

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3995

Appeal PA18-204

Ministry of Children, Community and Social Services

September 30, 2019

Summary: The appellants are sisters who submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Children, Community and Social Services (the ministry) for the court file numbers relating to child protection proceedings involving them that took place in the late 1960s. The appellants appealed the ministry's decision that such information is not in its custody or under its control for the purposes of section 10(1) of the *Act*. In this order, the adjudicator finds that the court file numbers sought by the appellants are not in records or parts of records that are in the custody or under the control of the ministry for the purposes of section 10(1), and he dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1) (custody or control); Part X of *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched. 1.

Orders Considered: Order P-1069.

OVERVIEW:

[1] Under section 10(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*), an individual has a right of access to records only if they are "in the custody or under the control" of an institution. The issue to be resolved in this appeal is whether the court file numbers relating to proceedings involving a specific Children's Aid Society (CAS) and two individuals in the late 1960s are "in the custody or under the control" of the Ministry of Children, Community and Social Services (the ministry) for the purposes of section 10(1) of the *Act*.

[2] The appellants, who are sisters, submitted an access request under the *Act* to the ministry for the following records:

. . . [W]e are requesting that the Ministry access our foster care/crown ward files in the custody and control of the Niagara Children's Aid Society (previously the Children's Aid Society of the city of St. Catharines and the county of Lincoln), to determine if the application submitted by them on May 30/1968 to Judge Thompson that resulted in us being placed into care, was in compliance with the Child Welfare Act/regulations and the Ministry's standards and guidelines in force at the time. (Ministry right to access CAS files for this purpose noted in Order P-1069 page 5)

If the Ministry finds . . . as we are confident they will . . . that the application by the CAS that resulted in us being placed in care was not in compliance with the Child Welfare Act/regulations and the Ministry's standards and guidelines in force at the time, then we are asking that the Ministry take the custody and control of our files (that were created as a result) away from the involved CAS.

As per Order P-1069, the only documents the Ministry found re our request were court orders ... with no court file numbers present. No evidence was located that the Ministry accessed our files at any time to determine if the involved CAS were in compliance with the Child Welfare Act/regulations and Ministry's standards and guidelines. We are asking that what should have been done at the time we were in care be done now.

[3] The ministry sent a decision letter to the appellants, which stated that it does not have custody or control of the requested records because CASs are not directly operated by the ministry.

[4] The appellants 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 issue in dispute. During mediation, the appellants decided to narrow their access request to court file numbers that they believe can be found in their CAS files.

[5] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. I sought and received representations from the parties on the issue to be resolved in this appeal.

[6] In this order, I find that the court file numbers sought by the appellants are not in records or parts of records that are in the custody or under the control of the ministry for the purposes of section 10(1) of the *Act*.

RECORDS:

[7] The information at issue in this appeal is court file numbers relating to child protection proceedings involving a CAS and the appellants in the late 1960s.

DISCUSSION:

Are the court file numbers sought by the appellants “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 or parts of 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 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).

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.

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.

Summary of the parties' representations

Ministry's representations

[12] The ministry submits that the court file numbers sought by the appellants are not in its custody or under its control for the purposes of section 10(1) of the *Act*.

[13] The ministry notes that more than 20 years ago, the appellants made previous access requests to it for all their Crown ward files. The records located by the ministry were court orders relating to child protection proceedings involving the appellants. It disclosed these court orders to them but withheld the personal information of other individuals under the mandatory personal privacy exemption in section 21(1) of the *Act*. The ministry also advised the appellants that the remaining records that they were seeking could be found in the Crown ward files maintained by a specific CAS.

[14] The ministry further states that the appellants appealed its access decision to the IPC on the basis that additional records should exist (i.e., the ministry had not conducted a reasonable search for records that were responsive to their access requests). They also claimed that the ministry should have control over CAS records and be able to access them.

[15] The ministry states that in Order P-1069, which was issued in 1995, the adjudicator found that it had conducted a reasonable search for responsive records. She also found that the ministry did not have control over the records held by the CAS for the purposes of section 10(1) of the *Act* because its right of access to the records is limited to requiring financial accountability for the funds provided to the CAS and to periodic administrative reviews for the purpose of ensuring compliance with the *Child and Family Services Act*.⁶

[16] With respect to the court file numbers sought by the appellants in this appeal, the ministry states that any application to the court would have been commenced by the CAS in question, and documents in support of any action would have been filed in the local court. It submits that any relevant court file numbers in this matter would be in the custody or control of the CAS in question or with the relevant court. It further submits that the administration of the courts in Ontario falls under the jurisdiction of the Ministry of the Attorney General.

Appellants' representations

[17] The appellants submit that the court file numbers they are seeking might be in the ministry's custody for the purposes of section 10(1), because this information may

⁶ This Act has been renamed and is now known as the *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched. 1.

have been redacted by the ministry before these court orders were disclosed to them. They further submit that these court file numbers are under the ministry's control, for the purposes of section 10(1), because it should have the right to request them from the CAS in question.

