

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3745

Appeal PA16-110

Ministry of Labour

June 30, 2017

Summary: The appellant made a request to the Ministry of Labour (ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of registration forms that are completed and kept at constructors' work sites. This order upholds the ministry's decision that the requested registration forms are not in their custody or under their control for the purposes of section 10(1) of the *Act*. The ministry's statutory production powers are insufficient in the context to support a finding that the ministry has custody or control of the requested records. 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 PO-2103.

Cases Considered: *City of Ottawa v. Ontario*, 2010 ONSC 6835; *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25, [2011] 2 SCR 306.

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Labour (the ministry) for access to a completed *Notice of Project* form (Form 0175) and for *Registration of Constructors and Employers Engaged in Construction* forms (Form 1000) for a construction project at four specified addresses.

[2] The ministry disclosed a copy of the *Notice of Project* form for the specified addresses and advised that no Form 1000 records existed in its custody or control.

[3] The appellant appealed the ministry's decision regarding the Form 1000 records.

[4] During mediation, the appellant acknowledged that while the Form 1000 records may not be in the possession of the ministry, the ministry was obligated to contact the constructor who has possession of any Form 1000 form to obtain a copy of it, and to provide an access decision with respect to it.

[5] The ministry referred to the part of the Form 1000 template that states:

Pursuant to section 5 of the *Construction Regulations*¹ made under the *OHS Act*,² "Before beginning work at a project, each constructor and employer engaged in construction shall complete an approved registration form. The constructor shall ensure that each employer at the project provides to the constructor a completed approved registration form; and a copy of the employer's completed form is kept at the project while the employer is working there."

[6] The ministry said that any Form 1000 is kept at the project site and that constructors are not required to file or submit a completed Form 1000 directly with or to the ministry. The ministry stated that constructors are, however, required to keep the Form 1000 at their project site, and have it available should a ministry inspector request it.

[7] The appellant maintained that a completed Form 1000 is under the ministry's control and requested that the appeal proceed to adjudication, where an inquiry is held.

[8] During the inquiry, I sought and received representations from the ministry and the appellant. Representations were shared in accordance with *IPC Practice Direction 7*.

[9] In this order, I find that the Form 1000 records the appellant requested are not in the custody or under the control of the ministry for the purposes of section 10(1) of the *Act*.

DISCUSSION:

[10] The issue in this appeal is whether the Form 1000 records the appellant requested are in the custody or control of the ministry.

[11] Section 10(1) reads, in part:

¹ *O. Reg. 213/91: Construction Projects.*

² *Occupational Health and Safety Act, R.S.O. 1990, c.0.1. (OHS Act)*

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 . . .

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

[13] 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.³ The courts and this office have applied a broad and liberal approach to the custody or control question.⁴ This office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution.⁵ In determining whether records are in the “custody or control” of an institution, the factors must be considered contextually in light of the purpose of the legislation.⁶

[14] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,⁷ 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?

Parties’ arguments

[15] The parties agree that the ministry does not have physical custody of the Form 1000 records requested by the appellant. The ministry’s initial representations therefore analyse the issue of custody and control applying the 2-part test in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* above. They say in respect of the two-part test that:

1. the contents of the record do not relate to a ministry matter; and
2. the ministry could not expect to be given such documents upon request except in the course of an inspector carrying out his or her duties under *OHSA*.

³ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁴ *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.

⁵ Orders 120, MO-1251, PO-2306 and PO-2683.

⁶ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

⁷ 2011 SCC 25, [2011] 2 SCR 306.

[16] The ministry's initial representations also consider whether the requested records are within the ministry's custody or control with respect to each of the ten questions described by the Ontario Superior Court in *City of Ottawa v. Ontario*⁸ as useful and relevant (when considered in the context of the legislative purpose and intent) for assessing the custody or control issue. The ministry submits that considering these 10 questions the ministry does not have custody or control of the requested Form 1000 records. Its submissions regarding the ten factors are summarized below:

(i) Was the record created by an officer or employee of the institution?

The record is created by constructors and employers engaged in construction. The requirement in section 5 of *O. Reg. 213/91 (Construction Projects)* is clearly that the record is created by constructors and employers at the project. The record is not created by or for an officer or employee of the ministry. The ministry has a regulatory role in this context and is not the entity for which the constructors and employers carry out their activities and create records.

(ii) What use did the creator intend to make of the record?

The constructors and employers engaged in construction complete the registration form and make it available at the particular worksite while they are working there. The record is used to provide information regarding who is working at the construction project. There is no intent or requirement in the legislation for this form to be provided to the ministry.

(iii) Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

The ministry does not have possession of the record. The ministry did not require the completed form for enforcement purposes and as such, does not possess the record or have any basis to possess or request the record.

(iv) 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?

The record was not held by an officer or employee of the ministry at any point.

(v) Does the institution have a right to possession of the record?

⁸ Cited above.

The only purpose for which an inspector would review the record would relate to *OHS*A enforcement. Otherwise, the ministry has no right to possess the record. The powers of inspectors are clearly set out in *OHS*A, which indicates that inspectors are limited to exercise their powers only for the purposes of carrying out his or her duties and powers under *OSHA* and the regulations. Therefore, if an inspector had no need to review or possess a record to carry out their duties under *OHS*A and the regulations, there would be no basis for an inspector to acquire the record.

(vi) Does the content of the record relate to the institution's mandate and functions?

