Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4419

Appeal PA20-00129

Ministry of the Attorney General

July 19, 2023

Summary: This appeal deals with a request for access to the total amounts of all travel, mileage, airfare, accommodations, meal, incidental, parking, and related costs and expenses paid for or incurred by judges of the Ontario Court of Justice to travel to specified geographic locations. The ministry took the position that it did not have custody or control of the information sought by the appellant. In this order the adjudicator finds that the ministry does not have custody or control of the information sought by the appellant and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 1, 2(1), 10(1); R.R.O. 1990, Regulation 460, section 1, Schedule of institutions; *Courts of Justice Act*, RRO 1990, c C.43, sections 72, 75(1) and 77(3).

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Ont. Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 (Ont. Div. Crt.).

OVERVIEW:

[1] An individual submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) to the Ministry of the Attorney General (the ministry or MAG) for access to:

> …the total amounts of all travel, mileage, airfare, accommodations, meal, incidental, parking, and related costs and expenses paid for or incurred by judges of the Ontario Court of Justice to travel to and from the Rainy River District to preside or perform judicial or official duties at the Fort Frances Courthouse or the satellite court locations in Atikokan and Rainy River. Please break down these totals for each fiscal or calendar year from 2000 to 2019.

[2] The ministry issued an access decision indicating that it "is not in possession of these records." The ministry's position was that:

> The requested records constitute judicial information and fall within the custody and control of the Ontario Court of Justice. The records are therefore not subject to the *Freedom of Information and Protection of Privacy Act* (*FIPPA*). Courts are not listed under section 2(1) *FIPPA*, nor are they designated as an institution as set out in regulation 460 of *FIPPA*.

[3] The requester (now appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore the possibility of resolution and discussed the appeal issues with both the ministry and the appellant.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the inquiry process where an adjudicator may decide to conduct an inquiry under the *Act*.

[5] The originally assigned adjudicator decided to conduct an inquiry. The parties and the Office of the Chief Justice of the Ontario Court of Justice (the Office of the Chief Justice or the OCJ), as an affected party, were invited to make representations about the issues under appeal and to respond to the parties' positions.

[6] The appeal was then reassigned to me to continue the adjudication of the appeal.

[7] In this order I find that the ministry does not have custody or control of the information sought by the appellant. The appeal is dismissed.

DISCUSSION:

[8] The only issue in this appeal is whether the ministry has custody or control over the records sought by the appellant.

[9] The question before me is not which body ought to have custody or control of the records. Rather, the question is which body does have custody or control for the purposes of the *Act*, which is a determination based on the particular facts of the case

and content of the records.

[10] The appellant asserts that the ministry has custody or control of responsive records or the data from which responsive records can be generated. The ministry argues that the Office of the Chief Justice has exclusive custody or control over the information sought by the appellant, but that even if it the ministry did have custody or control of the information, disclosing the information would compromise judicial independence.

[11] Section 10(1) of *FIPPA* provides that (emphasis added):

> … [E]very person has a right of access to a record or a part of a record that is in the custody or under the control of an institution …

[12] The Ontario Court of Justice is not an institution covered by the *Act*, meaning that it is not bound by the requirements of the *Act* to provide access to records.[1] However, the ministry is.

[13] In other words, if the records are in the custody or control only of the court and not the ministry, the *Act* does not apply to the records and the appellant does not have a right of access under the *Act*. Furthermore, the IPC does not have authority to review any decision made by the court regarding access, because the court is not an institution under the *Act*.

[14] The courts and the IPC have applied a broad and liberal approach to the custody or control question.[2] In deciding whether a record is in the custody or control of an institution, a number of factors are considered in context and in light of the purposes of the *Act*.[3]

[15] Section 1 of *FIPPA* sets out the purposes of the *Act*. It reads:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,

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[1] See section 2 of the *Act* and the schedule of Institutions set out in R.R.O. 1990, Regulation 460. See also *Ontario* (*Ministry of the Attorney General*) *v. Ontario* (*Information and Privacy Commissioner*), 2011 ONSC 172 (*MAG v. IPC*) at paragraph 4 (Ont. Div. Ct.)

[2] *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA) at paragraph 34; *Canada Post Corp. v. Canada* (*Minister of Public Works*), 1995 CanLII 3574 (FCA), [1995] 2 FC 110; Order MO-1251.

