

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3865

Appeal PA17-333

Ministry of the Attorney General

July 19, 2018

Summary: The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* for copies of "Eviction Information Requirements Forms". The ministry denied access to these forms as being records that are not within its custody or control. This order upholds the ministry's decision and finds that the responsive records are court records and are not within the ministry's custody or control.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1); *Courts of Justice Act*, R.S.O. 1990, c. 43, sections 73(1) and 76(1); *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, sections 5(b) and (c); *Administration of Justice Act*, R.S.O. 1990, c. A.6, section 4.7; *Execution Act*, R.S.O. 1990, c. E.24.

Orders Considered: Orders P-1089, P-1155, PO-2739, PO-3002, and PO-3321.

Cases Considered: *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 (CanLII); 104 O.R. (3d) 588.

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry or MAG) received the following request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

When a landlord receives an eviction order from the [Landlord and Tenant Board (the LTB)], to enforce the eviction they must file it with the court enforcement officer (sheriff) in the appropriate jurisdiction where the enforcement is to take place. The landlord files their order and fills out an eviction information instruction sheet [the Eviction Information Requirements Form (the EIRF)¹]. The instruction sheet provides the enforcement office (sheriff) with relevant information. The requestor (usually the landlord) provides their contact information, name, address & telephone number. I am requesting that information. The information of the requestor...

[2] The ministry issued a decision advising the requester that the responsive records are in the custody and under the control of the Superior Court of Justice and are not subject to the *Act*. The ministry noted that courts are not listed under section 2(1) of the *Act*, nor are they designated an institution in Regulation 460 of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision.

[4] During the course of mediation, the appellant advised the mediator that he believes that the records responsive to his request are in the custody or control of the ministry. The mediator conveyed the appellant's position to the ministry and requested further information regarding their determination that the responsive records were not in their custody or control.

[5] The ministry responded, providing further information to both the appellant and the mediator.

[6] The appellant maintained his position that the records responsive to his request are in the custody or control of the ministry and asked that the appeal proceed to the next stage of the process. Accordingly, this file proceeded to adjudication, where an adjudicator conducts an inquiry.

[7] Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I uphold the ministry's decision that the Eviction Information Requirements Forms are not in its custody or control.

¹ The appellant provided a copy of this sheet referred to in his request. This sheet is entitled "Eviction Information Requirements Form."

DISCUSSION:

Are the records “in the custody” or “under the control” of the ministry under section 10(1)?

[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. 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.²

[11] 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.³ 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).

[12] The courts and this office have applied a broad and liberal approach to the custody or control question.⁴

[13] 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.⁵ 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?⁶
- What use did the creator intend to make of the record?⁷
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁸

² Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

³ Order PO-2836.

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 Order 120.

⁷ Orders 120 and P-239.

⁸ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

- Is the activity in question a “core”, “central” or “basic” function of the institution?⁹
- Does the content of the record relate to the institution’s mandate and functions?¹⁰
- 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?¹¹
- If the institution does have possession of the record, is it more than “bare possession”?¹²
- 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?¹³
- Does the institution have a right to possession of the record?¹⁴
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁵
- 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?¹⁶
- To what extent has the institution relied upon the record?¹⁷
- How closely is the record integrated with other records held by the institution?¹⁸
- 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?¹⁹

⁹ Order P-912.

¹⁰ *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.

¹¹ Orders 120 and P-239.

¹² Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹³ Orders 120 and P-239.

¹⁴ Orders 120 and P-239.

¹⁵ Orders 120 and P-239.

¹⁶ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁷ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders 120 and P-239.

¹⁸ Orders 120 and P-239.

- 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?²⁰
- 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?²¹

[14] 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.²²

[15] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,²³ 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?

[16] It is the ministry's position that the responsive eviction records, the EIRFs, relate to court actions and are in the custody and under the control of the Superior Court of Justice. Therefore, it submits that they are not subject to the *Act* as courts are not listed as institutions subject to the *Act* under section 2(1), nor are they designated as institutions in Regulation 460 of the *Act*.

