

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-3699

Appeal PA15-114

Social Justice Tribunals Ontario

February 21, 2017

**Summary:** The appellant filed a request under the *Freedom of Information and Protection of Privacy Act* to the Social Justice Tribunals of Ontario for copies of notes a Vice-Chair made while presiding at a human right proceeding. The tribunal issued a decision letter to the appellant claiming that it does not have custody or control of the Vice-Chair's notes. The appellant appealed the tribunal's decision to this office. This order upholds the tribunal's decision and finds that the notes are not in the custody or control of the tribunal. The appeal is dismissed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1).

**Orders and Investigation Reports Considered:** Order 120, P-396, P-505, P-1132, and PO-1906.

### OVERVIEW:

[1] The appellant filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Social Justice Tribunals of Ontario (the tribunal or HRTO) for copies of the notes a Vice-Chair made during a specified human rights proceeding. Specifically, the request sought access to:

....a copy of [named Vice Chair's] hand written and typed notes for [specified file number] including but not limited to all his typed and hand written notes for all the hearings and directives he conducted on this matter.

[2] The tribunal issued a decision letter to the appellant advising that the responsive records were not in their custody or control.

[3] The appellant appealed the tribunal's decision to this office and a mediator was assigned to the appeal. However, mediation did not resolve the appeal and the issues in dispute were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry the parties provided representations to this office.

[4] In this order, I find that the Vice-Chair's notes are not in the tribunal's custody or control.

## **DISCUSSION:**

[5] The sole issue in this appeal is whether the Vice-Chair's notes are "in the custody" or "under the control" of the tribunal. The tribunal describes the records as the "personal notes" of the Vice-Chair. The tribunal submits that it does not have physical custody of the Vice-Chair's notes and the appellant appears not to dispute the board's claim. However, the appellant submits that the records are "under the control" of the tribunal.

[6] 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...

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

[8] 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>

[9] 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). In this appeal, the tribunal claims that if the records are found to be within its custody or control they would qualify for exemption under the law enforcement provisions in sections 14(1)/49(a).

[10] In Order 120, former Commissioner Sidney B. Linden outlined an approach to determine whether specific records fell within the custody or control of an institution.

---

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

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

Numerous orders have since considered the issue of custody or control and have adopted the principles articulated in Order 120.<sup>3</sup> The tribunal's submissions identify the following considerations set out in Order 120 as relevant in determining whether records are within its control or custody:

- the notes were not created by an employee or officer, but by an OIC appointee carrying out an independent adjudicative function;
- the notes were intended to be working notes, prepared for the Vice-Chair's own use and benefit as an aide memoire to assist in the drafting of an adjudicative decision issued in the course of determining an application under the *Human Rights Code*;
- human rights tribunal members take notes at their own discretion and not all members take notes;
- there is no legal requirement or tribunal policy regarding the creation, storage, maintenance or disposal of notes;
- the tribunal does not generally know if notes have been taken, and have no guidelines regarding the retention or destruction of notes;
- tribunal members store any personal notes separately from tribunal files – these notes are not part of the tribunal's case or application files, do not form part of the record of proceedings, are never uploaded to the electronic case management system, are not saved or stored in shared hard drives or electronic folders, and are not referenced in any common record keeping indexes;
- the tribunal member is the only person with access to the notes; and
- the tribunal member has complete control over the notes including the choice of how to make them (handwritten or on a personal or government issued laptop), where to store them, if at all (in a desk drawer at home or at the office or in a 'virtual desk drawer' in a laptop file folder) and how long to keep the notes before disposing of them.

[11] The tribunal states:

[i]n this particular case the Vice-Chair voluntarily used for his own convenience a government issued laptop, to which he had sole access, to create his personal notes. He could have deleted these notes at any time without the involvement of the [tribunal]. It can be said that, to the extent he chose to retain them in a personal file folder on his laptop, the [tribunal's] possession occurred by happenstance and the notes are only in [its] bare possession...

---

<sup>3</sup> See for example Orders P-239, P-271, P-326, P-396, P-505 and M-59.

[12] The appellant provided extensive submissions in support of her position that the records are in the tribunal's custody or control. In my view, the appellant's submissions fall under one of the three following arguments:

- The Vice-Chair is an employee of the tribunal and as a result the tribunal has custody or control of the records;
- The tribunal has control over the Vice-Chair's notes as they were created using a computer the tribunal owns; and
- If the Vice-Chair is not an employee, then section 6(6) of the *Solicitors' Act* supports the position that the notes belong to the tribunal.

[13] The appellant submits that the tribunal has custody or control over any work product created by the Vice-Chair, including any notes, given their working relationship. The appellant submits that the relationship between the tribunal and Vice-Chair is an employee-employer relationship for the following reasons:

- the Vice-Chair takes direction from upper management at the tribunal;
- the tribunal supplied the Vice-Chair with a computer and an office. In addition, the Vice-Chair is provided administrative support from tribunal employees;
- the Vice-Chair's business card suggests that he is a representative of the tribunal;
- the Vice-Chair receives his salary [and is expected to receive a pension] from the Government of Ontario; and
- the Vice-Chair is an "employee" as defined by the Canada Revenue Agency (CRA).

[14] The appellant also submits that the facts in this appeal support its position that the tribunal "... can exert at any time, physical possession" over any notes made on the computer the tribunal provided the Vice-Chair. In support of this position, the appellant states:

As the record is contained in a computer owned by the HRTO, it is not always within the walls of the HRTO as it travels with the Vice-Chair as he carries out his duties as assigned by the HRTO. In the event of a cessation of the Vice-Chair's relationship with the HRTO ... the computer would be returned to the HRTO for use by another employee. Therefore, it is submitted that the institution has possession of the record as it can recall the physical asset in which it is stored at any time. In older times, the record would have been stored in a large metal filing cabinet in the HRTO office where it would be present 100% of the time. As technology has advanced, the intent of the wording of this requirement must also become advanced.