[3] *Canada* (*Information Commissioner*) *v. Canada* (*Minister of National Defence*), 2011 SCC 25; *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *City of Ottawa v. Ontario,* 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); *Canada Post Corp. v. Canada* (*Minister of Public Works*), 1995 CanLII 3574 (FCA), [1995] 2 FC 110; *MAG v. IPC*; Order MO-1251.

> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[16] Section 2(1) of the *Act* defines a "record" to mean any record of information however recorded, whether in printed form, on film, by electronic means or otherwise,[4] and includes a record capable of being produced from machine readable records unless the process of producing it would unreasonably interfere with the operations of an institution.[5]

[17] Through its caselaw, the IPC has developed a list of factors to consider in determining whether a record is in the custody or control of an institution.[6] The list is not exhaustive – some of the listed factors may not apply in a specific case, while other unlisted factors may apply. The factors include the following:

- whether the record was created by an officer or employee of the institution,[7]
- what use the creator intended to make of the record,[8]
- whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record,[9]
- whether the activity in question is a "core", "central" or "basic" function of the institution,[10]
- whether the content of the record relates to the institution's mandate and functions,[11]
- whether the institution has physical possession of the record that amounts to more than "bare possession",[12]

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[4] Section 2(1)(a) and (b) of the *Act* further expand on the definition.
[5] Section 2 of Regulation 460 under the Act.
[6] Orders 120, MO-1251, PO-2306 and PO-2683.
[7] Order 120.
[8] Orders 120 and P-239.
[9] Order P-912, upheld in *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA).
[10] Order P-912.
[11] *MAG v. IPC*; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Ont. Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders 120 and P-239.
[12] Orders 120 and P-239.

- whether the institution has a right to possession of the record,[13]
- whether the institution has the authority to regulate the record's content, use and disposal,[14]
- whether there are any limits on the use to which the institution may put the record,[15]
- the extent to which the institution has relied upon the record,[16]
- how closely the record is integrated with other records held by the institution,[17] and
- 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.[18]

[18] Where an individual or organization other than the institution holds the record, the IPC has found that the following factors can assist in an assessment of custody or control:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[19]
- Who owns the record?[20]
- Who paid for the creation of the record?[21]
- What are the circumstances surrounding the creation, use and retention of the record?[22]
- Are there any contractual provisions between the institution and the individual who created the record that give the institution the express or implied right to possess or otherwise control the record?[23]

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[13] Orders 120 and P-239.
[14] Orders 120 and P-239.
[15] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[16] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Order 120.
[17] Orders 120 and P-239.
[18] Order MO-1251.
[19] Order PO-2683.
[20] Order M-315.
[21] Order M-506.
[22] Order PO-2386.
[23] *Greater Vancouver Mental Health Service Society v. British Columbia* (*Information and Privacy Commissioner*), 1999 CanLII 6922 (BC SC).

- Was there an understanding or agreement - between the institution and the individual who created the record or any other party - that the record was not to be disclosed to the institution?[24]

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?[25]

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? Did the agent have the authority to bind the institution?[26]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[27]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[28]

[19] In *Canada* (*Information Commissioner*) *v. Canada* (*Minister of National Defence*),[29] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[20] To put the matter into context it is important to consider the respective roles of the ministry and the Chief Justice of the Ontario Court of Justice regarding the administration of justice in Ontario.

The Courts of Justice Act

[21] As I will outline below, certain provisions of the *Courts of Justice Act*[30] (*CJA*) demarcate the division of responsibility between the Chief Justice of the Ontario Court of Justice (Chief Justice) and the ministry.

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[24] Orders M-165 and MO-2586.
[25] PO-2683.
[26] *Walmsley v. Ontario* (*Attorney General*) (1997), 34 O.R. (3d) 611 (C.A.) and *David v. Ontario* (*Information and Privacy Commissioner*) *et al* (2006), 217 O.A.C. 112 (Div. Ct.).
[27] Order MO-1251.
[28] Order MO-1251 and *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA).
[29] 2011 SCC 25.
[30] RSO 1990, c C.43.

[22] Section 72 of the *CJA* provides that the Attorney General shall superintend all matters connected with the administration of the courts, other than the following:

1. Matters that are assigned by law to the judiciary, including authority to direct and supervise the sittings and the assignment of the judicial duties of the court.

2. Matters related to the education, conduct and discipline of judges and justices of the peace, which are governed by other provisions of this Act, the Justices of the Peace Act and Acts of the Parliament of Canada.