[17] The ministry responded to each question listed above, as follows:

(a) Were the records created by an officer or employee of the ministry?

The information on the EIRF is not created by an employee of the ministry. The information is provided by a litigant to a court proceeding (specifically, the owner/landlord of the property subject to eviction) and is filed with the court.

(b) What use did the creator intend to make of the records?

¹⁹ Order MO-1251.

²⁰ Order MO-1251.

²¹ Order MO-1251.

²² *City of Ottawa v. Ontario*, cited above.

²³ 2011 SCC 25, [2011] 2 SCR 306.

The creator of the records is responding to a request made for this information by court staff acting at the direction of the court. The information is used by the Enforcement Officer in carrying out the duties assigned to them by the judiciary and act under the direction of the court pursuant to section 76(1) of the Courts of Justice Act to facilitate the enforcement of the eviction order and to assess any safety risks associated with the eviction.

(c) Does the ministry have a statutory power or duty to carry out the activity that resulted in the creation of the records?

Section 76(1) of the Courts of Justice Act states that "in matters that are assigned by law to the judiciary (which includes enforcing its own orders), registrars, court clerks, court reporters, interpreters and other court staff shall act at the direction of the chief justice or chief judge of the court". Enforcement Officers carry out evictions under the direction of the court pursuant to the Courts of Justice Act.

(d) Is the activity in question a "core", "central" or "basic" function of the ministry?

The activity in question, namely the enforcement of court orders, is not a core function of the ministry. The enforcement of court orders is a core function of the judiciary.

(e) Do the contents of the records relate to the ministry's mandate and functions?

The content of the EIRF does not relate to the ministry's mandate and functions. Instead, the content relates to a core function of the judiciary, which includes the enforcement of its orders.

(f) Does the ministry have physical possession of the records, whether because they have been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

The ministry does have physical possession of the records. The record is filed with the court by the creator and placed in a court file by court staff under the direction of the court and as required by the court.

(g) If the ministry does have possession of the records, is it more than "bare possession"?

The ministry's possession of the records is not more than bare possession as the information is not collected or used for any ministry purpose, or for any purpose unrelated to a court proceeding.

(h) If the ministry does not have possession of the records, is it being held by an officer or employee of the ministry for the purposes of his or her duties as an officer or employee?

Not applicable. The ministry has bare possession of the records.

(i) Does the ministry have a right to possession of the records?

The ministry has a limited right to possess these records as a custodian only and any authority it has over the records' use is at the direction of and subject to supervision by the courts.

(j) Does the ministry have the authority to regulate the records' content, use and disposal?

As part of the court record, the content, use and disposal of the records are within the authority of the court and not the ministry.

(k) Are there any limits on the use to which the ministry may put the records, what are those limits and why do they apply to the records?

The use to which the ministry may put the records is limited by the court's supervisory jurisdiction over court records. The ministry uses the court records under the direction of the court to facilitate the enforcement of court orders.

(l) To what extent has the ministry relied on the records?

The ministry relies on the information provided on the EIRF by the party to a court proceeding to effect the enforcement of a court order. The duty to enforce court orders is carried out by Enforcement Officers as officers of the court. Eviction orders result from judgments of the court and are under the court's overriding supervision.

(m) How closely are the records integrated with other records held by the ministry?

When the owner/landlord files the record with the court, the record is placed in the court file. The EIRF is not integrated with other records held by the ministry.

(n) What is the customary practice of the ministry and institutions similar to the ministry in relation to possession or control of records of this nature, in similar circumstances?

In carrying out their duties in connection with the administration of courts, ministry staff play a role with respect to documents related to court proceedings. This administrative relationship to records in court files does not amount to possession or control. All court records are under the care and control of the judiciary and all decisions with respect to those records are within the authority of the court.

[18] The appellant states that the responsive records in question are in the custody and under control of the Ministry of Housing under the Landlord and Tenant Board, the administrative tribunal responsible for adjudicating applications under the *Residential Tenancies Act*, and are not in the custody and control of the judiciary in any capacity.

