Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3763

Appeal PA16-233-2

Ministry of the Attorney General

August 21, 2017

Summary: The appellant submitted an access request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for Law Society of Upper Canada (LSUC) records relating to a former ministry lawyer who surrendered his license to practise law. In response, the ministry sent a decision letter to the appellant claiming that it has no responsive records. The appellant appealed that decision to this office. During the adjudication stage of the appeal process, the appellant claimed that the adjudicator is biased in favour of the ministry. In this order, the adjudicator finds that the LSUC records sought by the appellant are not in the custody or under the control of the ministry for the purposes of section 10(1) of the *Act*. In addition, he finds that the appellant has not established a reasonable apprehension of bias on his part. He dismisses the appeal.

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

Orders and Investigation Reports Considered: Order PO-2739.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 SCR 282.

OVERVIEW:

[1] Under section 10(1), the *Freedom of Information and Protection of Privacy Act*

(the *Act*) applies only to records that are in the custody or under the control of an institution. The issue to be resolved in this appeal is whether certain records held by the Law Society of Upper Canada (LSUC) relating to a lawyer formerly employed by the Ministry of the Attorney General (the ministry) are in the custody or under the control of that ministry for the purposes of section 10(1) of the *Act*.

[2] The appellant submitted an access request under the *Act* to the ministry for LSUC records relating to a former ministry lawyer who surrendered his license to practise law. It appears that her access request is related to an action that she brought against the Crown alleging that certain ministry employees, including the former lawyer, had misconducted themselves in proceedings that she was involved in before the Landlord and Tenant Board and subsequently the courts. Her access request stated, in part:

> Pursuant to section 23 of [the *Act*] and paragraph 17 of Order PO-3150 – December 27, 2012 – Information and Privacy Commissioner, Ontario and pursuant to section 13(1) of the *Law Society Act*, and ss. 10(1), s. 10.1, 11 and 21(2)(a) of [the *Act*].
>
> I request a complete and unredacted copy of the Notice of Intention to Surrender License with written request for exemption from publication – no record of publication in Ontario Reports – and the Application for Surrender of License to Practice Law, with any and all attachments specifically including the statutory declaration, any documents and explanations required by the LSUC and received by the LSUC as submitted by [name of the former ministry lawyer] as part of the process of surrendering his license to practice law under Bylaw 4.
>
> I request a copy of all documentation made and/or released by the LSUC with respect to the acceptance of the application to surrender license.
>
> . . .

[3] In response, the ministry issued a decision letter to the appellant which stated in part:

> This is to advise that the MAG has no responsive records with respect to documents emanating from the LSUC on the subject of this request.
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> As indicated in my letter of July 7, 2016, the LSUC is a self-regulatory body that is independent of MAG and not a scheduled institution under [the *Act*].

[4] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

[5] During mediation, the appellant advised the mediator that she believes that the LSUC records she is seeking are under the control of the ministry for the purposes of section 10(1) of the *Act*. The ministry reiterated that it has no responsive records and that the LSUC is not a scheduled institution under the *Act*, but it did not take a formal position on whether the records sought by the appellant are under its control.

[6] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. The Notice of Inquiry that I sent to the parties stated that the issue to be resolved in this appeal is whether the records sought by the appellant are in the ministry's custody or under its control for the purposes of section 10(1) of the *Act*. I received representations from both the appellant and the ministry on this issue. In her representations, the appellant alleges, amongst other things, that I am biased in favour of the ministry.

[7] In this order, I find that the LSUC records sought by the appellant are not in the custody or under the control of the ministry for the purposes of section 10(1) of the *Act*. In addition, I find that the appellant has not established a reasonable apprehension of bias on my part. The appeal is dismissed.

DISCUSSION:

CUSTODY OR CONTROL

Are the LSUC records sought by the appellant "in the custody" or "under the control" of the ministry for the purposes of section 10(1) of the Act?

[8] 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 . . .

[9] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution. 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.[1] The courts and the IPC have applied a broad and liberal approach to the custody or control question.[2]

[10] The Notice of Inquiry that I sent to the parties provided a list of factors to consider in determining whether or not a record is in the custody or control of an

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

[2] *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.

institution.[3] 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. In determining whether records are in the "custody or control" of an institution, these factors must be considered contextually in light of the purpose of the legislation.[4]

[11] 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.[5] 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).

