

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4162

Appeal PA18-00727

Ministry of Health

July 6, 2021

Summary: A journalist made a request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* to the Ministry of Health (the ministry) for briefing notes, memos and media talking points prepared in response to, or in anticipation of the release of, the Auditor General's 2017 report on Ontario Drug Benefit Program fraud. The ministry located a "House Book Note" and a table in response to the request, and notified the Office of the Auditor General of Ontario (the OAGO) about the request and the information at issue. The OAGO's position was that the records formed part of the Auditor General's "working papers" subject to the confidentiality provision at section 27.1 in the *Auditor General Act (the AGA)*, and were not in the ministry's custody or control under section 10(1) of *FIPPA*. The ministry adopted this position and denied access to the records. The requester appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

During an inquiry conducted into the appeal, after consulting again with the OAGO, the ministry issued a revised access decision disclosing further information in the "House Book Note," while continuing to withhold portions.

In this order, the adjudicator finds that the records are within the custody or control of the ministry within the meaning of section 10(1) of the *Act*. In relation to certain information that the ministry withheld as non-responsive to the request, the adjudicator orders the ministry to issue an access decision in relation to the responsive portions of the records remaining at issue. Finally, she notes that the OAGO's submission that certain information is exempt under section 22(a) of the *Act* is premature.

Statutes Considered: *Auditor General Act*, R.S.O. 1990, c. A.35, sections 10, 12, 19, 27.1; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1), 22(a), and 24.

Orders Considered: Orders P-48, PO-1677, PO-1678, PO-2725, M-152, and MO-2439.

OVERVIEW:

[1] A few weeks before publishing the Auditor General's report (the AG's report) on the annual value-for-money audit of Ontario's drug programs in 2017, the Office of the Auditor General of Ontario (OAGO) provided the Ministry of Health¹ (the ministry) with a copy of the final draft of the AG's report. The draft report, by nature, contained critiques of various ministry actions or choices. Ministry staff then prepared records summarizing the Auditor General's recommendations and observations, and the ministry's corresponding messaging, including some content directed at the Minister of Health (the minister).

[2] A journalist made a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*, or the *Act*) for records relating to the report. This appeal arose because the ministry withheld the records on the basis of the claim that they formed part of the Auditor General's "working papers," and were thus subject to the confidentiality provision at section 27.1 of the *Auditor General Act* (the *AGA*).² The ministry also claimed that the records were not in the ministry's custody or control under section 10(1) of *FIPPA*.

[3] The wording of the request was as follows:

Briefing notes, memos and media talking points prepared in response to, or in anticipation of the release of, the Auditor General's December 6, 2017 report on Ontario Drug Benefit Program (ODB) fraud.

[4] The ministry identified two records as responsive to the request, a House Book Note and an overview of the OAGO's observations regarding issues addressed in the House Book Note.

[5] The ministry consulted the OAGO about the request. Before sharing the relevant records with the OAGO, the ministry severed portions of the records on the basis that those portions were not responsive to the request. In response, the OAGO advised the ministry that it objected to disclosure of the information of which it had been notified.

[6] In its decision letter to the requester denying access to the records in full, the ministry stated the following:

¹ At the time of the request, the ministry was called the Ministry of Health and Long-Term Care. There are now two ministries, led by separate ministers, responsible for health and long-term care, respectively.

² R.S.O. 1990, C. A. 35.

Following consultations with the Office of the Auditor General, the records reveal information about the audit process, including information referencing the content of documentation, communications or discussions prepared for or arising from audits and follow-up engagements being conducted by the Office of the Auditor General. The basis for the removal is that information forming part of the Auditor General's working papers is outside of the control of the Ministry and falls outside the right of access given to individuals under section 10 (Right of Access) of the *Act*.

[7] The requester (now the appellant) appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The IPC appointed a mediator to explore the possibility of resolution.

[8] After the mediator had discussions with the appellant and the ministry, the appellant advised that he would like to pursue access to the records at the next stage of the appeal process. Accordingly, the appeal moved to the adjudication stage, where an adjudicator may conduct a written inquiry.

