

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3413

Appeal PA13-549

Ministry of the Attorney General

October 24, 2014

**Summary:** The appellant sought access from the Ministry of the Attorney General to certain records that are in the possession of the Ministry of Labour, relying on the supervisory powers set out in section 5 of the *Ministry of the Attorney General Act*. In this order, the adjudicator finds that the ministry does not have custody of the records and does not exercise control over them.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1); *Ministry of the Attorney General Act*, R.S.O. 1990, c. M-17.

**Orders and Investigation Reports Considered:** Order 120

**Cases Considered:** *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

### OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to “the records of the email and binders cited in the record request with the file number MAG-2008-810.”

[2] After clarifying the request with the requester, the ministry issued a decision clarifying that the request was for access to two specific records: an email dated May 30, 2007 addressed to the requester from the then-Acting Manager Workplace Insurance, Health and Safety Policy Unit at the Ministry of Labour; and the contents of a specified court file from November 2007.

[3] The ministry advised the requester that the email record he was seeking is in the custody and control of the Ministry of Labour (Labour) and that he may wish to contact that institution directly.

[4] With respect to the court records referred to in the decision letter, the ministry advised that court records fall under the direction and supervision of the Court of Ontario and are not subject to the provisions of *FIPPA*. The ministry provided the requester with information about how to access court records and concluded its correspondence by stating, "I trust this information is of assistance and have closed your file."

[5] The requester (now the appellant) appealed the ministry's decision to this office on the basis that his request was not properly clarified or interpreted and that the appeal had been closed without his consent. During mediation, the appellant clarified that he was seeking access to the following items:

1. **An email** of May or June 2007 (he could not confirm the exact date) which was sent to [the appellant's email address] from [an identified Manager] with the Workplace Insurance, Health and Safety Policy Unit, Ministry of Labour.
2. **Two binders** that were referred to in a Report which was posted on a Ministry of Labour website in 2007. The website address was as follows: ([www.labour.gov.on.ca/english/hs/reports/firefighters/index.html](http://www.labour.gov.on.ca/english/hs/reports/firefighters/index.html)). The title of the Report was as follows: "Report to Minister Peters on the Treatment of Firefighter Cancer Claims by the WSIB". The Report was dated July 14, 2006 and authored by [a named] Parliamentary Assistant. The appellant explained that the Report made reference to two binders which accompanied the Report. He is seeking access to these two binders which were described as:
  - A binder titled "Reports prepared on firefighting and cancer in Canada"; and
  - A white binder titled "Overview of regulation, policy and scientific evidence on firefighting and cancer in Canada".

[6] In response to the clarified request, the ministry issued a decision letter to the appellant which stated:

Your clarified request indicates the **email** was sent to you from a staff person at the Ministry of Labour; and the **two binders** were referenced in a Report posted on the Ministry of Labour website.

As indicated in your clarified request, the records you are seeking may be under the custody and control of the Ministry of Labour. Therefore, you may wish to contact that institution directly.

[7] The appellant advised the mediator that he believes the records he requested should be within the ministry's custody and control and this is the sole issue to be determined in this appeal. As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the ministry on the issue of whether it exercises the requisite degree of custody or control over the records sought by the appellant. A complete copy of the ministry's representations, along with a Notice of Inquiry, was provided to the appellant, who made lengthy submissions in response.

[8] In this order, I find that the ministry does not have the requisite degree of custody or control over the records.

## **DISCUSSION:**

### **Does the ministry have custody of or control over the requested records?**

#### **General principles**

[9] 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 . . .

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

[11] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.<sup>1</sup>

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<sup>1</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[12] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.<sup>2</sup> A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[13] The courts and this office have applied a broad and liberal approach to the custody or control question<sup>3</sup>.

### **Factors relevant to determining "custody or control"**

[14] 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.<sup>4</sup> 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?<sup>5</sup>
- What use did the creator intend to make of the record?<sup>6</sup>
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?<sup>7</sup>
- Is the activity in question a "core", "central" or "basic" function of the institution?<sup>8</sup>
- Does the content of the record relate to the institution's mandate and functions?<sup>9</sup>
- 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?<sup>10</sup>

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<sup>2</sup> Order PO-2836.

