



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

# **ORDER PO-2968**

**Appeal PA10-91**

**Ministry of Government Services**



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## **BACKGROUND:**

The Ministry of Government Services (the ministry) provided the following background about the Board of Funeral Services (BOFS), the organization whose records are at issue in this appeal. The BOFS is a corporation without share capital created by the *Funeral Directors and Establishments Act (FDEA)* and in the ministry's submissions, was meant to operate at arms-length from the ministry.

Section 2 of the *FDEA* states (emphasis added):

**“The principal object of the Board is to regulate the practices of funeral directors and persons who operate funeral establishments** and transfer services in accordance with this Act, the regulations and the by-laws in order that the public interest may be served and protected.

In addition, *FDEA* sets out additional objects of the BOFS in subsection 3(3):

1. To establish, maintain and develop standards of knowledge and skill among funeral directors and persons who operate funeral establishments and transfer services.
2. To establish, maintain and develop standards of qualification and standards of practice for funeral directors and persons who operate funeral establishments and transfer services.
3. To establish, maintain and develop standards of professional ethics among funeral directors and persons who operate funeral establishments and transfer services.
4. To administer the Compensation Fund.
5. To oversee and inspect trust accounts that funeral establishments and transfer services are required by law to establish or maintain.
6. To mediate complaints between consumers and licensees.
7. To establish and develop standards for funeral establishments.
8. To perform such other duties and exercise such other powers as are imposed or conferred on the Board by or under any Act.

Section 4(1) of the *FDEA* prescribes the composition of the Board. The board is composed of the following members, appointed by the Lieutenant Governor in Council:

1. A prescribed number of funeral directors, one of whom,
  - i. is not licensed to operate a funeral establishment
  - ii. is not a director of a corporation that is licensed to operate a funeral establishment, and
  - iii. does not direct the operation of a funeral establishment.
2. A prescribed number of persons who are not funeral directors.

Section 5 of the *FDEA* sets out the powers of the Minister of Consumer Services to review the BOFS' activities, to make requests or to advise the Board. It states:

5. The Minister may, in addition to any other powers and duties conferred on the Minister by or under any Act,
  - (a) review the activities of the Board;
  - (b) request the Board to undertake activities that, in the opinion of the Minister, are necessary and advisable to carry out the intent of this Act;
  - (c) advise the Board with respect to the implementation of this Act and the regulations and with respect to the methods used or proposed to be used by the Board to implement policies and to enforce its by-laws and procedures.

The ministry submits that apart from the Minister's power to review the activities of the BOFS, the Minister may only request that the BOFS undertake activities, or advise the BOFS with respect to the implementation of the *FDEA*. The ministry notes, "Even then, this power is limited to implementing the BOFS' policies, or enforcing their own by-laws and procedures."

## **NATURE OF THE APPEAL:**

The appellant made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about a named funeral home. Specifically, the request was for:

...all inspection records for the [named funeral home], from 1990 until its closure in 2007.

...I'm also requesting any and all documents and/or records related to the [named funeral home], including, but not limited to, e-mail correspondence, letters, notes to file and/or meeting minutes.

The ministry located responsive records and granted the appellant partial access to them. In addition, the ministry provided the appellant with an index of records claiming the application of the exemption in section 19 (solicitor-client privilege) of the *Act* to the remaining records. The ministry later provided the appellant with an amended index of records noting that the previous index did not indicate that inspection records do not exist.

During mediation, the appellant advised the mediator that she will not be pursuing access to the records denied under section 19 of the *Act*. Accordingly, these records are no longer at issue.

The appellant further advised that she is specifically seeking access to any inspection reports relating to the named funeral home. The ministry advised the mediator that it does not have any such inspection reports while the appellant disputes the ministry's search for the inspection reports, questioning whether the ministry's search was reasonable.

The appellant also questioned whether the BOFS is an institution under the *Act*. In addition, the appellant believes that, in the event that the ministry does not have the inspection reports, it should be able to obtain these reports from the BOFS. As such, the appellant has raised the issue of whether the inspection reports are in the ministry's custody or control.

During the inquiry into this appeal, I sought and received representations from the ministry, the BOFS and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7. In its representations, the appellant acknowledges that the BOFS is not an institution and is not therefore, subject to the *Act*. Accordingly, I will not be addressing this issue further in this order.