[9] As the adjudicator of this appeal, I began my inquiry under the *Act* by sending a Notice of Inquiry to the ministry and the OAGO.³ I sought and received written representations from the ministry and the OAGO in response. The OAGO indicated that it took no position on the House Book Note. I then asked the ministry to provide representations on custody or control of the House Book Note, or issue an access decision in relation to it. The ministry issued a revised decision. In the course of doing so, it undertook further consultations with the OAGO (regarding portions of the House Book Note that the ministry had previously not shared with the OAGO on the basis of being non-responsive). The ministry decided to release further information in the House Book Note, but withheld portions of it on the basis of either non-responsiveness or its position that it did not have custody or control of those portions.

[10] Given the ministry's determinations regarding non-responsiveness, the issue of scope/responsiveness was added to the appeal. I then sought and received written representations from the appellant in response to the representations of the ministry and the OAGO. Finally, I invited and received further representations from the ministry and the OAGO. The OAGO added an alternative claim to its position, that the records should be withheld under the discretionary exemption at section 22(a) (information already published) of *FIPPA*.

[11] For the reasons that follow, I find that that Record 2 (the overview table) and the portion of Record 1 (the House Book Note) that are at issue are in fact within the ministry's custody or control under section 10(1) of the *Act* and that the confidentiality

³ A letter on file indicates that the Auditor General advised the ministry that it may be interested in providing representations if the ministry's decision was appealed to this office.

provision in section 27.1 of the *AGA* does not apply to the information being requested in this case. However, I partially uphold the ministry's decision to withhold certain information on the basis that it is not responsive to the request.

[12] As a result, I resolve this appeal by ordering the ministry to issue a further access decision in relation to the records at issue.

RECORDS:

[13] Record 1 (15 pages) is a "House Book Note" containing a summary of the OAGO's recommendations, the ministry's messaging in response, and advice to the minister, and includes an appendix to the main body of the House Book Note, as described in the record itself. The ministry has disclosed some of the House Book Note but it withheld a portion of the appendix on the basis of lack of custody or control. All other remaining portions of the House Book Note were withheld as not responsive to the request.

[14] Record 2 (two pages) is an overview table setting out the OAGO's observations from the audit report. Its contents are also referenced in Record 1. It appears that the ministry initially disclosed the title, date, and page numbers of this record. A portion of this record was, and remains, withheld on the basis of custody or control, and the rest of it was, and remains, withheld as not responsive to the request.

ISSUES:

- A. What is the scope of the request? Which parts of the records are responsive to the request?
- B. Is section 27.1 of the *Auditor General Act* relevant in the circumstances?
- C. Is a portion of Record 1 and all of Record 2 in the custody or under the control of the ministry under section 10(1) of *FIPPA*?

DISCUSSION:

Issue A: What is the scope of the request? Which parts of the records are responsive to the request?

[15] The request that is the subject of this appeal was for "[b]riefing notes, memos and media talking points prepared in response to, or in anticipation of the release of, the Auditor General's December 6, 2017 report on Ontario Drug Benefit Program fraud."

[16] After identifying the two records at issue, the ministry withheld portions of each record on the basis that these portions are not responsive to the request. The responsiveness of portions of Record 1 became an issue in this appeal after the ministry

issued its revised decision relating to that record. The appellant takes issue with the ministry's position.

[17] As I will explain below, I find some part parts of Record 1 not responsive to the request.

[18] Section 24 of the *Act* 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;

(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).

[19] 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.⁴

[20] To be considered responsive to the request, records must *reasonably relate* to the request.⁵

The ministry's representations

[21] The ministry submits that the request provided sufficient detail to identify the records responsive to the request. The ministry determined that only portions of records 1 and 2 were responsive to the request, and only shared those portions with the OAGO when it consulted with the OAGO about the request.

[22] The ministry submits that some portions of Record 1 do not contain the ministry's responses to the OAGO's recommendations relating to ODB fraud, and therefore, do not *reasonably relate* to the request. The ministry emphasizes that the request specifically uses the words "ODB fraud." The ministry submits that specified

⁴ Orders P-134 and P-880.

⁵ Orders P-880 and PO-2661.

pages (or portions of pages)⁶ in Record 1 are not responsive because they contain:

- general background information, and
- key messages about the OAGO report and the ministry's responses to the OAGO recommendations relating to:
 - generic drug prices,
 - access to drugs through the Exceptional Access Program,
 - payment recovery by the ministry,
 - the MedsCheck Program,
 - dispensing fees paid to pharmacies for providing services to long-term care home residents, and
 - government initiatives related to opioid use and overdose.