3. Matters assigned to the judiciary by a memorandum of understanding under section 77.

[23] Section 75(1) of the *CJA* sets out that the powers and duties of the Chief Justice include the following:

1. Determining the sittings of the court.

2. Assigning judges to the sittings.

3. Assigning cases and other judicial duties to individual judges.

4. Determining the sitting schedules and places of sittings for individual judges.

5. Determining the total annual, monthly and weekly workload of individual judges.

6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.

[24] Section 77 (3) of the *CJA* provides that the Attorney General and the Chief Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court. Section 77(4) of the *CJA* provides that a memorandum of understanding may deal with the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice, but shall not deal with any matter assigned by law to the judiciary.

The Memorandum of Understanding (the MOU)

[25] The Attorney General and the Chief Justice entered into an MOU under section 77(3) of the *CJA*.

[26] Section 1.1 of the MOU provides that:

> The purpose of the Memorandum is to set out areas of financial, operational and administrative responsibility and accountability between the Ministry of the Attorney General and the Ontario Court of Justice.

The MOU provisions regarding financial matters

[27] Section 3.1 of the MOU provides that the operations of the Office of the Chief Justice are funded out of the Consolidated Revenue Fund through the annual Estimates process.

[28] Under section 2.1(a) of the MOU, the Attorney General is responsible for presenting the budget of the Office of the Chief Justice as part of the estimates of the ministry.

[29] Under section 2.2(2) of the MOU, the Office of the Chief Justice is responsible for all matters affecting the financial and administrative responsibilities of the Court, which include effectively and efficiently managing the operations and human resources of the OCJ and its annual budget (a) as well as overseeing judicial expense allowances (d).

[30] Under section 3.2 of the MOU, the Office of the Chief Justice is to participate in the ministry's annual budget planning cycle. It sets out that all funding is through the Program Review Renewal Transformation cycle or other ministry financial processes, and the Attorney General and the Chief Justice agree that no changes to the Chief Justice's operating budget shall be made by the ministry without prior consultation with the Chief Justice.

[31] Under section 3.4 of the MOU, the financial and administrative affairs of the Ontario Court of Justice, including the Office of the Chief Justice, may be audited by the Provincial Auditor as part of any audit conducted with respect to the ministry.

The MOU provisions regarding information

[32] Some provisions of the MOU also touch more directly upon matters related to judicial independence in drawing a distinction between judicial information and Court information.

[33] Under section 4.1 of the MOU, judicial information is defined as: "information the release of which would impair judicial independence and includes: personal judicial information, information relating to judicial assignments, court policies and programs (including educational programs) relating to the judiciary, and information and material in any form generated by, or at the request of, the Court, its judiciary or employees."

[34] Under section 4.1 of the MOU, Court information is defined to mean "information other than judicial information that relates to proceedings before the Court, and includes: court records relating to individual cases; court calendars and dockets; court activity reports whether in paper or electronic format; and all related reports, data and statistics."

[35] Section 4.1 of the MOU further states that judicial information and Court information also include all such information contained in any electronic or other case

tracking or recording systems managed by or on behalf of the Court.

[36] Under section 2.3 of the MOU, the ministry is responsible for:

a. Providing modern and professional court services that support accessible, fair, and timely justice services;

b. Storing, maintaining and archiving Court Information and Judicial Information, and releasing and providing access to such information, all of which is to be undertaken by the Court Services Division and JITO [the Judicial Information Technology Office] in accordance with Section 4 …

[37] Under section 3.8 of the MOU, the Attorney General and the Chief Justice agree to maintain a judicial technology environment with comprehensive security and privacy specifications for judiciary, considering principles regarding judicial independence and security of judicial information.[31] Further, under section 3.8 of the MOU, the Attorney General is to ensure that information technology services provided to the judiciary do not infringe upon judicial independence, and, in particular, do not limit the JITO's ability to segregate Judicial Information or to comply with the JITO's obligations under Section 4.

[38] Under section 4.3 of the MOU, judicial information is to be stored, maintained and archived by the Judicial Information Technology Office on behalf of the Court, and in accordance with the direction of the Office of the Chief Justice. Some judicial information may also be in the possession of the ministry provided it is stored, maintained and archived on behalf of the Court by the Court Services Division, and in accordance with the direction of the Office of the Chief Justice. Section 4.3 also provides that JITO and the Court Services Division shall store, maintain and archive judicial information and Court information in such a way as to ensure that such information remains within the sole custody and control of the Court at all times.

