Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4102

Appeal PA18-266

Ministry of Agriculture, Food and Rural Affairs

January 19, 2021

Summary: The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the ministry for information relating to a hearing of the Agriculture, Food and Rural Affairs Tribunal, including the notes made by members of the tribunal.

The ministry granted access to some of the records but refused to grant access to the tribunal members' notes on the basis that they were not in the custody or under the control of the tribunal. During mediation, the appellant also raised issues about the scope and reasonableness of the search.

During the inquiry, the ministry issued a supplementary decision that the exclusion in section 65(3.1) of the *Act* for notes and other materials made by tribunal members applied in this case. The exclusion in section 65(3.1) was not enacted or in force at the time of the request.

In this order, the adjudicator finds that the ministry may not rely on section 65(3.1). However, she dismisses the appeal, finding that the members' notes are not in the custody or the control of the ministry, that it assessed the scope of the request properly and that its search was reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c.F31, as amended, sections 65(3.1), 10, 10.1, and 24.

Orders and Investigation Reports Considered: Orders PO-3862, P-396, P-1230, P-505, P-396, PO-2648, PO-3699 (upheld on Reconsideration PO-3994-R), P-1132, and PO-1906.

Cases Considered: *Campbell v. Campbell*, [1995] M.J. No. 466 (Man. C.A.), *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue),* [1997] 1 S.C.R. 271, *Canada (Privacy*

Commissioner) v. Canada (Labour Relations Board), [2000] F.C.J. No. 617, *Tunian v. Canada (Immigration and Refugee Board),* [2004] F.C.J. No. 1041, *B.K. v. Franklin,* [2003] O.J. No.1887, and 156621 *Canada Ltd. v. Ottawa (City),* [2004] O.J. No. 1003.

OVERVIEW:

[1] The access request before me is best understood with some context.[1] It relates to a hearing of the Agriculture, Food and Rural Affairs Tribunal (the tribunal) that took place in 2017 (the hearing). The appellant was a party to the matter before the tribunal and was present at the hearing. During the hearing, legal counsel representing a witness advised the presiding chair that he suspected that the appellant was recording the hearing. After discussion, the chair asked the appellant to provide his phone to a tribunal staff member, which he did.

[2] In April 2018,[2] the appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Agriculture, Food and Rural Affairs (the ministry) for information relating to the tribunal hearing described above.[3] Specifically, the appellant sought access to,

> … the recording of the [tribunal] proceedings for […], held [a specified date] in the Council Chambers of the County of [..].
>
> I am also requesting notes of the members of the Tribunal, evidence as submitted to the Tribunal on [the specified date].
>
> I am also requesting any and all correspondence between the Acting Chair of the Tribunal and the Chair of the Tribunal related to any and all matters with respect to the Chair['s] search and seizure of the Appellants electronic devices and any evidence that the Acting Chair had that purported the Appellant was recording the proceedings of Tribunal on [the specified date].

[3] The ministry located one audio recording of the hearing and granted the appellant full access to it.

[4] Regarding the appellant's request for "evidence as submitted to the Tribunal on [the specified date]," the ministry interpreted this to mean documentary evidence submitted by all parties to the hearing as well as any new documentary evidence

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[1] Drawn from the ministry's representations.
[2] The date is relevant to Issue A.
[3] The ministry responded to the request for records from the tribunal. References in this Order to the tribunal or the ministry are to the respondent in this appeal.

submitted on that date. As the appellant was a party to the hearing, the ministry stated that it believed the appellant possessed this information and that no additional records exist; however, the ministry advised that it could provide the appellant with duplicate copies of this information for a fee.[4]

[5] Regarding the notes taken by tribunal members, the ministry advised the appellant that the members used the notes for their personal use as a tool to assist in their decision- making process. The ministry stated that these notes "are stored by each panel member separate and apart from Tribunal records," are not shared with the tribunal, do not form part of the record of proceedings and are not intended for public distribution. The ministry denied access to these records stating, "Given that the Tribunal does not have custody of the notes and cannot control if the panel members take notes, how the notes are maintained and how long the notes are to be kept, access to the notes is denied."