<sup>3</sup> *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.

<sup>4</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>5</sup> Order 120.

<sup>6</sup> Orders 120 and P-239.

<sup>7</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>8</sup> Order P-912.

<sup>9</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); and Orders 120 and P-239.

<sup>10</sup> Orders 120 and P-239.

- If the institution does have possession of the record, is it more than “bare possession”?<sup>11</sup>
- 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?<sup>12</sup>
- Does the institution have a right to possession of the record?<sup>13</sup>
- Does the institution have the authority to regulate the record’s content, use and disposal?<sup>14</sup>
- 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?<sup>15</sup>
- To what extent has the institution relied upon the record?<sup>16</sup>
- How closely is the record integrated with other records held by the institution?<sup>17</sup>
- 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?<sup>18</sup>

[15] 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?<sup>19</sup>
- Is the individual, agency or group who or which has physical possession of the record an “institution” for the purposes of the *Act*?

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<sup>11</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>12</sup> Orders 120 and P-239.

<sup>13</sup> Orders 120 and P-239.

<sup>14</sup> Orders 120 and P-239.

<sup>15</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>16</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders 120 and P-239.

<sup>17</sup> Orders 120 and P-239.

<sup>18</sup> Order MO-1251.

<sup>19</sup> Order PO-2683.

- Who owns the record?<sup>20</sup>
- Who paid for the creation of the record?<sup>21</sup>
- What are the circumstances surrounding the creation, use and retention of the record?<sup>22</sup>
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

[16] In determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.<sup>23</sup>

[17] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,<sup>24</sup> the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

### **Representations of the parties**

[18] The ministry relies on a number of the factors listed above in support of its position that Labour, and not the ministry, maintains custody and control over the requested records. It points out that the records were created by staff within Labour, for use in the context of that ministry’s functions. The ministry adds that the records do not relate to its mandate or core functions and that it does not exercise authority over the regulation or the use to be made of the records or their disposal. It goes on to submit that the records are not now and never have been in the possession of the ministry and that if they exist at all, they are in the custody or control of Labour.

[19] The ministry argues that it directed the appellant to seek the records from Labour, though it did not, for reasons that are not at all apparent, simply forward the request to Labour under section 25(1) or transfer it under section 25(2) on the basis that Labour has a greater interest in the records.

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<sup>20</sup> Order M-315.

<sup>21</sup> Order M-506.

<sup>22</sup> Order PO-2386.

<sup>23</sup> *City of Ottawa v. Ontario*, cited above.

<sup>24</sup> 2011 SCC 25, [2011] 2 SCR 306.

[20] The ministry has provided representations addressing the fact that Labour is also an institution under the *Act*. It goes on to submit that even the disclosure required by the federal Crown in the context of criminal proceedings does not extend to all records maintained by the federal government, but only to those materials which it has or can obtain.<sup>25</sup> By way of analogy, the ministry argues that in the context of a request under the *Act*, only records which are maintained by the institution which receives a request fall within the custody or control of that institution and that the responsive records do not encompass any and all records held by all provincial institutions.

[21] Finally, the ministry relies upon the decision of the Supreme Court of Canada in *Canada (Information Commissioner)*, which is cited above, for the proposition that the two part test enunciated by the Court requires that the records sought must relate to "the ministry's functions and mandate". It argues that because these records do not relate to any of its own functions or mandate, this fact "ends the inquiry as to 'control'."

[22] The appellant's initial arguments focus on his view that the ministry exercises control over the records for the purposes of the *Act* by virtue of the application of section 5(c) of the *Ministry of the Attorney General Act*<sup>26</sup> (the *MOAGA*) which grants to the Attorney General the power to "superintend all matters connected with the administration of justice in Ontario." He argues that this broad language encompasses "the right to superintend the information contained in the records sought" and that the ministry exercises the requisite degree of control over them as a result. The appellant also relies on sections 5(e) and (f) of *MOAGA* in support of this position.