[19] The appellant states that Order PO-3002 mandates disclosure of the records and that since the issuance of Order PO-3002, he has been obtaining this information periodically upon request and the payment of the applicable fees, to the Landlord and Tenant Board.

[20] By way of background, the appellant states that a landlord may at his sole discretion, file his eviction order, obtained through a proceeding at the Landlord and Tenant Board, with the court enforcement office in the jurisdiction where the eviction is to take place. He states that MAG superintends, amongst other things, clerks, administration, staff and Court Enforcement.²⁴ He states:

The landlord provides the Court Enforcement Office their order issued out of the Landlord [and] Tenant Board to carry out their eviction. They pay the applicable fees and fill out an information instruction sheet [the EIRF] with relevant information, such as the landlord's name, address, contact information, residential address of the tenant, and generally, comments about any problematic situation the sheriff may encounter...

It is a core function of MAG to provide enforcement of eviction orders on behalf of the Landlord and Tenant Board not the judiciary. The Landlord and Tenant Board, which does not have a separate enforcement division under the *Residential Tenancies Act*, relies on the MAG to enforce their

²⁴ The appellant relies on sections 5(b) and (c) of the *Ministry of the Attorney General Act* (the *MAGA*), R.S.O. 1990, c. M.17, which reads:

The Attorney General

(b) shall see that the administration of public affairs is in accordance with the law;

(c) shall superintend all matters connected with the administration of justice in Ontario.

particular order... All landlord's who chose to have their eviction order enforced have no choice but to file it with the MAG enforcement (sheriff) to complete the eviction of their tenant. At all material times, the judiciary is not involved in the process...

The records in question are not subject to the direction and supervision of the courts. The judiciary has no involvement with the creation of these records. The creator has provided these records to the Landlord and Tenant Board [in the application process] not the judiciary...

The responsive records requested are being held by the Ministry of Housing and now, when filed to enforce an eviction, are being held in a limited role by [MAG's] Enforcement Division. It is a core function of the MAG to accept these orders (Landlord and Tenant Orders) and have them enforced through their Enforcement Division.

[21] In reply, MAG states that Order PO-3002 does not address the issue raised in the present case, as that was a case about fees for producing records.

[22] It is the ministry's position that, although the appellant periodically receives some of the information requested from the LTB, this is not a factor in determining whether the information requested is in the custody or under the control of the ministry. The ministry relies on sections 73(1) and 76(1) of the *Courts of Justice Act* (the *CJA*) enforcement is a function of the court, which read:

73(1) Registrars, sheriffs, court clerks, assessment officers and any other administrative officers and employees that are considered necessary for the administration of the courts in Ontario may be appointed under Part III of the *Public Service of Ontario Act, 2006*.

76(1) In matters that are assigned by law to the judiciary, registrars, court clerks, court reporters, interpreters and other court staff shall act at the direction of the chief justice of the court.

[23] The ministry further states that:

...The eviction order may... be an order of the LTB, but when the order and the EIRF are filed with the court, they become court records. The EIRF relates to a function within the jurisdiction of the court, is not integrated with the records of the ministry and is, as a result, in the custody and under the control of the court.

[24] In sur-reply, the appellant re-iterates that his request was for the instruction sheet or the EIRF provided to the sheriff, which is generated when a landlord files their eviction order and fills out the EIRF and files it at the ministry's Enforcement Division. He submits that:

The ministry is of the belief that these are orders issued under the old *Landlord and Tenant Act* [the *LTA*] which were indeed filed and heard at the courts. The landlord would receive court judgment that provided for a writ of possession to be filed at court enforcement officers at the jurisdiction that they wanted their eviction carried out. [The *LTA*] was repealed ... and replaced with the *Tenant Protection Act* and subsequently with the *Residential Tenancies Act*. (Currently in effect).

Analysis/Findings

[25] The appellant provided a blank copy of the EIRF. The evidence before me is that a landlord completes this form and then files it with the sheriff, along with a copy of an eviction order previously obtained from the LTB.