[23] The contents of Record 1 are divided into several "Issues" listed in the record. Appearing under the heading "Issue 1" in Record 1 is information regarding payment recovery by the ministry from pharmacies that have been inspected. The ministry submits that its responses to the OAGO recommendations that relate to payment recovery by the ministry are not responsive to the request on the grounds that the ministry "does not inspect pharmacies for fraud, and that potentially 'inappropriate claims' that may be identified during an inspection can arise for reasons unrelated to fraud."

[24] "Issue 2" relates to why cases of potentially activity by pharmacy operators were not referred to the Ontario Provincial Police (OPP) in a more timely way, and what Ontario plans to improve this process. The ministry disclosed information under what it described as Issue 2 in Record 1 to the appellant.

Analysis/findings

[25] Having reviewed Record 1, the wording of the request, and the ministry's submissions, I agree with the ministry on the issue of responsiveness, in part. Specifically, I find that the portions of Record 1 relating to generic drug prices, access to drugs through the Exceptional Access Program, the MedsCheck Program, dispensing fees paid to pharmacies for providing services to long-term care home residents, and government initiatives related to opioid use and overdose are not *reasonably related* to the request. Having reviewed these portions of the record, I find that their contents

⁶ Specifically, pages 1-2, portions of page 3, pages 4-11, portions of page 12, and pages 13-15 of Record

have nothing to do with “fraud,” even taking a liberal interpretation of the request. Accordingly, I uphold the ministry’s decision to withhold those portions of Record 1.

[26] However, adopting a liberal interpretation of the request, and resolving any ambiguity in the request in the appellant’s favour, I find that the portions of Record 1 regarding payment recovery by the ministry (“Issue 1”) are responsive to the request, as they have to do with payment recovery for inappropriately paid claims. A portion of this information cites specific examples of claims that appear on their face to be inappropriate. I cannot expand on this further in this public order without revealing information that is thus far withheld in the record. I do not accept the ministry’s submission that because it “does not inspect pharmacies for fraud” and because potentially inappropriate claims that may be identified during an inspection may arise for various reasons, it follows that information relating to payment recovery by the ministry for inappropriately paid claims is not *reasonably related* to the request. While inappropriate claims may arise for reasons unrelated to fraud, the ministry does not sufficiently address the fact that some do relate to fraud, given the discussion of OPP involvement under Issue 2. Since the information under Issue 1 includes background information relating to inappropriate claims, at least some of which may have been for fraud, I find that it is *reasonably related* to the request.⁷

[27] Similarly, taking a liberal interpretation of the request, and resolving ambiguity in favour of the appellant, I find that the information in Record 1 described as general information is *reasonably related* to the request. This section places the information in the record in context, provides an overview of the record, and includes some references to issues 1 and 2. I also find that information indicating who prepared and approved the record is responsive to the request, as these ministry staff would have prepared and approved of responsive portions of the request.

[28] However, in this general information overview portion of Record 1, where there are brief mentions of the issues of generic drug prices, access to drugs through the Exceptional Access Program, the MedsCheck Program, dispensing fees paid to pharmacies for providing services to long-term care home residents, and government initiatives related to opioid use and overdose, I find these to be non-responsive to the request because they have nothing to do with fraud.⁸

[29] In conclusion, I uphold the ministry’s decision to withhold portions of Record 1 on the basis of non-responsiveness, in part, but I do not uphold the ministry’s decision to withhold portions of the record dealing with payment recovery by the ministry and general background information found in the record, as discussed above.

⁷ These portions of record 1 are identified under the heading of “Issue 1” on pages 2 and 3 of Record 1, and as items 5, 6, and 7 on pages 12 and 13 of Record 1.

⁸ These portions of Record 1 consist of the first, second, and fifth bulleted points in paragraph 3 of page 1; the fourth, fifth, and sixth paragraphs on page 1; and the first, third, and fourth bulleted points on page 2.

Issue B: Is section 27.1 of the *Auditor General Act* relevant in the circumstances?

[30] For the reasons that follow, I find that section 27.1 of the *AGA* does not apply to the information being requested (in part of Record 1 and all of Record 2).

