Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4032

Appeal PA18-00686

Ministry of Transportation

February 28, 2020

Summary: The appellant made a request under the *Act* to the Ministry of Transportation for access to records relating to a private railway crossing owned by the appellant including correspondence sent by a ministry employee relating to the crossing. In its decision, the ministry advised the appellant that no records exist, as the railway crossing is not under the ministry's jurisdiction. The appellant maintained that there should be responsive records in the ministry's record holdings and the issues of custody and control and reasonable search were canvased at adjudication. In this order, the adjudicator upholds the ministry's decision that it does not have custody or control of the records at issue and does not require the ministry to conduct a search for records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O 1990, c. F.31, as amended, section 10(1) and 24.

Orders and Investigation Reports Considered: Orders MO-3779 and MO-3768-F.

Cases Considered: *City of Ottawa v. Ontario*, 2010 ONSC 6835.

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Transportation (the ministry) for access to all records in any format related to a private railroad crossing owned by the appellant, including correspondence sent and received by several named individuals,

companies and institutions.

[2] In its decision, the ministry advised the appellant that no records existed, as the railway crossing is "not under the ministry's jurisdiction." The ministry maintains that even if the emails may be present on their servers, they are not in the ministry's custody or control, as they are private correspondence unrelated to ministry business.

[3] The appellant appealed the ministry's decision.

[4] During mediation, the appellant advised of his belief that responsive records do exist. The ministry maintained its decision, and the appellant advised he would like to pursue the appeal at adjudication.

[5] I sought and received representations from the appellant and the ministry. Representations were shared in accordance with Practice Direction 7 of the IPC's *Code of Procedure*.

[6] For the reasons outlined below, I find that the records at issue are not in the ministry's custody or control, and that its search for records was reasonable.

ISSUES:

A. Are the records "in the custody" or "under the control" of the ministry under section 10(1)?

B. Did the ministry conduct a reasonable search for records?

DISCUSSION:

Issue A: Are the records "in the custody" or "under the control" of the ministry under section 10(1)?

[7] I note that while the ministry's decision was that no records existed. During mediation, the appellant provided evidence of an email from a ministry email address that was related to his request. Additional emails were found on the ministry's servers.

[8] The ministry claims that the records are the result of an employee's improper use of email resources for personal matters, and do not represent or relate to any ministry business. The ministry argues that the records are therefore not in the ministry's custody or control. 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]

[9] Section 10(1) states, 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] A requester will not necessarily be provided access to a record that is found to be in the custody or control of an institution.[2] 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). The courts and this office have applied a broad and liberal approach to the custody or control question.[3]

[11] 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.[4] Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. Factors to consider include:

- Was the record created by an officer or employee of the institution?[5]
- What use did the creator intend to make of the record?[6]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[7]
- Is the activity in question a core, central or basic function of the institution?[8]
- Does the content of the record relate to the institution's mandate and functions?[9]

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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] Order PO-2836.
[3] *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.
[4] Orders 120, MO-1251, PO-2306 and PO-2683.
[5] Order 120.
[6] Orders 120 and P-239.
[7] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner*, cited in note 7.
[8] Order P-912.
[9] *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.) (*City of Ottawa*) and Orders 120 and P-239.

- 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?[10]

- If the institution does have possession of the record, is it more than bare possession?[11]

- Does the institution have a right to possession of the record?[12]

- Does the institution have the authority to regulate the record's content, use and disposal?[13]

- Are there limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[14]

- To what extent has the institution relied upon the record?[15]

- How closely is the record integrated with other records held by the institution?[16] and

- 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?[17]

[12] 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.[18]

The ministry's representations

[13] In its representations, the ministry explains that the railway crossing referred to in the records is not managed or owned by the ministry. It notes that while the Ministry of Transportation does manage many railway crossings, the one discussed in the records at issue is private. The ministry argues that the email, regardless of the sender's ministry employment and email address, is not related to the business of the ministry and therefore is not a record in its custody or control.

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[10] Orders 120 and P-239.
[11] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[12] Orders 120 and P-239.
[13] *Ibid*.
[14] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[15] *Ibid* and see note 9.
[16] See note 9.
[17] Order MO-1251.
[18] *City of Ottawa v. Ontario*, cited above.

[14] The ministry cites the decision of the Divisional Court in *City of Ottawa* v. *Ontario*[19], and argues that it is applicable to the present case. That decision also concerned an employee's use of email resources for personal correspondence. The Court found that such personal correspondence did not fall under the scope of the *Act*. In that case, personal email correspondence sent via city email resources was considered unrelated to the city's mandate or business, and therefore not in the custody or control of the city.

[15] The ministry also refers directly to the non-exhaustive criteria for determining whether a record is within an institution's custody or control, as set out above. Amongst its responses to each criterion, the ministry submitted that: the intended use of the record was personal only; that the record is not subject to any exercise of ministerial power or duty, and; that the activity discussed in the records is not a function of the ministry "to any degree."

The appellant's representations

[16] In response to the ministry's representations, the appellant asserts that recipients of the email most likely treated it in an official manner, as it came from a ministry email address. The appellant contends this means that the email is, in fact, ministry business.