[6] The ministry also advised the appellant that there was no correspondence between the acting chair and the chair regarding the "search and seizure of an electronic device" and "no evidence that the hearing was being recorded by any of the appellants" in attendance.

[7] The appellant appealed the ministry's access decision,[5] and the IPC appointed a mediator to explore a resolution with the parties.

[8] During mediation, the ministry clarified its position that the notes are not "in the custody" or "under the control of" the tribunal within the meaning of section 10 of the *Act*. The appellant maintained his position that the notes are in the custody or within the control of the ministry and that they should be disclosed.

[9] The appellant also took the position that he believed additional responsive records ought to exist. Specifically, he sought the "requirements" of a particular witness at the hearing, who he referred to as an "alleged expert." In addition, the appellant sought access to all correspondence between the chair and the acting chair, not only what was associated with the "search and seizure" of his phone. The ministry took the position that the additional records identified by the appellant were outside of the scope of his original request.

[10] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process. The adjudicator initially assigned to the appeal conducted an inquiry in which she invited and received representations from the

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[4] This part of the search is not under appeal and will not be addressed in this order; however, the ministry confirmed in its representations that it is able to provide the appellant with these records, which it believes are duplicates of those the appellant already has, for a fee.

[5] The appellant also appealed the fees charged by the ministry, but that issue was resolved at mediation.

ministry and the appellant, which were shared in accordance with the *Code of Procedure* and *Practice Direction 7.*

[11] During the inquiry, the ministry made supplementary representations and issued a supplementary decision that the exclusion in section 65(3.1) of the *Act* applies in this case, the exclusion that applies to notes and other materials made by tribunal members. The ministry's supplementary representations were shared with the appellant and representations were invited, but none were received.

[12] The appeal was transferred to me to conclude the inquiry. In this order, I find that the ministry may not rely on section 65(3.1). However, I find that the members' notes are not in the custody or the control of the ministry, that it assessed the scope of the request properly and that its search was reasonable. I therefore dismiss the appeal.

ISSUES:

A. Are the tribunal members' notes excluded from the *Act* under section 65(3.1)?

B. Are the tribunal members' notes "in the custody" or "under the control" of the ministry within the meaning of section 10(1) of the *Act*?

C. Did the ministry properly assess the scope of the request?

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

DISCUSSION:

Issue A: Are the tribunal members' notes excluded from the *Act* under section 65(3.1)?

[13] One of the main issues in this appeal is the appellant's request to access the notes of the tribunal members presiding at the hearing. Initially, the ministry's sole argument was that the notes are not "in the custody" or "under the control" of the ministry within the meaning of section 10(1), which is the topic discussed under Issue B. The ministry made a second argument during the inquiry for which some context is required.

Background

[14] While the inquiry was under way, a new section was added to the *Act* to establish an exclusion for certain records, including notes of quasi-judicial decision makers (section 65(3.1)). Section 65(3.1) states,

> 65(3.1) This Act does not apply to personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity.

[15] Like the other exclusions in the *Act,* if the exclusion applies the records at issue are not able to be accessed through the *Act.*

[16] Section 65(3.1) was not part of the *Act* when the request was made or this inquiry commenced. The section 65(3.1) amendment was introduced in the *Tribunal Adjudicative Records Act, 2019*,[6] which was contained within the *Protecting What Matters Most Act (Budget Measures), 2019.*[7] The *Protecting What Matters Most Act (Budget Measures), 2019* received royal assent on May 29, 2019 and the relevant sections came into force on June 30, 2019.

Supplementary decision

[17] Shortly after the amendment came in to force, the ministry made a supplementary access decision that section 65(3.1) excluded the notes from the *Act.*

[18] In brief representations, the ministry submits that section 65(3.1) applies to notes taken by tribunal members and that therefore they are excluded. Although invited to do so, the appellant did not make representations on this particular issue, although he made several arguments about the notes which will be addressed under Issue B.