It is submitted that the institution can exert physical possession of the record on demand.

[15] Finally, the appellant argues that if the Vice-Chair is not an employee, section 6(6) of the *Solicitor's Act* requires him to deliver the records in question to the tribunal upon payment of monies for the completion of his work at the tribunal. Under the heading "Solicitor's Costs", section 6(6) of the *Solicitor's Act* reads:

Client's papers

Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, shall deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power belonging to the client.

### **Decision and analysis**

[16] As noted above, previous decisions from this office adopted the reasoning in Order 120 which identified a list of factors which may be relevant in determining whether records are in custody or control of an institution. In Order P-396, the former Assistant Commissioner Tom Mitchinson stated:

A number of orders have dealt with the issue of custody or control (Orders P-239, P-271, P-326, M-59), all of which turn on the particular circumstances of this appeal in relation to the type of factors listed by the former Commissioner in Order 120. Similarly, this appeal must be decided on the basis of its particular facts.

[17] In that order, Assistant Commissioner Mitchinson found that notes made at a pre-hearing conference by a board member at the Rent Review Hearings Board (the board) were created for her own personal use. In the absence of evidence that the notes were subsequently filed in any record keeping system over which the board has administrative control, it was found that the notes were not in the control of the board.

[18] Similarly, in Order P-505, this office found that notes made at an Ontario Municipal Board (the board) hearing by a presiding board member were never in the custody or control of the board but were located in the member's personal possession at his home and were created for his own personal use.

[19] More recently, in Order PO-1906 this office applied the reasoning in Orders P-1132 and P-1230 and found that notes relating to a proceeding before the Ontario Labour Relations Board (the board) were not in the board's custody or control having regard to the board's evidence that the notes, if they exist, were made for the personal use of the adjudicator and were not integrated with other records held by the board.

[20] In support of her position, the appellant referred to previous decisions from this

office which have held that records not directly related to an institution's core functions or were created by individuals not employed by the institution are not in the custody or control of an institution.<sup>4</sup> Accordingly, the appellant appears to take the position that the type of records which are properly not in the custody or control of an institution are records prepared by third parties retained by institutions. The appellant argues that the circumstances of this appeal are quite different from these cases in that the Vice-Chair is an employee and the notes he created are directly related to the tribunal's core function. In addition, the appellant argues that the Vice-Chair's decision is not advisory in nature, but binding on the tribunal.

[21] In my view, whether or not the Vice-Chair is an employee or an independent contractor is not the sole determining factor in assessing whether the tribunal exercises control or custody over his notes for the purposes of the *Act*. In Order P-396 Assistant Commissioner Mitchinson found it was not necessary to address the issue of adjudicative independence to determine whether the tribunal member's notes were in the custody or control of the Rent Review Hearings Board. In that order, Assistant Commissioner Mitchinson stated:

The sole issue is whether the Board member's notes are in the custody or under the control of the Board, not whether the Board is able to demand production of the notes from its members.

[22] Similarly, I find that the fact that the notes were prepared by a full-time member entitled to pension benefits as opposed to a part-time member who may have an outside law practice is not determinative of the custody and control issue in this appeal. In addition, the fact that the notes were created on tribunal property, whether it be a laptop or a legal pad paid for by the tribunal also does not determine who has custody or control of the record for the purposes of the *Act*.

[23] What is relevant is whether the tribunal has custody or control of the notes in the particular circumstances of this appeal. I have reviewed the evidence and am satisfied that the Vice-Chair's notes were created for his own use and were not provided to the tribunal. In making my decision, I accept the tribunal's evidence that the notes, if they exist, would have been stored separate from any tribunal files or electronic data management system. Accordingly, any notes, if they exist would be in the Vice-Chair's possession and the tribunal does not regulate the use of these types of records. In the absence of evidence that the Vice-Chair's notes became integrated with the tribunal's record keeping management system, I find that the notes are not in the control or custody of the tribunal.

[24] In making my decision, I have taken into account the test set out in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*<sup>5</sup>. I have also considered the appellant's submission that section 6(6) of the *Solicitor's Act* supports

---

<sup>4</sup> In support of her position, the appellant referred to Orders MO-1251, MO-2586, PO-2306, PO-2836 among others.

<sup>5</sup> 2011 SCC 25, [2011] 2 SCR 306.

her position that the Vice-Chair's notes are in the tribunal's control. Although it is not clear to me exactly how the *Solicitor's Act* may apply, the appellant's submission in this regard appears to be similar to her point that the Vice-Chair made his notes on a government issued laptop, which the tribunal should "recall" or "exert physical possession" upon receipt of a request under the *Act*. In my view, the appellant's arguments address the issue of whether the tribunal has a right under law to compel the production of the notes. Whether or not the tribunal or a court can order the production of the Vice-Chair's notes is an issue outside the jurisdiction of this office. In any event, my finding that the tribunal in the circumstances of this appeal does not have custody or control of the Vice-Chair's notes does not affect the power of a court or tribunal to compel the production of these same documents, if they exist.<sup>6</sup>

[25] Having regard to the particular circumstances of this appeal and the type of factors listed in Order 120, I am satisfied that the Vice-Chair's notes are not in the custody or under the control of the tribunal.

**ORDER:**

The appeal is dismissed.

Original Signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

February 21, 2017 \_\_\_\_\_

---

<sup>6</sup> Section 64(2) states that the *Act* "does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document".