[31] The OAGO opposes disclosure on the basis that the records are a part of the Auditor General's "working papers" and are, therefore, subject to section 27.1 of the *AGA*. The OAGO considers that the effect of this section is that the records were never in the ministry's custody or control (despite the fact that the ministry created these records). In its initial access decision, and during the inquiry, the ministry deferred to the OAGO's position on the issue of custody or control and did not provide representations for my consideration on this issue.

[32] Although the OAGO argued section 27.1 of the *AGA* as part of its argument on custody or control, the two concepts, while related, are distinct. I will begin by addressing the relevance of section 27.1 of the *AGA* in the circumstances of this appeal. The relevant portion of this provision says:

27.1 (1) The Auditor General, the Deputy Auditor General, . . . each employee of the Office of the Auditor General and any person appointed to assist the Auditor General for a limited period of time or in respect of a particular matter shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her employment or duties under this Act.

[33] In my view, it is useful to begin with a brief analysis of the nature of the portion of Record 1 that is in dispute (putting it in its context of Record 1 as a whole) and of Record 2.

Does section 27.1 of the AGA apply to the records?

The ministry's position

[34] The ministry (through its access decisions) and the OAGO take the position that the records at issue form part of the Auditor General's working papers.

[35] The ministry's initial decision uses the following language:

Following consultations with the Office of the Auditor General, the records reveal information about the audit process, including information referencing the content of documentation, communications or discussions prepared for or arising from audits and follow-up engagements being conducted by the Office of the Auditor General. The basis for the removal is that information forming part of the Auditor General's working papers is outside of the control of the Ministry and falls outside the right of access given to individuals under section 10 (Right of Access) of the *Act*.

[36] A similar rationale was stated in the ministry's revised access decision for Record 1.

[37] In its initial representations about custody or control, the ministry states the following:

As to whether or not these records are audit working papers that are outside of the control of the Ministry, the OAGO, who has the opportunity to provide representations on this appeal, can provide more information on this point.

[38] The ministry describes⁹ the first nine pages of Record 1 as the "Ministry's House Book Note containing the Ministry's responses to the OAGO report relating to Ontario Drug Programs). The responsive portions of Record 1 that are in dispute on the issue of custody or control are found in the remaining pages of Record 1, which the ministry describes as the "Ministry's responses to the final draft of recommendations from the OAGO."

The OAGO's position

[39] Counsel for the OAGO asserts that a portion of Record 1 and all of Record 2 consist of part of the "working papers" of the Auditor General. On the basis of this characterization of the records, he states that the records are subject to the confidentiality provision at section 27.1 of the *AGA*, and should not be accessible under *FIPPA*. More specifically, he addresses:

- the core function of the Auditor General (carrying out independent audits and investigations into government spending),¹⁰
- the duty of audit subjects to disclose information to the OAGO¹¹ (including privileged information),¹²
- the Auditor General's right of free access to records belonging to, or used by, its audit subjects that the Auditor General believes to be necessary to perform his or her duties under the *AGA*,¹³ and

⁹ In its representations on responsiveness. As noted above, the ministry did not make representations on the issues of custody and control or section 27.1 of the *AGA*.

¹⁰ As reflected in section 12 of the *AGA*.

¹¹ Under section 10 of the *AGA*, which says, in part: "Every ministry of the public service . . . shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act."

¹² The relevant privilege is not lost by doing so, under section 10(3) of the *AGA*, which says: "A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege."

- the existence of the statutory confidentiality provision in the *AGA*.

[40] Counsel for the OAGO submits that the records were prepared during the OAGO's annual audit and in response to part of the Draft Report from the Auditor General. He argues that the records at issue are the auditor's working papers because they "specifically relate to the audit... and the OAGO's observations and recommendations during the audit process." With respect to the parts of Record 1 that are at issue, counsel more specifically characterizes them as "includ[ing] the Ministry's comments, . . . in response to audit recommendations and the Draft Report of the OAGO and contains information that the Ministry created or prepared in response to the OAGO's audit of the ODP."

[41] Counsel also argues that there is a reasonable expectation that disclosure of these records would cause undue harm to and interference with the OAGO's function to conduct audits free of political interference or influence.

[42] In addition, counsel discussed at length several IPC orders dealing with similar confidentiality provisions. I will address these in my analysis, below.

Analysis/findings

[43] As I will explain below, I find that the records requested from the ministry are not subject to section 27.1 of the *AGA*.