The ministry is not able to rely on the exclusion because it was not in force at the time of the request

[19] Before considering whether the exclusion applies, I must first consider whether the ministry may rely on the exclusion because it was not in place at the time the request was made. The issue of whether an amendment to the *Act* has retroactive or retrospective effect was discussed in Order PO-3862 regarding a different exclusion added to the *Act*.

[20] I agree with and will rely on the analysis of the adjudicator in Order PO-3862 and therefore reproduce it here, at some length:

> There is a strong presumption that legislation is not intended to have retroactive or retrospective application unless the legislation contains language clearly indicating that it, or some part of it, is meant to apply retroactively or retrospectively or unless the presumption is rebutted by

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[6] S.O. 2019, c. 7, Sched. 60, s. 9.
[7] S.O. 2019, c. 7.

> necessary implication.[8] The fundamental question is whether the legislature intended the provision to have retroactive or retrospective application.[9]
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> In the current appeal, there is insufficient evidence before me to suggest that the legislature intended the amendment to the *Act* at section 65(11) to have retroactive or retrospective application. There is nothing expressly set out in the legislation indicating that the legislature intended it to be applied in that way, nor do I accept that the evidence suggests that the amendment should be applied retroactively or retrospectively by necessary implication.
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> The request in this appeal was submitted to [the institution] approximately three months prior to the date that the *Act* was amended to include the exclusion at section 65(11). There is no evidence to support a conclusion that the legislature intended the provision to have retroactive or retrospective application. Therefore, the exclusion at section 65(11) is not relevant to this appeal.

[21] Like the amendment at issue in Order PO-3862, there is no part of the *Tribunal Adjudicative Records Act, 2019* or the *Protecting What Matters Most Act (Budget Measures), 2019* to indicate that the legislature intended for the section 65(3.1) amendment to have retroactive or retrospective affect, nor has the ministry presented any evidence that the amendment should be applied retroactively or retrospectively by necessary implication. Without this kind of evidence, there is no basis for me to conclude that the exemption has application for requests made prior to June 30, 2019.

[22] The request was submitted to the ministry in April 2018, more than a year before June 30, 3019 and I therefore find that section 65(3.1) is not relevant to this appeal and it may not be relied upon by the ministry.

Observation about section 65(16) of the Act – adjudicative records

[23] Before leaving this issue, I make the following observations about section 65(16), another new exclusion added to the *Act* effective June 30, 2019 pursuant to the legislation described above. Section 65(16) creates an exclusion for "adjudicative records," which has a specific meaning set out in the *Tribunal Adjudicative Records Act, 2019.*

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[8] *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1997] 1 S.C.R. 271 at para 15.

[9] *Campbell v. Campbell*, [1995] M.J. No. 466 (Man. C.A.), citing *Acme (Village) School District No. 2296 v. Steele-Smith*, [1993] S.C.R. 47.

[24] I considered, but determined that section 65(16) is not relevant to this appeal because the hearing commenced well prior to June 30, 2019.[10] I include these observations because if the hearing commenced after June 30, 2019, section 65(16) may have had the effect of excluding from the *Act* some of the other records sought by the appellant in this appeal.

Issue B: Are the tribunal members' notes "in the custody" or "under the control" of the ministry within the meaning of section 10(1) of the *Act*?

[25] The ministry submits that the tribunal members' notes are not "in the custody" or "under the control" of the tribunal within the meaning of section 10(1) and therefore the appellant may not access them through the *Act.* The appellant vigorously disputes the ministry's position.

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

[27] 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.[11] The courts and this office have applied a broad and liberal approach to the custody or control question.[12] Mere possession of a record that does not relate to the institution's mandate and functions may not amount to custody for the purpose of section 10(1).

[28] Originating in Order 120, 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, including whether the institution has possession or right to possession of the record at issue.[13] Factors relevant to this appeal will be discussed in more detail below.

[29] On a number of occasions prior to the addition of section 65(3.1) to the *Act*, IPC adjudicators considered whether the notes of tribunal members are "in the custody" or

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[10] Section 2 of the *Tribunal Adjudicative Records Act, 2019,* read in conjunction with section 65(16) of the *Act.*
[11] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[12] *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.
[13] Orders 120, MO-1251, PO-2306 and PO-2683.