[18] The appellants state that they filed an access request for records with the relevant CAS but the records that were disclosed to them contained no court file numbers. In addition, they filed an access request with the Ministry of the Attorney General, which conducted a search for records in three courthouses, but was unable to locate any court files relating to them. Finally, they submitted an access request to the Archives of Ontario, but that institution was also unable to locate any records relating to them.

[19] With respect to whether the court file numbers might be in the ministry's custody for the purposes of section 10(1), the appellants point out that the court orders that the ministry disclosed to them in 1995 do not have any court file numbers in the location in which they would normally appear. However, they submit that these court orders were "heavily censored" and question whether this information might have been severed.

[20] They further state that in 2017, one of them wrote to the ministry to ask whether there were court file numbers on any of the court orders in its possession. The ministry located four court orders but advised the appellants that there were no court file numbers on them.

[21] With respect to whether these court file numbers are under the ministry's control, for the purposes of section 10(1), the appellants acknowledge that Order P-1069 found that the ministry's right to access records held by CAS is limited to requiring financial accountability for the funds provided to that organization. However, they submit that if the court orders relating to them were supplied to the ministry by the CAS in connection to funding purposes, this give the ministry the right to request the court file numbers from that CAS.

Analysis and findings

[22] I have considered the evidence submitted by the parties. For the reasons that follow, I find that the court file numbers sought by the appellants are not in records or parts of records that are in the custody or under the control of the ministry for the purposes of section 10(1) of the *Act*.

Custody

[23] I will first determine whether the court file numbers sought by the appellants are in records or parts of records that are "in the custody" of the ministry for the purposes of section 10(1). In 1995, the appellants submitted an access request to the ministry and received court orders relating to child protection proceedings involving them in the late 1960s. The ministry severed out the personal information of other individuals

before disclosing these court orders to the appellants.

[24] As noted above, the appellants submit that the court file numbers they are seeking might be in the ministry's custody for the purposes of section 10(1), because this information may have been redacted by the ministry before these court orders were disclosed to them. I do not find this submission to be persuasive for two reasons.

[25] First, the only information that the ministry severed out from the court orders that it disclosed to the appellants in 1995 was the personal information of other individuals. In my view, court file numbers do not qualify as "personal information," under the definition of that term in section 2(1) of the *Act*. Consequently, it would be improbable that the ministry would have severed out the court file numbers from the court orders before disclosing them to the appellants.

[26] Second, in 2017, one of the appellants wrote to the ministry and asked it whether there is a court file number on any of the court orders that are in the ministry's possession. It appears that staff at the ministry retrieved and examined the unsevered versions of these court orders and advised her in writing that they were unable to identify a court file number on these documents.

[27] In these circumstances, I am satisfied that the court file numbers sought by the appellants are not in records or parts of records that are "in the custody" of the ministry for the purposes of section 10(1) of the *Act*.

Control

[28] I will now determine whether the court file numbers sought by the appellants are in records or parts of records that are "under the control" of the ministry for the purposes of section 10(1). The appellants submit that the records containing this information are under the ministry's control, for the purposes of section 10(1), because it should have the right to request it from the CAS in question.

[29] This issue was already decided in Order P-1069, in which the adjudicator found that the ministry did not have control over any records held by the CAS for the purposes of section 10(1) of the *Act* because the right of access to such records is limited to requiring financial accountability for the funds provided to the CAS and to periodic administrative reviews for the purpose of ensuring compliance with the *CFSA*.

[30] There is no evidence before me to suggest that the ministry's relationship with CASs in Ontario has changed in such a way that would cause me to reach a different conclusion in the circumstances of this appeal. I find, therefore, that the court file numbers sought by the appellants are not in records or parts of records that are under the control of the ministry for the purposes of section 10(1) of the *Act*.

Conclusion

[31] I find that the court file numbers sought by the appellants are not in records or parts of records that are in the custody or under the control of the ministry for the purposes of section 10(1) of the *Act*.

[32] I recognize that this will be an unsatisfactory outcome for the appellants, who are having significant difficulties in obtaining this information, which should be reasonably attainable in normal circumstances. However, I would draw the appellants' attention to the fact that a new access and privacy scheme that applies to CASs will soon be coming into effect in Ontario. On January 1, 2020, Part X of the *Child, Youth and Family Services Act* will come into force and provide an individual with a right of access to a record of their personal information that is in a service provider's custody or control if it relates to the provision of a service to the individual. This right of access is subject to a list of exceptions.⁷ A person who is refused access to a record of their personal information will have the right to make a complaint to the IPC,⁸ which will have various powers, including the authority to make an order directing the service provider about whom the complaint was made to grant the individual access to the requested record.⁹

ORDER:

I uphold the ministry's decision that the court file numbers sought by the appellants are not in its custody or under its control for the purposes of section 10(1) of the *Act*. The appeal is dismissed.

Original signed by _____
Colin Bhattacharjee
Adjudicator

September 30, 2019 _____

⁷ *Supra* note 6, section 312(1).

⁸ *Supra* note 6, section 316(1).

⁹ *Supra* note 6, section 321(1)(a).