[44] To begin with, section 27.1 imposes a duty of confidentiality on the "Auditor General, the Deputy Auditor General, . . . each employee of the Office of the Auditor General and any person appointed to assist the Auditor General for a limited period of time or in respect of a particular matter." Neither the OAGO nor the ministry addressed whether and how that duty of confidentiality applies to the ministry and its staff.

[45] It is important to note that the AG's final draft report itself is not a record at issue before me.

[46] Record 1 is a "House Book Note," which includes an appendix. A portion of the appendix is in dispute with respect to custody or control. It is this portion that counsel for the OAGO says is subject to section 27.1 of the *AGA*. Based on my review of Record 1, it is clear that it was prepared (and approved) by ministry communications staff. This preparation and approval took place after the OAGO sent the ministry a copy of its final draft of the AG's report.¹⁴ The format of this House Book Note can be described as

¹³ Under section 10(2) of the *AGA*, which says, in part: "The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry . . . that the Auditor General believes to be necessary to perform his or her duties under this Act."

¹⁴ The AG's report was released on December 6, 2017.

follows:

- general overview of the ministry's key messaging and general information about the objectives of the audit;
- more particular information about several of what the ministry described as key issues and responses, where each numbered key issue is set out (and what the ministry can expect criticism on), followed by a response section, and then a section described by the ministry as confidential advice to the Minister; and
- an appendix, which is a table summarizing the OAGO's recommendations and corresponding suggested response (or talking points) of the ministry.

[47] In other words, Record 1, in its entirety, is about the audit and the OAGO's recommendations arising out of it, and contains the ministry's messaging and briefing information in response to those recommendations. Despite this content, counsel for the OAGO takes no position on most of this record and only argues that a portion of Record 1 is subject to section 27.1 of the *AGA* because it "specifically relates to the audit." I find that this inconsistent position regarding various parts of Record 1 is not explained, or sufficiently discernable from counsel's representations or from the record itself, and dissuades me from accepting that the portion of Record 1 that is at issue is subject to section 27.1 of the *AGA*.

[48] Record 2 was also prepared by ministry staff, as acknowledged by the OAGO. It is a table containing only an overview of the OAGO's observations from the audit. At two pages long, it presents, in even shorter form, the OAGO's observations on issues referenced in Record 1. From my review of Record 2, it is dated after the date on which the OAGO sent the ministry the final draft of the AG's report, but before the date that the AG's report was made public.

[49] Similarly, given the nature, purpose, and timing of the creation of the records (after the OAGO shared its final draft of the Auditor General's Report), the basis for accepting that the records were created "during" the audit is not clear from the evidence before me.

[50] Finally, I am not persuaded that the IPC orders cited in the representations of counsel for the OAGO are relevant to deciding whether the records before me are subject to section 27.1 of the *AGA*.

[51] The request in Order M-152 was specifically for the school board's auditor's working papers, which were prepared by the accountants, not the client school board. Those circumstances are distinguishable from the ones in this appeal, where the ministry (the client) prepared the records, not the OAGO, and the request is for the papers prepared by the ministry, not the auditor's working papers. Therefore, the reasoning in Order M-152 is not relevant in the circumstances.

[52] Order P-48 is not relevant because in that appeal, the custody or control of the

records was not at issue to begin with. That case turned on the merits of the exemption at issue and is distinguishable from the preliminary issues that arise in this appeal.

[53] In my view, Order MO-2439 is also unhelpful here. In that order, the IPC held the following about the scope of the word *matters* in the relevant confidentiality provision:

. . . “*matters*” *appears to include* a reference to person’s knowledge of the fact that a particular issue or complaint is under consideration by the Auditor General, and/or the particulars of that complaint, and to ancillary information derived solely in that context. It is a more specific term than “information.” In my view, it *does not include information that came to a person’s attention during the course of their everyday work, whether or not that information was later provided to the Auditor General.* [Emphasis added.]

[54] In my view, this passage clearly shows that the scope of the term *matters* in the confidentiality provision is limited, and not as sweeping as counsel suggests. It appears from the dates found in the records that nothing was under consideration any longer, as the final draft of the Auditor’s Report had already been prepared. Whatever the scope is of *all matters* in section 27.1 of the *AGA*, it cannot reasonably extend to *matters* in a public report that the Minister of Health would reasonably be expected to publicly communicate and be accountable for. Therefore, I am not persuaded that the fact that the records would reveal that the OAGO had been considering an issue is evidence that weighs in favour of finding that the records are subject to section 27.1 of the *AGA*.