"under the control" of the tribunal.[14] The issue was most exhaustively canvassed in Order P-396, in which the adjudicator reviewed the legislative history of the *Act* and concluded,

> In my view, notes created by tribunal members are not, *per se*, excluded from the scope of the *Act*; to do so would require a legislative amendment. The determinative issue is whether particular notes are in the custody or under the control of an institution, based on the circumstances of a particular appeal.

[30] After considering the factors set out in Order 120, the adjudicator in Order P-396 concluded that in that the Rent Review Hearing Board member's notes at issue in that appeal were not in the custody or control of the Board. The adjudicator stated,

> The notes which are the subject of this appeal are currently located outside the Board premises and are in the board member's personal possession. The Board does not regulate the use of the notes, and has taken no steps to exert control over them. They were created by the Board member for her own personal use and, according to the Board's representations, […] she never allowed any other person to see, read, or use the notes for any purpose.
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> …
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> … if the records had been contained in the appellant's appeal file or in any other record keeping system over which the Board had administrative control, in my view, they would properly have been considered in the custody or control of the board, and governed by the provisions of the *Act.*

[31] The approach taken in Order P-396 has been followed by several IPC adjudicators, including appeals involving tribunal members' notes relating to the Ontario Municipal Board,[15] the Ontario Labour Relations Board,[16] the Health Professions Appeal Review Board,[17] an independent ombudsman,[18] and the Human Rights Tribunal of Ontario.[19]

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[14] See for example, Orders P-1230, P-505, P-396, PO-2648, PO-3699 (upheld on Reconsideration PO-3994-R), P-1132, and PO-1906.
[15] Order P-505.
[16] Orders PO-1906, P-1132 and P-1230.
[17] Order PO-2648.
[18] Order P-271,
[19] Order PO-3699, upheld on reconsideration at PO-3994-R.

Ministry's representations

[32] The ministry submits that the notes taken by the three panel members presiding at the hearing are not in the custody or under the control of the tribunal. It submits that the members are not employees of the tribunal, but rather they are Lieutenant Governor in Council appointees who adjudicate cases independently.

[33] The ministry refers to *Canada (Privacy Commissioner)* v. *Canada (Labour Relations Board),*[20] a Federal Court of Appeal decision that found that the notes of panel members of the Canada Labour Relations Board were not under the control of the government institution within the meaning of the federal equivalent to the *Act*. The ministry submits that the following factor articulated by the Federal Court of Appeal should be persuasive in the present appeal:

> These notes are being taken during the course of quasi-judicial proceedings, not by employees of the Board, but by Governor in Council appointees endowed with adjudicative functions which they must perform, not as agent of the Board, but independently of other members of the Board including the chairperson of the Board or a government institution.

[34] Further, the ministry submits that the board members are under no requirement to take notes and that if they do, it is within the members' discretion to decide what to write down, where to keep their notes and how they wish to maintain them including their maintenance or disposition. The ministry says that tribunal staff do not provide guidance to panel members about their notes. The ministry says that if notes are taken, they do not form part of the records retention schedules of the ministry or the tribunal.

[35] The ministry admits that the members took notes but that "each panel member indicated" that the notes taken were for their own personal and exclusive use to assist them in their decision-making and that the notes were kept separate and apart from the tribunal's records. The ministry states that the panel members indicated that "they did not and would not" share their notes with tribunal or ministry staff for purposes of processing the access request.

[36] The ministry points to *Canada (Privacy Commissioner)* and *Tunian v. Canada (Immigration and Refugee Board)*[21] for the proposition that disclosure of tribunal member notes would be contrary to the principle of adjudicative privilege and an intrusion into the panel members' thought processes beyond what is set out in their reasons.

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[20] [2000] F.C.J. No. 617 ("*Canada (Privacy Commissioner)*") at para 5.
[21] [2004] F.C.J. No. 1041 ("*Tunian*").