[23] In his representations, the appellant goes on to argue that even if the ministry does not have physical possession of the records, it exercises legal possession of the record by virtue of the various oversight functions that it maintains under section 5 of *MOAGA*. He then reviews the factors listed above which he argues support his position that the ministry exercises the requisite degree of control over the records. Again, relying on the provisions of section 5 of *MOAGA*, he suggests that the ministry's "superintendence of the information contained in the records" is a core, central or basic function of the ministry. He also submits, without further proof or attribution, that the ministry has the right to physically possess the records and has "responsibility for the care and protection of the information, so that the foundational correctness that it is can be used to uphold the rule of law when carrying out imposed function 5(b) of *MOAGA*." [sic]

## **Analysis and findings**

[24] I accept the position of the ministry that it does not have physical possession of the records which are sought by the appellant. I have reviewed the representations of the parties with respect to the criteria set out in previous orders to determine whether

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<sup>25</sup> R. v. McNeil, 2009 SCC 3, [2009] 1 S.C.R. 66 at para. 22.

<sup>26</sup> R.S.O. 1990, c. M-17.

the ministry exercises the requisite degree of control over the records. I have also applied the reasoning from the decision of the Supreme Court of Canada in *Canada (Information Commissioner)*. In my view, an application of the two-part test established in that case, as well as an evaluation of the relevant considerations from other decisions of this office, leads to the conclusion that the ministry does not have control over the records which the appellant is seeking.

[25] To begin, I find that the subject matter of the records sought do not relate to a “departmental matter” which falls within the mandate or authority of the ministry. Based solely on the wording of the request, it would appear that any responsive records would fall within the ambit of the duties and responsibilities of Labour as they originated with staff with that ministry and not with the ministry. In addition, contrary to the position taken by the appellant, I find that the powers and duties of the ministry which are outlined in section 5 of the *MOAGA* do not extend so far as to include oversight and control over the record-holdings of other provincial government bodies, such as Labour. These other provincial entities operate as separate institutions for the purposes of the *Act* and requests for information from their record-holdings can be made directly to them.

[26] Further, I find that I have not been provided with any basis which would enable me to determine that the ministry could “reasonably expect to obtain a copy of the document upon request” from Labour, as contemplated by the second part of the test under *Canada (Information Commissioner)*. Contrary to the arguments put forward by the appellant, I find that the ministry does not exercise any supervisory or other oversight of Labour and its record-holdings which would enable it to request and reasonably expect to receive copies of the records sought by the appellant. As a result, I find that neither aspect of the two-part test which would establish “control” over a record have been met with respect to the ministry and the records sought.

[27] In addition, based on my review of the factors from previous orders which are described in detail above, I find that the appellant has not satisfied me that the ministry exercises any of these indicia of control over the requested records, listed or unlisted. Other than his reliance on his own interpretation of the meaning of section 5 of *MOAGA*, the appellant has not referred to any of the other considerations which may support a finding that the ministry exercises the requisite degree of control over the records.

[28] The ministry has referred me to a number of the criteria from previous orders referred to above which are applicable to the records being sought in this appeal. I am satisfied that the records do not relate to the ministry’s mandate or core functions and it does not exercise authority over the regulation of the use made of the records or their disposal. Further, I find that the records were created and are maintained exclusively by staff at Labour, which is also an institution under the *Act*. I conclude that



the preponderance of factors favour a finding that the ministry does not exercise control over the records which the appellant is seeking.

[29] By way of summary, I dismiss the appeal on the basis that the ministry does not exercise the requisite degree of control over and does not have custody of the records sought by the appellant.

**ORDER:**

I dismiss the appeal on the basis that the ministry does not have custody of and does not exercise the requisite degree of control over the records.

Original Signed By: \_\_\_\_\_ October 24, 2014 \_\_\_\_\_  
Donald Hale  
Adjudicator