[55] Likewise, in Order MO-2843, the IPC held that the relevant confidentiality provision extended to correspondence and attached information sent to the investigator (the Toronto Ombudsman, in that appeal). However, those circumstances can also be distinguished, as the IPC held that the records in Order MO-2843 were “about the complaint or investigation being conducted by the Ombudsman.” Here, records are the ministry’s own briefing and communications materials prepared after the OAGO had prepared a final draft of the audit report. Again, the evidence before me does not sufficiently establish the position that the records were created *during* the audit. Having reviewed the records and representations before me, and the IPC’s jurisprudence on provisions similar to section 27.1 of the *AGA*, I find that the evidence before me does not establish that the records at issue before me are of the type referred to in section 27.1 of the *AGA*.¹⁵ It would appear that the intent of section 27.1 of the *AGA* is to

¹⁵ Counsel submits that although “working papers” is not explicitly defined in the *AGA*, that term has been defined in secondary sources as “the records kept by an independent auditor of the procedures followed, tests performed, information obtained, and conclusions reached in an audit.” [Citation omitted.] He further states that the “Chartered Accountants of Canada’s *Standard Practices for Investigative and Forensic Accounting Engagements* (November 2006) notes that working papers would include ‘all

protect the confidentiality of certain records in the hands of the Auditor General, and that records created by the ministry based on information the Auditor General chose to provide to it would not be covered by section 27.1.¹⁶

[56] For these reasons, I find that the records being requested are not subject to section 27.1 of the *AGA*. As a result, it is not necessary to discuss the question of which statute prevails (*FIPPA* or the *AGA*).

[57] I turn now to the issue of whether the records are in the ministry's custody or control under section 10(1) of *FIPPA*.

Issue C: Is a portion of Record 1 and all of Record 2 in the custody or under the control of the ministry under section 10(1) of *FIPPA*?

[58] For the reasons that follow, I find that the information at issue (in part of Record 1 and all of Record 2) is in the custody or control of the ministry under section 10(1) of *FIPPA*.

[59] Without substantive representations from the ministry on custody or control, I have considered the nature of the records themselves, the wording of *FIPPA* and the *AGA*, past IPC orders, and the representations of the OAGO and the appellant in making my decision. Although I do not set the representations out in this order in detail, I have considered them in their entirety.

Section 10(1) of *FIPPA*

[60] Section 10(1) of the *Act* says, 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 . . .

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

[62] 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.¹⁷

[63] A finding that a record is in the custody or under the control of an institution

information used and relied upon,' including information from audit subjects in response to an audit such as "engagement letters and other correspondence" as well as "notes and other recordings of interviews, meetings and discussions"[Citation omitted.]

¹⁶ See Order MO-2439 (reconsidered on other grounds in Order MO-2629-R), Order MO-2843, Reconsideration Order MO-2629-R and Interim Order MO-3513-I.

¹⁷ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

does not necessarily mean that a requester will be provided access to it.¹⁸ 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).

[64] The OAGO takes the position that the ministry lacks control over the records. The ministry adopted the OAGO's position but did not provide representations on this issue.

[65] The courts and the IPC have applied a broad and liberal approach to the custody or control question.¹⁹

Factors relevant to determining custody or control

[66] Based on the above approach, the IPC 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 set out below.²⁰ 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, the factors must be considered contextually in light of the purpose of the legislation.²¹

- Was the record created by an officer or employee of the institution?²²
- What use did the creator intend to make of the record?²³
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?²⁴
- Is the activity in question a core, central or basic function of the institution?²⁵
- Does the content of the record relate to the institution's mandate and functions?²⁶

¹⁸ Order PO-2836.

¹⁹ *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.

²⁰ Orders 120, MO-1251, PO-2306 and PO-2683.

²¹ *City of Ottawa v. Ontario*, cited above.

²² Order 120.

²³ Orders 120 and P-239.

²⁴ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

²⁵ Order P-912.