[37] On this latter point, the ministry points to *B.K. v. Franklin*,[22] a decision of the Ontario Superior Court in which the Court refers to the notes of members of the Health Professions Appeal and Review Board as the "private property" of the board members and therefore not able to be ordered disclosed by the Court in the context of a judicial review application.

[38] Lastly, the ministry refers to *156621 Canada Ltd. v. Ottawa (City)*,[23] a decision of the Ontario Superior Court that determined that a board member of the Ontario Municipal Board could not be compelled to disclose his notes in the context of a judicial review proceeding. The ministry points to the factors reviewed by the Court, which it says are similar to those advanced by the ministry in this appeal.

Appellant's representations

[39] The appellant's representations on this issue refer to both notes and, in some places, emails. Although this Issue deals only with the notes, I have summarized the appellant's arguments including the parts pertaining to the emails below. The appellant's arguments about emails will be taken into account at Issues C and D, below.

[40] The appellant submits that the members are the directing minds of the tribunal. He submits that their notes and emails leading up to and including at the hearing are part of the public record of the decision-making process.

[41] Regarding the ministry's arguments about adjudicative privilege, the appellant submits that the notes are not privileged. Rather, he says the notes were prepared "in association with" the members engagement or "charge" with the ministry. He says that the members are not judges. He acknowledges that the members may be appointed by order in council but, he argues, this does not mean that they are not bound by the laws of Ontario.

[42] He submits that when a member accepts their appointment and when they are acting on behalf of the ministry, which is an institution under the *Act,* "their independence ceases as private citizens." He points to the *Act,* which he says states that "institutions must take reasonable measures to preserve records…." I understand the appellant to be referring to section 10.1 of the *Act.*

[43] Lastly, he argues that the ministry is not a business and the members are officers when fulfilling their duties to the panel. Their personal email and notes as they apply to their duties as members of the tribunal are accessible to the public because of the requirements of the *Act*. The appellant refers to Order M-813, which deals with records of municipal councillors, for the proposition that emails and notes associated

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[22] [2003] O.J. No.1887 ("*B.K.*") at paras 17 and 19.
[23] [2004] O.J. No. 1003 ("*156621 Canada Ltd.*") at para 4.

with an officer's role with the government are subject to the *Act.*

[44] To summarize, the appellant argues that it is not consistent with the *Act* that the members are permitted to unilaterally control their notes. He argues that the notes were created while carrying out a government duty and that therefore they should be accessible through the *Act.* In fact, he argues that the tribunal had a duty under the *Act* to maintain those records. He disagrees with the principle that underpins the court decisions referred to by the ministry, that there is a realm of private property for individuals otherwise acting as government officials.

Analysis and finding

[45] I adopt the approach taken by the adjudicator in Order P-396, discussed above. That is, I start from the proposition that without a statutory exclusion, there is nothing inherent about notes taken by members of an adjudicative tribunal that removes them from the scope of the *Act.* The analysis is whether those notes are within the custody or under the control of the institution using a factor-based analysis informed by the context of the appeal and the purposes of the *Act*.[24]

[46] I will deal first with the appellant's arguments relating to section 10.1 of the *Act.* This section of the *Act* was introduced to the *Act* in 2014 and it was not argued or at issue in the appeals referred to above dealing with adjudicative notes. Section 10.1 states,

> 10.1 Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution. 2014, c. 13, Sched. 6, s. 1.

[47] I considered whether section 10.1 impacts the prior jurisprudence relating to because I understand the appellant to argue that because the tribunal is an institution under the *Act* it has a responsibility to obtain the notes from the members to fulfill is obligations under the *Act* to maintain such records.

[48] Having considered the matter, I see no reasonable basis to examine further whether the addition of section 10.1 would have altered this office's prior jurisprudence about adjudicative notes. As can be seen, the same phrase is used in both sections 10.1 and section 10: "in the custody or under the control." Reading the words literally and as they appear in the section, it is clear that before the obligation to maintain a particular

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[24] Order 120 and *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) ("*City of Ottawa v. Ontario*").

record arises, it must first be established that the record is in the institution's custody or under its control.