[26] The EIRF is a Superior Court of Justice form²⁵ and is used for both evictions resulting from LTB orders and Court orders/judgments (writ of possession). This form is completed by the person requesting the execution of the eviction order. The person completing the form provides the sheriff with information about the premises, the person requesting the eviction (the landlord), and the tenant/mortgagor/occupant. The form requires set filing and enforcement fees to be paid to the Minister of Finance.

[27] I agree with the ministry that once the EIRF and LTB eviction order are filed with the sheriff, these documents become part of a court file.

[28] In support, I note that concerning fees paid to the sheriff as set out in the EIRF, the *Administration of Justice Act* (the *AJA*)²⁶ includes the following provision as to the issuance of a court order to waive the eviction fees:

4.7 (1) A person who is entitled to have a tribunal order enforced by a sheriff on payment of a fee may request a fee waiver under this section by giving a written request, in the form provided by the Ministry,

(a) to a judge or deputy judge of the Small Claims Court, if the order relates only to the payment of an amount within the monetary jurisdiction of that court; or

(b) to a judge or case management master of the Superior Court of Justice, in any other case.

(2) The clerk or registrar of the court shall consider the request before it is considered by the judge, deputy judge or case management master,

²⁵ The Court form number on the EIRF provided by the appellant is "SS-0418 (rev. 06/09) CSD".

²⁶ *Administration of Justice Act*, R.S.O. 1990, CHAPTER A.6.

and if the clerk or registrar determines that the person meets the prescribed conditions referred to in subsection 4.3 (4),

(a) he or she shall give the person a certificate indicating that all fees relating to the enforcement of the tribunal order that are or would be payable by the person on or after the date of the certificate are waived; and

(b) subsections (3) to (5) do not apply. 2004, c. 31, Sched. 1, s. 2.

(3) If the judge, deputy judge or case management master is of the opinion that the person lacks the financial means to pay fees relating to the enforcement of the tribunal order, he or she shall make an order directing the clerk or registrar to give the person a certificate indicating that all such fees that are or would be payable by the person on or after the date of the certificate are waived. 2004, c. 31, Sched. 1, s. 2.

(4) The date of the certificate shall be the date on which the order is made under subsection (3). 2004, c. 31, Sched. 1, s. 2.

(5) The decision of the judge, deputy judge or case management master is final. [Emphasis added by me].

[29] Sheriffs act at the direction of the chief justice of the court. This is confirmed by sections 73(1) and 76(1) of the *CJA*, reproduced above.

[30] As well, orders of this office have found that sheriffs function as employees of the Court. For example, in Order P-1155, Assistant Commissioner Tom Mitchinson found that in preparing and administering the jury rolls, the sheriff acts as an officer of the Court.

[31] Similarly, in Order P-1089 Inquiry Officer John Higgins found concerning writs of seizure and sale,²⁷ that:

(1) in issuing and dealing with writs of seizure and sale [which are issued by the court and then filed with the sheriff], the Registrar and the sheriff act as officers of the Court;

(2) writs of seizure and sale result from judgments of a court and remain under the court's overriding supervision while in the possession of the sheriff;

²⁷ A writ of seizure and sale, as well as a writ of possession (referred to in the EIRF), are enforced by sheriffs in accordance with the terms of the *Execution Act*, R.S.O. 1990, c. E.24

(3) despite the ministry's administrative involvement with writs of seizure and sale, including the manner in which searches for them are conducted by members of the public, the ministry does not have sufficient powers relating to the acquisition, retention and disposal of writs of seizure and sale by the sheriff to give it "control" over such writs in the hands of the sheriff;

(4) the ministry's possession of writs of seizure and sale in the hands of the sheriff is a "bare" possession, and does not include sufficient rights to deal with them to amount to "custody" for the purposes of the Act;

(5) accordingly, the ministry does not have custody or control of writs of seizure and sale in the hands of the sheriff and I find that they fall outside the scope of the Act. [Emphasis added by me].