- 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?²⁷
- If the institution does have possession of the record, is it more than “bare possession”?²⁸
- 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?²⁹
- Does the institution have a right to possession of the record?³⁰
- Does the institution have the authority to regulate the record’s content, use and disposal?³¹
- 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?³²
- To what extent has the institution relied upon the record?³³
- How closely is the record integrated with other records held by the institution?³⁴
- 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?³⁵

[67] In this order, I will discuss those factors that I find relevant, based on the evidence before me, below.

[68] The parties were provided with the above list of custody or control factors developed by the IPC in the Notice of Inquiry issued to each of them, and the questions

²⁶ *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.

²⁷ Orders 120 and P-239.

²⁸ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

²⁹ Orders 120 and P-239.

³⁰ Orders 120 and P-239.

³¹ Orders 120 and P-239.

³² *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

³³ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders 120 and P-239.

³⁴ Orders 120 and P-239.

³⁵ Order MO-1251.

posed in relation to those factors. In response, the ministry stated that it takes no position regarding the OAGO's representations on the issue of custody or control of Record 2. (With respect to Record 1, it adopted the OAGO's position, implicitly, through its revised decision letter.)

Was the record created by an officer or employee of the ministry?

[69] On its face, the House Book Note (Record 1) was created by a senior communications advisor with the ministry.

[70] While Record 2 does not clearly indicate the name of an author, the OAGO's representations state that this record was created by the ministry. I recognize that the substance of the record (the content filling the table) consists of an abridged version of the OAGO's observations, and that the observations themselves were not *created* by the ministry. However, ministry staff put together the table itself.

What use did the creator intend to make of the record?

[71] Although the ministry did not provide representations directly about this question, it is possible to draw inferences about what use the creator intended to make of the records from the records themselves.

[72] The House Book Note was created and approved by a ministry communications employee. It consists of a response to the Auditor General's annual report regarding value-for-money and Ontario's drug programs. It contains an overview about the key messages, current status, and purpose of the audit, as well as more detailed information about key issues, corresponding responses and information marked as confidential advice to the minister.

[73] Previous IPC orders have considered House Book Notes or issue sheets, though mainly in the context of such records having been withheld under the discretionary exemption at section 13(1) (advice or recommendations) of *FIPPA*.³⁶ There appears to be no IPC order addressing a claim by an institution that a House Book Note created by its employee is not in its custody or control.³⁷ The IPC has generally found that House Book Notes, by their nature, contain "information [that] is provided to the Ministers for the specific purpose of making it available to the public if called upon to do so as part of open legislative debate."³⁸

³⁶ See, for example, Orders P-771, P-1006, and PO-1678.

³⁷ Even when the records related to an audit, see Order P-1543.

³⁸ See Order PO-1678. At other times, the IPC has found, for example, that House Book Notes are excluded from the *Act* (see, for example, Orders P-1543 and PO-3326-I, or were subject to solicitor-client privilege having been prepared by or for counsel (see, for example, Orders PO-3046 and PO-3078), but those records are not analogous to the records in this appeal.

[74] On my review of the House Book Note before me, I find it reasonable to conclude that its creator intended to provide the Minister of Health with both a summary of key issues that were anticipated to be points of praise or critique in the Auditor General's report, which was due to be published shortly, and corresponding suggested messaging (responses). There is support for my conclusion in the fact that this record was identified as being responsive to a request for "[b]riefing notes, memos and media talking points prepared in response to, or in anticipation of the release of" the AG's report."

[75] In my view, Record 2 has a similar purpose. As discussed, Record 2 was prepared by ministry staff after the OAGO had shared the final draft of the AG's report with the ministry. As a two-page record setting out an abridged version of the OAGO's observations, the table appears to have been intended to act as a reference document for the Minister of Health, or for internal ministry use. Again, as with Record 1, the fact that Record 2 was identified as a record responsive to the request lends some support for my conclusion about its intended use.

[76] As noted, the Auditor General's report was issued to the public on December 6, 2017. Based on my review of the records, it appears that they were prepared after the OAGO had completed its final draft of the Auditor General's report, and in anticipation of the public release of the Auditor General's report, for the purpose of preparing the Minister of Health to communicate publicly about the contents of that report. The contents of the records and the wording of the request also lead me to conclude that it is not reasonable to accept the OAGO's argument that the ministry never had custody or control of its own public messaging documentation. By having advance notice of what the Auditor General's final report would say, the ministry was given an opportunity to prepare for its responses to any potentially negative information within it, or positive information that it wished to highlight. From my review of the records at issue, that is what they appear to have been prepared to do.