[49] As was the case prior to the 2014 amendment to add section 10.1, the *Act* does not define "in the custody or under the control," leaving this office to interpret this phrase, which it has done by establishing a set of factors that assist with making the determination. I will now consider whether the ministry has custody or control over the notes.

[50] To begin, I accept the ministry's evidence that it does not have actual possession of the notes. Since there can be no custody without possession, the issue then is whether it has "control over" the notes.[25] The following factors are of assistance in making this assessment.

Was the record created by an officer or employee of the institution?[26]

[51] The ministry says the members are not officers or employees, but rather are appointees. The appellant acknowledges that they are appointees, but argues that they are officers. As I understand the appellant's argument, he submits that the members are not third parties to the tribunal, but rather individuals carrying out the work of the tribunal. It is on this point, that I understand the appellant to rely on Order M-813.[27]

[52] In my view, this factor weighs in favour of a finding that the notes are in the control of the tribunal. However, it is but one factor.[28]

What use did the creator intend to make of the record?[29]

[53] The evidence is that the notes were for the members' own personal use to assist in their individual decision making process. The notes were not required to be made by the tribunal and they do not form part of the tribunal's files.

[54] In my view, this factor weighs against a finding that notes are in the control of the tribunal. I also observe that prior orders of this office involving adjudicator's notes

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[25] Even if I had found that the ministry had possession of the notes, I would nevertheless be required to determine whether this amounts to more than bare possession such that the ministry has custody of them. See *City of Ottawa v. Ontario*, cited above, and Order P-239. The factors to assess whether an institution has custody are similar to those used to assess control, and I would have come to the same conclusion – that the ministry does not have custody of the records.
[26] Order 120.
[27] In order M-813, the adjudicator found that the records at issue were in the possession of a municipal councillor, not in the custody or control of the city. However, the adjudicator examined whether the councillor was an "officer," which is the point that I believe the appellant relies upon.
[28] Order PO-3699, upheld on reconsideration at PO-3994-R.
[29] Orders 120 and P-239.

place significant weight on this factor.

[55] Related to this factor, I have also taken into account the legislative history of the *Act* that was canvassed in Order P-396. Specifically, I observe that it was contemplated that personal notes taken by adjudicators to assist with their independent decision-making would remain beyond the reach of the *Act* if those records did not become comingled with an institutions records. As quoted in Order P-396, the minister responsible for introducing the *Act* stated as follows during Legislative Committee hearings (emphasis added),

> The quasi-judicial tribunal members, in so far as they make notes and in so far as those notes come within the custody of government may be obliged to disclose them. We had to draw the line somewhere and we drew the line at judge's notes. I think the practical reality is that many tribunal officials, the chair of the Ontario Labour Relations Board as with judges, may make notes and then destroy them at the end of the day – there is no compulsion to retain those notes under any statute – or may take them home. That is to say, they are not within the custody of government and therefore not producible. But if the chairman of the Labour Relations Board files his notes in his office in a filing cabinet they will be producible.

[56] In my view, the consistent approach taken by prior IPC adjudicators is best understood with the context provided by the legislative history. That is, the drafters were aware of and accepted what appears to be a common practice of allowing members of adjudicative tribunals to keep certain notes as personal property. The notion that certain notes of adjudicative decision makers are private property, as argued by the ministry, has also been acknowledged by the courts in other settings.[30]

Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[31]

[57] The appellant makes the case that the members were carrying out a statutory duty. I agree. The ministry's view is that their duties are carried out in a manner that is independent. I also agree. In my view, this factor is not of particular assistance in assessing whether the tribunal has custody or control of the notes.

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[30] See *Tunian*, cited above, *B.K.*, cited above, and *156621 Canada Ltd.*, cited above.

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

Does the content of the record relate to the institution's mandate and functions?[32]

[58] As I understand the overall argument, the appellant argues that the tribunal has authority to convene hearing panels and make decisions and the notes would not have been taken but for the hearing. These considerations would tend to suggest that the notes are within the control of the tribunal. However, I also accept the ministry's explanation that the contents of the notes are not known to it and they are not records required to be maintained by the tribunal.