The content of the record relates to a specific construction project. The only relationship to the record is that the ministry requires it to be completed by employers and constructors by virtue of the ministry's mandate to develop, communicate and enforce workplace standards while encouraging greater workplace self-reliance.

(vii) Does the institution have the authority to regulate the record's use?

The ministry only has the ability to enforce the requirements set out in *OHS*A and its regulations. As such, the ministry's authority is limited to requiring contractors and employers to complete the form and have it available **at the project** [emphasis in original] while the employer is working there.

The ministry cites Order PO-2103, to support its submission that the ability to access records pursuant to its regulatory mandate does not equate to custody or control. The ministry submits that the ability of the ministry to regulate is to enforce workplace standards and not to possess all records of the entities subject to *OHS*A for the purposes of the *Act*.

(viii) To what extent has the record been relied upon by the institution?

The ministry has not relied on the record.

(ix) How closely has the record been integrated with the other records held by the institution?

The record has never been in the possession of the ministry and has therefore not been integrated with any of its records.

(x) Does the institution have the authority to dispose of the record?

The ministry does not regulate the disposal of the record and only requires that it be made available at the project while the employer is

working there. The constructor or employer would dispose of the record at the appropriate time without any notice to or knowledge of the ministry.

Summary of ministry's representations

[17] The ministry submits that it does not have possession of the requested record because the ministry did not require the completed form for enforcement purposes. Absent requiring the record for such a purpose, the ministry says it has no basis to possess or to request the record. The ministry also submits that there is a qualitative difference between an organization's powers to possess records pursuant to its regulatory mandate and its powers to possess records for other reasons, for example where it owns them or where they were created on its behalf.

[18] The appellant's representations responding to the ministry's initial representations make two, related arguments- one related to custody and one to control. I will outline each in turn.

Custody

[19] The appellant refers to the ministry's own submissions,⁹ which acknowledge that ministry inspectors can review a Form 1000 upon request for *OHS*A enforcement purposes. The appellant says this power of access constitutes a "legislative custody". The appellant says given these powers, it is reasonable that the ministry could exercise these powers to access a Form 1000 in order to make it available to the public.

Control

[20] The appellant argues that the Form 1000 is under the control of the ministry by operation of the health and safety legislation referred to in the excerpt from the Form 1000 template above. The appellant says the legislation equates to the ministry having "control" over the Form 1000 because the ministry controls when, where and by whom the form is to be completed.

[21] The appellant also says that as there is no confidentiality requirement regarding the form, it should be able to be viewed by the public. The appellant also questions how the applicable legislation is enforced without public access to the record.

Ministry response

[22] In response to the appellant's arguments the ministry cites Order PO-2103, which it says dealt with a very similar fact situation to the present involving powers of the Ministry of Agriculture, Food and Rural Affairs. Order PO-2103 states in part:

⁹ At para. 22 of the ministry's initial representations.

I agree that pursuant to its statutory inspection powers, the ministry may demand the production of pound records and, in that sense, the ministry has a right to possess the records. In my view, this limited right does not lead to the conclusion that the ministry in any generalized way has the right to possess the records as would be the case, for example, where an agent is carrying out a statutory function on a ministry's behalf ... The opposite view would lead to an absurdity, suggesting for example that the Ontario Human Rights Commission has control over all records in Ontario, simply because pursuant to its powers it may seize records held by anyone in the province, as long as certain conditions are met. In my view, there is a qualitative difference between an organization's powers to possess records pursuant to its regulatory mandate, and its powers to possess records for other reasons, such as the fact that it owns them or they were created on its behalf.

[23] The ministry says that under section 54(1) of *OHS*A, an inspector is limited to exercise powers for the purposes of carrying out his or her duties and powers under the Act and the regulations. It submits that inspectors have authority under *OHS*A to access a Form 1000 only if the record was relevant to an inspection or investigation being performed under *OHS*A and that there is no general right of access to a Form 1000. The ministry accepts that if it had in fact acquired the record at issue for enforcement purposes then the ministry would have custody or control over the record for the purposes of the *Act*.

[24] It says that the fact that the appellant would like a copy of a Form 1000 does not provide the ministry with the authority to obtain it under *OHS*A.

Analysis

[25] It is common ground that the ministry does not have physical possession of the requested Form 1000 records.

[26] The appellant argues that the statutory inspection powers of the ministry are sufficient to find the ministry has custody or control of the Form 1000 records.

[27] I agree with the ministry's submission that the reasoning in Order PO-2103, and summarized in the excerpt from that order above, applies to the present appeal to answer the custody and control arguments raised by the appellant. As in Order PO-2103,¹⁰ considering all relevant factors in context, the ministry's statutory inspection powers are insufficient to support a finding that the ministry has custody or control of the requested records for the purpose of section 10(1) of the *Act*.

[28] Considering the Form 1000 records in the context of the legislative purpose and

¹⁰ See also Order P-1069.

intent of the *Act*, I find that the requested records are not in the custody or control of the ministry for the purposes of section 10(1) of the *Act*.

[29] I recognize the appellant's concern that the public have an effective method of scrutinizing the actions of constructors to protect the public interest. However, I believe that other means to scrutinize constructors' activities are available, and note that the ministry has disclosed in full to the appellant other records regarding the construction project that was the subject of the appellant's request.

ORDER:

I find that the records the appellant requested are not "in the custody" or "under the control" of the ministry for the purpose of section 10(1) of the *Act*. The appeal is dismissed.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ June 30, 2017