Does the ministry have a statutory power or duty to carry out the activity that resulted in the creation of the record?

[77] Given the nature of the records and the purpose for which they were created by ministry staff, I am satisfied that the ministry has the statutory power or duty to prepare such communications and reference records for the Minister of Health.

Is the activity in question a core, central or basic function of the ministry?

[78] Turning again to the purpose of the records, as communications and/or reference materials for the Minister of Health, I find it reasonable to accept that the ability to communicate with Ontarians, or fellow Members of the Legislative Assembly, about the state of Ontario's drug programs is an activity that qualifies as *core, central, or basic* to the effective and transparent functioning of the ministry.

Does the content of the records relate to the ministry's mandate and functions?

[79] The records relate to Ontario's Drug Benefit programs, and specifically observations made about it after an audit was performed of these programs by the Auditor General, flagging areas of progress and concern for the ministry. I find that the content of the records relates to the mandate and functions of the Ministry of Health.

Does the ministry 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?

[80] I find that the ministry has physical possession of the records because they were created by ministry personnel, or pursuant to their responsibilities to provide the Minister of Health with briefing notes and suggested messaging in response to the anticipated Auditor General's report. The ministry located the records in its record holdings in response to the request.

If the ministry does have possession of the record, is it more than bare possession?

[81] The IPC has held that "bare possession does not amount to custody for the purposes of the *Act*,"³⁹ and that "there must be some right to deal with the records and some responsibility for their care and protection."⁴⁰

[82] Based on the evidence before me, I find that the ministry has more than "bare possession" of the records, having had its staff prepare the records for the intended use already discussed.

Does the ministry have the authority to regulate the record's content, use and disposal?

[83] In my view, the fact that the records were created by ministry staff is evidence that it has the authority to regulate the content, use, and disposal of the records. I draw this conclusion notwithstanding that portions of the House Book Note (including the appendix at issue) contain the observations of another body (in this case the OAGO). Similarly, in terms regulating the content of Record 2, I acknowledge that this record contains information regarding the OAGO's observations, but that does not mean that the ministry employees did not turn their minds and skills to creating the table and summarizing the OAGO's observations. Therefore, in the circumstances, I find that the ministry has the authority to regulate the content, use, and disposal of the records.

³⁹ Order P-239.

⁴⁰ Order P-239.

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 record?

[84] The ministry created the records and I do not find evidence that there are limits on the use to which the ministry may put the records.

Weighing the factors

[85] All of the factors relevant in the circumstances, and for which I have received evidence, weigh in favour of a finding that the records at issue are in the ministry's custody or control. In the circumstances, on balance, I am satisfied that the information at issue is in the custody or control of the ministry within the meaning of section 10(1) of *FIPPA*. It follows that the ministry must issue a decision on access to the records, with the exception of the portions that I have found non-responsive to the request.⁴¹

[86] Since the ministry has not yet issued such an access decision, it is premature to consider the question of whether the OAGO, as a third party, may raise the discretionary exemption at section 22(a) (already published) of *FIPPA* in the alternative, as it did, late in the inquiry.

ORDER:

1. I uphold the ministry's decision with respect to responsiveness, in part, and find that certain information in Record 1 is not responsive to the request.
2. I allow the appeal on the issue of custody or control of the remaining portion of Record 1. The ministry is ordered to issue an access decision in relation to the remaining responsive portions of Record 1.
3. I allow the appeal on the issue of custody or control of Record 2. The ministry is ordered to issue an access decision in relation to Record 2, bearing in mind my findings on the responsiveness of the corresponding information in Record 1. For the purposes of the access decision referred to above, the ministry should treat the date of this order as the date of the request for the purposes of the procedural requirement of the *Act*.
4. In order to verify compliance with order provisions 2 and 3, I reserve the right to require the ministry to provide me with a copy of its access decision and any information disclosed to the appellant as a result of the access decision.

⁴¹ I leave it with the ministry to determine what notice to, or consultation with, the OAGO is appropriate before making its access decision, depending on which exemptions it claims, if any, and any other considerations as may be relevant.

Original Signed by: _____

Marian Sami
Adjudicator

July 6, 2021 _____