[59] Taking both arguments into account, I find that this factor weighs in favour of a finding that the notes are not in the control of the ministry. Related to my finding above, I accept that while the notes would relate to the institution's mandate and functions in a broad sense, they are taken by adjudicators to assist with their independent decision- making.

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?[33]

[60] Whether the members are officers or employees was discussed above and I will not revisit that issue.

[61] Regardless of the status of the individual, and of most relevance to this appeal, the issue is whether the notes are for the purpose of their duties to the tribunal. Again, the ministry says that the notes are for the members' personal use; the appellant denies that such a distinction can be drawn when the members are carrying out their public duties.

[62] I accept the evidence of the ministry that the notes are not a requirement of any duty of the tribunal. That they exist is because of the members' personal choice to create them. This factor weighs in favour of a finding that the notes are not in the control of the ministry.

[63] I have reached this conclusion after considering the prior orders of this Office in relation to similar records, the general practice of adjudicative decision makers as recognized by courts, and the evidence of the ministry in this appeal that the notes are taken as a matter of the members' complete discretion that is unregulated by the tribunal.

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[32] *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 v. Ontario,* cited above; and, Orders 120 and P-239.
[33] Orders 120 and P-239.

Does the institution have a right to possession of the record[34] *and does the institution have the authority to regulate the record's content, use and disposal?*[35]

[64] I accept the tribunal's evidence that it does not have any right to possession of the record, nor the authority to regulate any aspect of the notes. These factors weigh heavily in favour of a finding that the notes are not in the control of the ministry.

Summary

[65] Having considered all of the factors above, I find that the members' notes are not in the custody or control of the tribunal and I uphold this part of the ministry's decision.

Issue C: Did the ministry properly assess the scope of the request?

[66] During the mediation, a dispute arose about the scope of the request. This issue of scope arises in relation to the following part of the request:

> I am also requesting any and all correspondence between the Acting Chair of the Tribunal and the Chair of the Tribunal related to any and all matters with respect to the Chair search and seizure of the Appellants electronic devices and any evidence that the Acting Chair had that purported the Appellant was recording the proceedings of Tribunal on [a specified date].

[67] During mediation the appellant took the position that his request was for access to all correspondence between the chair and the acting chair, not only what was associated with "the search and seizure of an electronic device," which I understand to refer to the circumstances leading to his providing the staff member with his phone for a short period of time.

[68] Disputes between parties about the scope of an access request require consideration of section 24 of the *Act,* which imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;

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[34] Orders 120 and P-239.
[35] Orders 120 and P-239.

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[69] Previous IPC orders have established that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[36] To be considered responsive to the request, records must "reasonably relate" to the request.[37]

Representations

[70] The appellant did not make direct representations on this issue, but I have considered his position as I understand he put it at the mediation stage of the appeal and I also understand from the totality of the representations, which are summarized under Issue B, that he seeks access to emails between the tribunal members. The focus of his representations, however, was that they are in the custody and control of the tribunal.

[71] The ministry submits that the written request, reproduced above, was sufficiently clear. In support, it provided affidavit evidence of the tribunal chair and the member acting as the chair on the day of the hearing. The chair, who was primarily responsible for overseeing the tribunal's response to the request, stated that he found the request to be clear.

[72] The acting chair provided affidavit evidence about some of the events that occurred at the hearing that shed some light on the request. As is briefly outlined in the Overview above, the acting chair stated that during the hearing, legal counsel for one of the witnesses stated that he suspected that the appellant was recording the hearing with his phone. The acting chair then canvassed the issue with the appellant. At one point, after an exchange between the appellant and the acting chair, the appellant provided a tribunal staff member with his phone for a short period of time.

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[36] Orders P-134 and P-880.
[37] Orders P-880 and PO-2661.

Analysis and findings

[73] In my view, this aspect of the request is clear and unambiguous. It was a request for correspondence between two individuals regarding a particular topic: "any and all matters with respect to the Chair search and seizure of the Appellants electronic devices…." A request for "all correspondence" without any limitation as to topic or time period is a broader request and does not reasonably relate to the request as worded.