Custody

[12] I will first determine whether the LSUC records sought by the appellant are "in the custody" of the ministry for the purposes of section 10(1). A key factor in making this determination is whether the ministry has physical possession of these records, because physical possession is the best evidence of custody.[6]

[13] Bare possession of records, however, does not amount to custody, absent some right to deal with the records and some responsibility for their care and protection.[7] Consequently, even if the ministry has physical possession of the LSUC records, this only results in them being "in the custody" of the ministry for the purposes of section 10(1) if the ministry has some responsibility to deal with them and some responsibility for their care and protection.

[14] For the reasons that follow, I find that the LSUC records sought by the appellant are not "in the custody" of the ministry for the purposes of section 10(1) of the *Act*.

[15] As noted above, these records relate to a former ministry lawyer who surrendered his license to practise law. They include the Notice of Intention to Surrender License; the Application for Surrender of License to Practise Law, with all attachments, including the statutory declaration; and other documents that he was required to submit to the LSUC under Bylaw 4.

[16] The ministry states that it does not have physical possession of these LSUC records. It submits that because the LSUC is the body that regulates the legal profession, only the LSUC has physical possession of these records.

[17] In her representations, the appellant refers to the "requested records in the

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[3] Orders 120, MO-1251, PO-2306 and PO-2683.
[4] *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.)
[5] Order PO-2836.
[6] Order P-120.
[7] Orders P-239 and PO-1947-F and *City of Ottawa v. Ontario*, cited above.

possession of the LSUC." She does not assert that the ministry has physical possession of these records but instead submits that the ministry has "statutory control" over the records under section 13(1) of the *Law Society Act.*[8] I address this argument in my discussion below on whether the LSUC records are "under the control" of the ministry.

[18] The LSUC is a self-governing body that regulates, licenses and disciplines Ontario's lawyers and paralegals under both the *Law Society Act* and its own rules, regulations and guidelines. As a regulatory and licensing body, the LSUC oversees the process that lawyers must follow when surrendering their license to practise law, and it therefore has physical possession of the records that are generated and submitted as part of this process.

[19] It is theoretically possible that the ministry could have physical possession of such records if, for example, its former lawyer saved them on his work computer or kept copies in a paper file at the ministry. However, there is no evidence before me to suggest that this is the case and even if it was, that would likely amount to the ministry having bare possession of such records, which would mean that they are not in the custody of the ministry.

[20] Given that the ministry does not have physical possession of these records or copies of them, I find that they are not "in the custody" of the ministry for the purposes of section 10(1) of the *Act*. However, they may still be subject to the *Act* if they are "under the control" of the ministry for the purposes of section 10(1).

Control

[21] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[9] 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?

[22] For the reasons that follow, I find that part one of this test is not met in the circumstances of this appeal, and the LSUC records sought by the appellant are therefore not "under the control" of the ministry for the purposes of section 10(1) of the *Act*.

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[8] R.S.O. 1990, c. L.8.
[9] 2011 SCC 25, [2011] 2 SCR 306.

(1) Do the contents of the LSUC records relate to a ministry matter?

[23] To satisfy part one of the two-part test in *National Defence*, the LSUC records must relate to a ministry matter. In her representations, the appellant does not refer to this part of the test but cites section 13(1) of the *Law Society Act*, which states:

> The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario, and for this purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society.

[24] The appellant suggests that the LSUC records relating to the ministry's former legal counsel fall within the Attorney General's "public interest guardian role" under section 13(1) and therefore relate to a ministry matter. She states:

> Two lawyers employed by the Ministry were named in a civil action alleging they had given assistance to landlords in landlord/tenant disputes. One of the lawyers is no longer employed by the Ministry and no longer has a license to practice law. The other remains unscathed. The LSUC allowed a lawyer to skulk away into the night not requiring the public notice of his license being surrendered. Then when I enquired as to the reason the lawyer no longer had a license to practice law, employees of the LSUC lied to me. These issues were raised in my request and in my appeal. This is a matter that falls within the public interest guardian role of the Attorney General under section 13 of the *Law Society Act.*

[25] The appellant also provided me with a copy of Order PO-2739, in which the adjudicator found that the same ministry had custody and control of "Offence Type Statistics by Location reports" that ministry staff prepared for the judiciary in the Ontario Court of Justice. She submits that this order is applicable to the facts in the current appeal.