[17] The appellant also claims that the ministry's mandate is to "oversee a world-class provincial transit and transportation system". The appellant seems to be suggesting that this mandate brings the emails under the control of the ministry, by virtue of the ministry's general oversight of the transit system.

[18] The appellant asserts that ministry employees must know that emails they create are property of the ministry, and distinguishes *City of Ottawa* on the basis that the road crossing is his property, and he should therefore be privy to communications about it.

Analysis and finding

[19] While I find that the ministry has bare possession of the employee's emails, I find that it does not have custody or control of these emails for the purposes of section 10(1) of the *Act*. I accept the ministry's representations that it does not have a statutory power or duty to carry on the activity that resulted in the creation of the record and that the content of the record does not relate to the ministry's mandate and functions. The ministry's bare possession is based on the fact that the employee, whose emails are the subject of the request, used her ministry email account for a personal matter.

[20] In *City of Ottawa*, the Divisional Court found that when a government employee uses his or her workplace email address to send and receive personal emails unrelated

[19] See note 9.

to his or her work, these emails are not in the custody and control of the institution and, therefore do not fall within the scope of the *Act*. Justice Molloy speaking for the panel stated:

> Much will depend on the individual circumstances of each case, but general speaking, I would expect very few employee emails that are personal in nature and unrelated to government affairs to be subject to the legislation merely because they were sent or received on the email server of an institution subject to the *Act*.

[21] In this regard, the records in this appeal and those in *City of Ottawa* are notably similar.

[22] I also do not agree that the appellant's identity as owner of the crossing meaningfully distinguishes the present appeal from the *City of Ottawa*. The fact that the appellant's property was the subject matter of the emails does not bring the records within the ministry's control.

[23] For these reasons, I find that the records are not within the ministry's control in the meaning contemplated by section 10(1) of the *Act*.

Issue B: Did the ministry conduct a reasonable search for records?

[24] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[20] If I find that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied with the decision, I may order further searches.

[25] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[21] To be responsive, a record must be "reasonably related" to the request.[22]

[26] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[23]

[27] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all

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[20] Orders P-85, P-221 and PO-1954-I.
[21] Orders P-624 and PO-2559.
[22] Order PO-2554.
[23] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[24]

[28] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[25]

The ministry's representations

[29] The ministry was asked to provide an affidavit detailing its search for records responsive to the request. The affidavit explains that a ministry Freedom of Information officer advised the employee's manager of the request, and the employee was asked to search their email account. This search located five total email chains, all of which the ministry submits were unrelated to ministry business. The ministry also noted that the content of the records relates to a dispute between the ministry employee who sent the emails and the appellant.

[30] In its accompanying representations, the ministry submits that the records that were located initially were a result of an inappropriate use of ministerial email systems for personal matters, and an isolated incident as a result of the dispute between the appellant and the ministry employee. The ministry submits that its search efforts were reasonable in light of these circumstances.

The appellant's representations

[31] The appellant disputes the ministry affiant's confirmation that the email records, which were located, were not related to the ministry's business. The appellant submits that since a further search was not conducted for additional records, the affiant can not confirm that there are no additional records that may be responsive to his request.

[32] The appellant maintains that the search for responsive records should have been conducted by a neutral or third party, or by the ministry IT department, rather than by the employee who created the records.

[33] The appellant also contends that it is possible records have been deleted, and that further searches of the ministry's electronic backups are necessary.

Analysis and finding

[34] The appellant asserts that the ministry should be required to search backups, as emails may have been deleted. I do not have evidence before me to suggest that any information has been deleted, and the records at issue were generated from a personal use of the ministry's IT resources relating to an isolated issue.

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[24] Order MO-2185.
[25] Order MO-2246.

[35] Moreover, prior decisions of this office have specifically considered the need to search backups as part of a reasonable search. In Order MO-3768-F, the adjudicator considered that electronic backups were not a required part of a reasonable search in the absence of any further compelling information suggesting that additional records may be contained therein.[26] In that appeal, there was prior evidence of some records being deleted. No such evidence is before me in this appeal. As an apparent recipient of the emails, the appellant would presumably be aware of any other emails sent to his attention that would have been responsive to the request.

[36] Given that the source of the emails is a dispute involving the appellant and the staff member at the ministry, and the absence of any evidence to suggest any additional responsive records would be contained in backups, I do not consider that backup searches are required as part of a reasonable search.

[37] Based on my review of the ministry's affidavit and its representations, I find that its search for responsive records was reasonable. I also do not take issue with the fact that the named employee was asked to search her own emails. As the subject matter of the emails related to the incident between the employee and the appellant, and not a ministry related matter, I accept that the employee would be the most knowledgeable staff member to search for records.

[38] Accordingly, the ministry's search for responsive records is upheld as reasonable and I dismiss the appeal.

ORDER:

1. I find that the ministry does not have custody or control of the emails located as a result of its search.

2. I uphold the ministry's search for responsive records as reasonable.

Original Signed by: February 28, 2020
Stephanie Haly
Adjudicator

[26] Order MO-3768-F from [40].