[74] I find that the ministry properly interpreted the scope of the request and this part of the appeal is dismissed.

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

[75] The appellant's general position is that additional records responsive to all parts of his request ought to exist.

[76] First, he stated during the mediation that he sought and had not received the "requirements" of an "alleged expert" to provide a report as required by the Provincial Engineers of Ontario. The "alleged expert" the appellant refers to is an engineer who appeared as a witness at the hearing. I understand this request to refer to the professional qualifications of the witness. Second, he also believes that additional correspondence between the chair and the acting chair exists.

[77] I will also address whether the ministry conducted a reasonable search for the following part of the request, "…any evidence that the Acting Chair had that purported the Appellant was recording the proceedings of Tribunal on [a specified date]."

[78] 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 24.[38] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[79] The *Act* does not require the institution to prove with absolute certainty that further records do not exist.[39] 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.[40]

[80] 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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[38] Orders P-85, P-221 and PO-1954-I.
[39] Orders P-624 and PO-2559.
[40] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[41]

[81] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[42]

Representations

The ministry

[82] The ministry stands by its search, submitting that it was reasonable and by addressing the issues raised by the appellant in this appeal.

Regarding the expert

[83] The ministry explains that at the hearing one of the parties called an engineering expert witness. The ministry says that the expert witness provided no report but that the evidence relied upon by the expert witness was provided to the appellant in advance of the hearing, which is attested to in affidavit evidence provided by the ministry in this inquiry. The ministry submits,

> The 'requirements of a named individual as an alleged expert to provide a report' was accepted and considered by the Tribunal as part of the evidence [at the hearing] and therefore the appellant is or should also be in possession of that information.

Regarding the correspondence between chair and acting chair

[84] As referred to above, the ministry provided affidavit evidence from the chair and acting chair about the steps undertaken to locate responsive records to the following part of the request:

> I am also requesting any and all correspondence between the Acting Chair of the Tribunal and the Chair of the Tribunal related to any and all matters with respect to the Chair search and seizure of the Appellants electronic devices and any evidence that the Acting Chair had that purported the Appellant was recording the proceedings of Tribunal on [a specified date].

[85] Neither the chair nor the acting chair believed there to be any records of correspondence between them about the circumstances leading to the appellant providing the tribunal staff member with his phone. However, they explain the steps

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[41] Order MO-2185.
[42] Order MO-2213.

that they took to verify their recollection. The chair stated that he searched his emails using the name of the acting chair. He also contacted the acting chair to request that she conduct a similar search. The acting chair stated that she carried out a variety of searches in her email account to identify responsive records. The chair and the acting chair stated that the searches undertaken did not yield any responsive records.

Regarding the evidence of the "evidence that the acting chair had"

[86] The ministry submits that based on the evidence provided by the acting chair, there are no records responsive to the request. In fact, the acting chair stated, "we had no evidence that [the appellant] was recording the hearing."

The appellant

[87] Other than the hearing notes of the tribunal members that I discussed above, the appellant's representations did not elaborate on the positions he took at mediation; however, he maintains in general that there are additional records within the ministry's possession – or that ought to be in the ministry's possession – that should be disclosed.

Analysis and findings

[88] The appellant's stated request was narrow and involved records related to a particular hearing. Having considered the evidence of the ministry which describes the approach taken by the tribunal to carry out the search, I am satisfied that the ministry conducted a reasonable search. I accept the evidence of the ministry that information about the expert witness was part of the tribunal's evidentiary record and that there are no additional records. As noted at the outset, the ministry's search for the evidence filed at the tribunal hearing is not an issue before me.

[89] Regarding the other aspects of the search, it is my view that chair and the acting chair were sufficiently experienced and knowledgeable about the circumstances to carry out the search. I also find that the steps they took with respect to all aspects of the search amounted to a reasonable effort.

[90] I find that the search was reasonable and I uphold it.

ORDER:

The appeal is dismissed.

Original Signed by: January 19, 2021
Valerie Jepson
Adjudicator