[26] In its representations, the ministry also does not directly address part one of the two-part test set out in *National Defence*, but its submissions on section 13(1) of the *Law Society Act* suggest that the LSUC records sought by the appellant do not engage the Attorney General's oversight function under section 13(1) and therefore do not relate to a ministry matter. It states:

> The LSUC is an entity independent of government under the *Law Society Act*. The Attorney General does not make day-to-day regulatory decisions in respect of the legal profession. Section 13(1) is to be used only where the Attorney General's intervention is needed to ensure that the legal profession continues to be regulated in the public interest. Ministry

> officials are unaware of any instance in which an Attorney General has used section 13(1) to compel production of documents by the LSUC.
>
> The Ministry oversees several professional regulators, including those in the legal, accounting and engineering professions. Its mandate is oversight of regulators, not regulation of professionals. The records at issue in this appeal relate to the LSUC's regulation of the former Ministry employee, not to any concerns about whether the LSUC is regulating in the public interest. They do not engage the Attorney General's oversight function, and thus do not properly come within the scope of section 13(1).

[27] At the outset, I find that Order PO-2739, which is cited by the appellant, is distinguishable from the facts in the current appeal and therefore not applicable for two reasons. First, it was decided three years before the Supreme Court of Canada's decision in *National Defence*, which means that the two-part test set out in that decision was not applied by the adjudicator. Second, in Order PO-2739, the adjudicator found that the ministry had both custody and control of the reports sought by the appellant in part because its staff, who are responsible for the administration of the courts, prepared, maintained, manipulated, produced and used the information in those reports. In the current appeal, the ministry does not have custody of the LSUC records sought by the appellant or the information in those records, and its staff are not responsible for the administration of the LSUC, which is an independent, self-regulating professional body.

[28] I will now turn to assessing whether part one of the two-part test set out in *Canada (Information Commissioner)* is met with respect to the LSUC records sought by the appellant. The contents of these records relate to a former ministry lawyer who surrendered his license to practise law. In my view, the fact that these records are about a former ministry employee does not automatically mean that their contents relate to a ministry matter. On the contrary, this individual's intention to surrender his license was a regulatory and licensing matter overseen solely by the LSUC, not by the ministry.

[29] Although the appellant asserts that this lawyer may have surrendered his license because of misconduct, there is no evidence before me to support this assertion or to support her argument that the ministry's duty under section 13(1) of the *Law Society Act* to act as the guardian of the public interest should be engaged by the former employee's actions. In addition, I have not been provided with any evidence to show that the contents of the LSUC records relate to any other type of ministry matter.

[30] In these circumstances, I find that the contents of the LSUC records sought by the appellant do not relate to a ministry matter. Consequently, part one of the two-part test set out in *National Defence* has not been met. Given that both parts of this test must be met to establish that an institution has control of records that are not in its physical possession, it is not necessary for me to consider whether part two of this test

has also been met. In short, I find that the LSUC records sought by the appellant are not "under the control" of the ministry for the purposes of section 10(1) of the *Act*.

ADDITIONAL ISSUE – BIAS

[31] I will now address another issue that the appellant has raised in this appeal. In her representations, she alleges that I am biased in favour of the ministry.

[32] In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*[10], the Supreme Court of Canada stated that the test for reasonable apprehension of bias was articulated in a previous decision of the Court in the following way:

> . . . what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.[11]

[33] The Court also set out other principles that expanded on the test that must be met to establish that a decision-maker has exhibited a reasonable apprehension of bias, including the following:

Because there is a strong presumption of judicial impartiality that is not easily displaced (*Cojocaru v British Columbia Women's Hospital and Health Centre*, [2013] 2 SCR 357, at para 22), the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias . . . "[12]

[34] For the reasons that follow, I find that the appellant has not established a real likelihood or probability of bias on my part, and the threshold for establishing a reasonable apprehension of bias has therefore not been met.

[35] The appellant claims that the Notice of Inquiry that I sent to her contains evidence of bias on my part. She states:

> FIRSTLY on page 2 of the Notice of Inquiry it states the content of the decision letter of the Ministry. I attach a copy of the decision letter which states nothing of the kind. The Ministry ignored the request. As I am sick of stating it is the Ministry decision which is being appealed and not the position taken by the IPC since the date of the decision. On a request for

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[10] 2015 SCC 25, [2015] 2 SCR 282 at para 20.
[11] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. The test was subsequently endorsed and clarified by the Supreme Court, for example, in *Wewaykum Indian Band v. Canada*, [2003] 2 SCR 259, at para 60 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 46, among others.
[12] Note 10 above, at para 25.