## **DISCUSSION:**

### **CUSTODY OR CONTROL**

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.), and 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 control of an institution, as follows [Orders 120, MO-1251, PO-2306 and PO-2683]. 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 and 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 and 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 and 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 and P-239]
- Does the institution have a right to possession of the record? [Orders P-120 and P-239]
- Does the institution have the authority to regulate the record’s content, use and disposal? [Orders P-120 and 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 and P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120 and 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? [PO-2386]
- 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? [PO-2386]
- 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? Did the agent have the authority to bind the institution? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.); *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.)]
- 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]

Both the BOFS and the ministry provided submissions in support of their position that none of the criteria for custody and control set out above have been met. The ministry further submits that the Ontario Court of Appeal's finding in *Walmsley*, cited above, should be instructive in this appeal. The ministry states:

In *Walmsley*, the Court of Appeal held that an institution does not have custody or control over records of another person or body, where the purpose is to create an independent arms-length relationship with another person or body. In the Ministry's submission, the BOFS is established to be at arms-length from the Ministry in relation to the day-to-day administration of the FDEA and to regulate the practice of funeral directions and establishments. In the Ministry's submission, the FDEA clearly establishes, the legislature's intention that the BOFS is to regulate and govern funeral directions and establishments, including inspecting persons licensed under the FDEA.

*Was the record created by an officer or employee of the institution?*

Both the BOFS and the ministry submit that the inspection reports are prepared by BOFS inspectors who are not employees or officers of the ministry. Rather, they submit that BOFS inspectors are employees of the Board.

*What use did the creator intend to make of the record?*

The BOFS inspectors created the records to be used internally by the Board in regulating the practices of funeral directors and persons who operate funeral establishments and transfer services in accordance with the *FDEA*. The BOFS states:

As part of [the] regulatory process, the BOFS undertakes regular inspections of funeral establishments/transfer services in Ontario to ensure that licensees are complying with the various requirements in the *FDEA* and the regulations thereunder. Those requirements address such things as the format and content of funeral contracts, as well as the physical premises of the establishment (e.g., cleanliness, necessary equipment, etc.). The inspection report is given to the licensee who is asked to remedy any deficiencies noted by the inspector. If the deficiencies are numerous or serious the matter may be brought to the attention of the Registrar who may consider taking action against the licensee, which may include a proposal to revoke, suspend or impose conditions on the license. Alternatively, the matter may be brought to the attention of the Executive Committee of the BOFS which may consider referring allegations of professional misconduct against a funeral direction to the Discipline Committee<sup>1</sup>.

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<sup>1</sup> Section 7(1) of the *FDEA* provides that the Board establish a number of committees including the Discipline Committee. The Discipline Committee's function as described by the *FDEA* is to hear and determine allegations of professional misconduct or incompetence against a funeral director when so directed by the Board, the Executive Committee or the Complaints Committee.

The Registrar of the BOFS is appointed by the Board and his or her powers are set out in section 2(2) of the *FDEA*. However, in general, the Registrar is tasked with making licensing decisions regarding applicants and licensees, which are subject to appeal<sup>2</sup>.

*Does the institution 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?*

Both the ministry and the BOFS submit that the ministry does not have physical possession of any of the inspection reports. The ministry notes that the BOFS has never voluntarily provided it with individual records, nor has it provided them under a statutory or employment requirement to the ministry. The ministry further submits that a search of its records holdings did not result in any copies of inspection reports being found in the ministry's possession.

*Does the institution have a right to possession of the record?*

The ministry submits that the inspection reports are kept in strict confidence by the BOFS and:

...the Ministry does not require such records because the Ministry does not administer the day-to-day operations of the Act. A record of inspection of a particular licensee under the Act is clearly in relation to the day-to-day operation of the *FDEA*.

It is further submitted that the situation with the BOFS is no different than the Ministry's treatment of the Ministry's Delegated Administrative Authorities, such as the Electrical Safety Authority or the Real Estate Council of Ontario. In the Ministry's submission, the Ministry has no involvement with the day-to-day operations of the BOFS and that day-to-day administration includes licensing decisions, inspection results, and the recording of those inspection results.

The BOFS further notes that it is required under the *FDEA* to deliver an annual report to the ministry and this report is primarily composed of statistical information and would not include all or part of any actual inspection reports.

*Does the content of the record relate to the institution's mandate and functions?*

The BOFS submits that the record relates to its mandate and not the ministry's. The ministry states that while its mandate is to oversee the operation of the BOFS this does not include the administration of the day-to-day operation of the BOFS.

*Does the institution have the authority to regulate the record's content, use and disposal?*

Both the BOFS and the ministry submit that the ministry does not have authority to regulate the content, use or disposal of the record.

