access to the records under the *Act*. That being said, I urge the appellant to contact the Superior Court of Justice regarding access to these publicly available records.

ORDER:

I uphold the OPGT's decision and dismiss the appeal.

Original Signed By: _____

Catherine Corban
Adjudicator

_____ June 26, 2009