[32] As noted above, the EIRF is a form filed with, and used by, the sheriff in enforcing both Landlord and Tenant Board Orders and writs of possession.

[33] In this case, it is clear that the sheriff has possession of the EIRFs, as they are filed with the sheriff and placed in a court file and acted upon by staff at the direction of the court. The eviction order that is being enforced by the sheriff may also be an order of the LTB, but when the order and the EIRF are filed with the sheriff, they become court records. I find that the EIRF relates to a function within the jurisdiction of the court, is not integrated with the records of the ministry and is, as a result, in the custody and under the control of the court.

[34] I agree with the ministry that the EIRF is in the custody or control of the court. As noted above, courts are not listed under section 2(1) of the *Act*, nor are they designated an institution in Regulation 460 of the *Act*. The issue in this appeal is whether this form is also within the custody or control of MAG.

[35] The appellant relies on sections 5(b) and (c) of the *Ministry of the Attorney General Act*, which provides that the Attorney General superintends all matters connected with the administration of justice in Ontario. Although this may be the case, it does not mean that MAG has custody or control of court records.

[36] As stated in Order PO-3321, this office has found that "court records" are not in the custody or under the control of an institution, even though the institution may possess such a record. An institution's limited ability to use, maintain, care for, dispose of and disseminate such records does not necessarily amount to "custody" for the purposes of the *Act*.²⁸

²⁸ See Orders P-994 and PO-3321.

[37] In the 2011 judicial review of Order PO-2739,²⁹ the Court explained that:

Judicial independence consists of three core components: security of tenure, financial security and administrative independence. It is the third component that is relevant in this case. Judicial administrative independence requires judicial control with respect to matters of administration bearing directly and immediately on the exercise of the judicial function.

Where the Chief Justice or a judge of a court is exercising responsibilities relating to administrative matters that bear directly on the exercise of the judicial function, the principle of judicial independence requires judicial control. Similarly, any information or documentation created by and for the judiciary to carry out these judicial administrative functions is also constitutionally protected. In order to ensure judicial independence, the judiciary, by necessity, must have supervisory control over access to, and disclosure of, this information.

[38] Therefore, I find that EIRFs, as court records, are not within the custody or control of MAG. In making this finding, I have considered the findings in Order PO-3002 relied upon by the appellant, which dealt with a fee estimate for records requested from the LTB. However, in that appeal, the issue was not whether the LTB had custody or control of the responsive records. Even though the appellant in Order PO-3002 received some of the same information that is in the EIRF, the EIRF itself was not a record at issue in Order PO-3002.

[39] In this appeal, the issue is whether MAG has custody or control of the EIRFs, forms filed with the sheriff of the court. I agree with MAG that the court, not the ministry, has custody or control of the EIRFs. In making this finding, I agree with MAG that:

The information on the EIRF is not created by an employee of the ministry. The information is provided by a litigant to an LTB proceeding (specifically, the owner/landlord of the property subject to eviction) and is filed with the court and placed in a court file by court staff.

As part of the court record, the content, use and disposal of the records are within the authority of the court and not the ministry.

The information is used by the sheriff or the Enforcement Officer in carrying out the duties assigned to them by the judiciary and act under the direction of the court pursuant to section 76(1) of the *Courts of*

²⁹ Paragraphs 27, 28 and 31, *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 (CanLII); 104 O.R. (3d) 588.

Justice Act to facilitate the enforcement of the eviction order and to assess any safety risks associated with the eviction.

The enforcement of LTB orders is not a core function of the ministry and does not relate to the ministry's mandate and functions.

[40] Even though the ministry hires sheriffs or Enforcement Officers, as referred to above, this alone does not mean that MAG has custody or control of records in their possession. I find that based on my review of the factors listed above, the ministry does not have custody or control of the responsive records, the EIRFs, which are court records. As a result, there is no right of access to the records from MAG under section 10(1) of *FIPPA*.

ORDER:

I uphold the ministry's decision that it does not have custody or control of the EIRFs and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

July 19, 2018