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<sup>2</sup> The ministry further notes that the Registrar is tasked with oversight of the BOFS' day-to-day activities and is solely responsible for licensing and related decisions. The ministry states, "As these responsibilities and powers have been delegated to the Registrar by the *Act*, the Ministry is precluded from exercising those functions."



*If the record is not in the physical possession of the institution, who has possession of the record, and why?*

The BOFS has possession of the records and maintains the records pursuant to its statutory duty to regulate funeral establishments and transfer services in Ontario.

*Who owns the record?*

The BOFS' position is that it owns the inspection records as they were created by its employees for the purposes of fulfilling BOFS's statutory mandate to regulate funeral establishments and transfer services.

*Who paid for the creation of the record?*

The BOFS paid for the creation of the record in that it paid the salary of the inspector who created the inspection report along with any related expenses. Both the ministry and the BOFS note that BOFS does not receive any funding from the Ontario Government. The BOFS generates its own funds by licensing and other revenue established by regulation under the *FDEA*.

*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?*

The BOFS and the ministry confirm that there are no contracts between them or any individual employees of BOFS that expressly or impliedly give the ministry the right to possess or control the records in any way.

*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? 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?*

The BOFS and ministry confirm that while there is no agreement or understanding between the ministry and the inspectors or the ministry and the BOFS, the *FDEA* contains a confidentiality provision in section 48(1) which states:

**Matters confidential**

48. (1) Every person employed in the administration of this Act, including any person making an inspection under this Act and any member of the Board or a committee of the Board, shall preserve secrecy with respect to all matters that come to the person's knowledge in the course of the person's duties, employment, inquiry or inspection and shall not communicate any such information to any other person except,

- (a) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations;
- (a.1) as authorized under the Regulatory Modernization Act, 2007;
- (b) to the person's counsel;
- (c) with the consent of the person to whom the information relates; or
- (d) to an employee of the Ministry of Consumer and Business Services or to an employee of another ministry who requires the information in the performance of his or her duties and if disclosure is necessary for the administration of this Act or any other Act and the regulations thereunder administered by the Minister. R.S.O. 1990, c. F.36, s. 48 (1); 2001, c. 9, Sched. D, s. 7 (4); 2007, c. 4, s. 32.

The ministry submits that section 48(1)(d) is not relevant in this appeal as a ministry employee cannot need an inspection report to perform his or her duties since the BOFS administers the *FDEA* on behalf of the ministry.

*Was the individual who created the record an agent of the institution for the purposes of the activity in question?*

Both the ministry and the BOFS confirm that the inspectors are employees of BOFS and not the ministry's agents.

*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?*

The ministry submits the following on this factor:

The fact that the Ministry has never sought the records, and that the BOFS would refuse to provide these records if requested is highly determinative of the control issue. This is supported by the existence of the confidentiality clause contained in s. 48 of the *FDEA* and the fact that no Ministry employee would come within any listed exceptions, as explained above.

The BOFS submits that inspection reports are not provided to the ministry in order to protect the integrity of the inspection process.

The appellant submits that because the Minister has the right under the *FDEA* to review the activities of the BOFS, including revoking its by-laws, then the ministry must have control over the records. The appellant states:

...it is inconceivable that the Ministry would be forced to [review] without access to the Board documents. The authority granted to the Minister, in our view, gives the Ministry the right to demand access to records held by the Board of Funeral Services and is not dependent only on the voluntary compliance by the Board. Thus effectively, the Ministry has control of the records of the board including the inspection records for funeral homes. The reasoning of Letourneau J. should apply to find the Ministry of Consumer Services has control of the records requested even if it does not have custody of them.

The appellant cited *Canada Post Corp.*, cited above, in support of its position that the power given to the Minister under the *FDEA* indicates that the ministry exerts control over the record for the purposes of this appeal.

The ministry also made submissions on the application of *Canada Post Corp.*, cited above and states:

In *Canada Post Corp. v. Canada (Minister of Public Works)*, 30 Admin. L.R. (2d) 242 (Fed. C.A.), the Federal Court held that a broad, liberal and purposive approach should be taken when interpreting access to information legislation. This was reiterated by the Ontario Court of Appeal in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072. (hereinafter "*Criminal Code Review Board*")