> information the requester is required to be specific. The Ministry completely ignored the part of the request which is the focus of the Notice of Inquiry. This position is clearly stated in my appeal.
>
> SECONDLY that the decision letter is being falsified in the Notice of Inquiry is a clear indication of bias.

[36] The appellant is referring to the fact that the IPC split her appeal into two parts because the ministry's initial decision letter did not respond to her entire access request. Specifically, the ministry only responded to the second part of her access request, in which she requested the following records:

> . . . a complete and unredacted copy of Ministry documentation held under personnel records which record the exact date in 2015 [name of former the former ministry lawyer] ceased to be an employee of the Ministry of the Attorney General and the reason i.e. terminated, reason for termination, resigned – reason for resignation…why and when [name of same individual] left employment with the provincial government and ceased to practice law.

[37] In response, the ministry sent a decision letter to the appellant which stated that it had located one responsive record but it was excluded from the scope of the *Act* under section 65(6)3, which states that the *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[38] The appellant appealed the ministry's decision to the IPC, which opened appeal PA16-233 and assigned an intake analyst to review the appeal. After soliciting and receiving submissions from the parties, the intake analyst concluded that the record held by the ministry is excluded from the *Act* under section 65(6) and dismissed the appeal, which means it did not go beyond the intake stage of the appeal process. The appellant asked the intake analyst to reconsider her decision but that request was declined, and the file was closed.

[39] However, in its decision letter that led to appeal PA16-233, the ministry did not respond to the first part of the appellant's access request, which is for LSUC records relating to a former ministry lawyer who surrendered his license to practise law. As a result, the IPC intake analyst asked it to issue a supplementary decision letter. The ministry then issued a supplementary decision letter that addressed that part of the appellant's access request and the IPC opened appeal PA16-233-2, which is the appeal before me. The text of both this part of the appellant's access request and the ministry's supplementary decision letter is reproduced in the Notice of Inquiry sent to the parties and the overview section of this order.

[40] The appeal that was assigned to me to adjudicate is appeal PA16-233-2, which addresses whether the LSUC records the appellant is seeking are in the custody or under the control of the ministry for the purposes of section 10(1) of the *Act.* I am not addressing the ministry's decision in appeal PA16-233, which was resolved at the intake stage of the appeal process and is closed. As such, there was no reason for me to refer to the decision letter that the ministry issued with respect to the records sought by the appellant in that appeal.

[41] In my view, an informed person, viewing the matter realistically and practically, would not conclude that the fact that I did not cite the ministry's decision letter that became the subject of appeal PA16-233, which was not before me for adjudication, is evidence I would not decide this matter fairly. I find that the appellant's argument on that point does not establish a real likelihood or probability of bias on my part, and the threshold for establishing a reasonable apprehension of bias has therefore not been met.

[42] The appellant also claims that I am biased because she previously emailed a copy of Order PO-2739 to an adjudication review officer during the inquiry. She submits that the fact that this order was not considered by the IPC or the ministry in its representations, is another indication that the IPC "is not maintaining the required independence from government in ignoring precedent."

[43] Although the appellant's submissions here are not entirely clear, it appears that she is claiming that the fact that this particular IPC order was not listed in the "Custody or Control" section of the Notice of Inquiry sent to the parties is evidence of bias, because it is a precedent that should be followed.

[44] I do not find that the appellant's submissions on this point to be persuasive. References to previous IPC orders in a Notice of Inquiry are provided to assist the parties in making representations on the issues in an appeal. They do not necessarily represent a complete listing of all IPC orders on a particular issue, and it is up to the parties to cite additional orders in their representations that they believe are relevant or applicable and to explain why.

[45] In the Custody and Control section of this decision above, I have considered and addressed in detail whether Order PO-2739 applies in the circumstances of this appeal. In my view, an informed person, viewing the matter realistically and practically, would not conclude that the omission of Order PO-2739 from the Notice of Inquiry is evidence that I would not decide this matter fairly. I find that the appellant's argument on this point does not establish a real likelihood or probability of bias on my part, and the threshold for establishing a reasonable apprehension of bias has therefore not been met.

ORDER:

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

Original Signed by: August 21, 2017

Colin Bhattacharjee
Adjudicator