The *Criminal Code Review Board* decision considered the issue of custody and control and can be taken to adopt some of the IPC's tests for custody or control. In the Ministry's submission, it is clear in that the Court of Appeal recognized a difference between an institution's use of alternate service delivery providers (in this case court reporters who recorded the proceedings for the Board, which was an institution under the Act) and a person or organization who is intended to be at arms-length from government. Indeed, the Court of Appeal carefully preserved its ratio in *Walmsley v. Ontario (Attorney General)* 1997 CanLII 3017 (ON C.A.), (1997), 34 O.R. (3d) 611 (C.A.) (hereinafter "*Walmsley*") in the *Criminal Code Review Board* case. In *Walmsley*, the Court of Appeal held that an institution does not have custody or control over records of another person or body, where the purpose is to create an independent arms-length relationship with another person or body. In the Ministry's submission, the BOFS is established to be at arms-length from the Ministry in relation to the day-to-day administration of the *FDEA* and to regulate the practice of funeral directors and establishments. In the Ministry's submission, the *FDEA* clearly establishes, the legislature's intention that the BoFS is to regulate and govern funeral directors and establishments, including inspecting persons licensed under the *FDEA*.

## FINDINGS

Based on my review of the parties' representations I find that the ministry does not have custody or control of the responsive records. I accept both the ministry and the BOFS's submission that the inspection reports and related records are kept by the BOFS under its statutory mandate to perform inspections under the *FDEA*, but also to establish and maintain standards relating to the knowledge, practice and professional ethics among funeral directions, funeral establishments and other transfer services.

While I accept the appellant's submission in favour of a broad and liberal approach to the custody and control as suggested by the Federal Court of Appeal in *Canada Post Corp*, I find the Court of Appeal's approach in *Walmsley*, cited above, to be more instructive in the current appeal.

In *Walmsley*, the Court of Appeal considered the following factors as indicative that Ministry of the Attorney General did not exercise control over the responsive records in that case, finding at paragraph 23:

It is true, as the Assistant Commissioner said, that the documents in question were held by these individuals because of their role on the Committee and that the contents of the documents related to the work of the Ministry. While these factors are of some limited relevance to the question of Ministry control, much more important are the following considerations. **Individual Committee members were neither employees nor officers of the Ministry. They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry. The Ministry had no statutory or contractual right to dictate to the Committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess. The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them. While there may have been elements of agency in the relationship between individual Committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents.** Finally, there is nothing in the record that allows the conclusion that these documents were in fact controlled by the Ministry. Hence, it cannot be said that the documents in the possession of individual Committee members were under the control of the Ministry. [emphasis added]

Based on my review of the parties' representations on the factors, I accept the ministry and BOFS's submissions that the ministry does not have control over the records for the following reasons:

- The inspection reports are prepared by BOFS inspectors who are employees of BOFS.

- The inspection reports are created as part of BOFS's mandate to establish and maintain standards for funeral establishments and transfer services.
- BOFS is not funded by the ministry or the Ontario government.
- Minister's powers relate to reviewing the activities of the Board; requesting the Board to undertake certain activities or advising the Board with respect to the implementation of the *FDEA*.
- It is the mandate of the BOFS, and not the ministry, to regulate the practices of the funeral directors, funeral establishments and transfer services.
- There are no agreements or undertakings between the BOFS and the ministry relating to the creation, use or disposal of the inspection reports.

Considering the factors I have listed above and the factors considered by the Court in *Walmsley* to be indicative of a lack of sufficient control, I find that the ministry does not have custody or control of the inspection reports for the purposes of the *Act*.

## **SEARCH FOR RESPONSIVE RECORDS**

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

The ministry submits that the appellant's request was twofold and included inspection records for a named funeral home and any documents and/or records related to the named funeral home. In support of its search, the ministry submitted an affidavit from the manager of the Delegated Authority Liaison at the ministry. The manager's main responsibilities include oversight, accountability and issues management for seven regulatory organizations, including the BOFS. The manager affirmed that she and three additional ministry employees conducted email, electronic and print record search for the Sector Liaison Branch, Policy and Consumer Protection Services Division at the ministry as well as in the Assistant Deputy Minister's office at the ministry for responsive records.

The manager affirmed that while a number of responsive records were located with respect to part two of the appellant's request, no inspection records for the named funeral home were found.

I find that the appellant did not provide a reasonable basis for her belief that the inspection records should exist at the ministry, other than her position that the records are in the control of the ministry.

Based on the ministry's representations including the evidence provided in the affidavit, I find the ministry's search to be reasonable, given that it does not exercise the requisite degree of custody or control over the inspection reports sought.

**ORDER:**

1. I uphold the ministry's decision that the inspection records are not in its custody or control.
2. I find that the ministry's search for the inspection records was reasonable.

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ May 10, 2011