The MOU provisions pertaining to the release of, or access to, judicial or Court information

[39] Section 4.4 of the MOU provides that the Court Services Division and JITO shall not release, or provide access to, judicial information to any person or organization (including any person within the Ministry or the Government of Ontario) without the prior consent of the Office of the Chief Justice.

[40] Section 4.5(a) of the MOU establishes that policies and procedures governing the release of, or access to, court information will be in accordance with relevant legislation, case law, and judicial orders, and based on the principles of openness, judicial independence, data accuracy, proper administration of justice, proper purpose,

[31] As outlined in the Canadian Judicial Council's publication: *Blueprint for the Security of Judicial Information 2004* (as updated).

compliance with the law and effective use of public resources.

[41] Section 4.5(b) of the MOU states:

> The Court Services Division and JITO shall release, or provide access to, Court Information only in accordance with the following:
>
> > i. The Court Services Division Policies and Procedures on Public Access to Court Files, Documents and Exhibits. These Access Policies and Procedures shall not be revised without the prior consent of the Office of the Chief Justice.
> >
> > ii. Standing agreements between the Court Services Division and the Office of the Chief Justice regarding the on-going release of statistical reports and data extracts, as well as access to electronic court case tracking systems. As provided in paragraph 4.7, the Court Services Division and the Office of the Chief Justice shall maintain, and update regularly, a list of such standing agreements.
> >
> > iii. The release of, or access to, Court Information not provided for in paragraphs 5(b)(i) and (ii) requires the prior consent of the Office of the Chief Justice.

[42] Regarding access to or the release of court information to the ministry for purposes related to the ministry's business planning, statutory and constitutional functions, section 4.5(c) of the MOU establishes that:

i. The Office of the Chief Justice agrees that Court Information provided to a specific person or division within the Ministry pursuant to the standing agreements referred to in paragraph 4.5(b)(ii) may be used by other persons or divisions within the Ministry for purposes related to its business planning, statutory and constitutional functions.

ii. The Office of the Chief Justice will not withhold consent to the release of, or access to, other Court Information that the Ministry requires to perform its business planning, statutory and constitutional functions, in particular in relation to its accountability for the administration of the courts in matters not assigned by law to the judiciary, unless such release is clearly inconsistent with the principles set out in paragraph 4.5 (a). Such Court Information shall be provided to the Ministry in a format appropriate for Ministry use.

iii. The Ministry agrees not to share outside the Ministry any Court Information it receives, or has access to, for purposes related to its business planning, statutory and constitutional functions, without the prior consent of the Office of the Chief Justice.

iv. Where the Office of the Chief Justice withholds consent to the release of or access to Court Information to the Ministry, the Office of the Chief Justice will provide a reason to the Ministry for doing so.

[43] As I explain in more detail below, I find that the provisions of the MOU on the whole represent a division of responsibility and assignment of authority between the ministry and the Office of the Chief Justice that is consistent with the protection of judicial independence, while enabling limited access to specific types of information to facilitate the performance of the ministry's operational functions.

The Office of the Chief Justice's representations

[44] The Office of the Chief Justice takes the position that any responsive records constitute judicial information which is within the sole custody and control of the Office of the Chief Justice and not subject to the *Act*. The Office of the Chief Justice adopts and relies on the ministry's representations and points to section 2.2(2) of the MOU, the section that delineates the responsibilities of the Office of the Chief Justice, in support of its position.

The ministry's representations

[45] The ministry takes the position that any responsive records are in the exclusive custody or control of the Office of the Chief Justice and that the information is judicial information, which engages the constitutional principal of judicial independence.[32]

[46] The ministry explains that as outlined in the MOU, the Office of the Chief Justice manages its own annual budget. It states that travel cost claims for the judiciary and judicial expense claims from across the province are processed exclusively by the Office of the Chief Justice and payments come out of the Office of the Chief Justice's budget.

[47] The ministry states that that information created by and for the Chief Justice or a judge of the court to carry out judicial administrative functions is in the custody and control of the judiciary, not the ministry. The ministry submits that this is consistent with the MOU, the *CJA*, and the constitutional principle of judicial independence.

[48] The ministry acknowledges that as part of the ministry's public budget reporting requirement, which is reflected in the annual Public Accounts of Ontario, the Court Services Division must report annually on aggregate judicial expenditures across all categories, but that the information that the Office of the Chief Justice has shared with authorized ministry staff to enable the ministry to meet its aggregate financial reporting

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[32] The ministry references *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick,* 2002 SCC 13; *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 SCR 673; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3; *Ell v. Alberta*, 2003 SCC 35 (CanLII), [2003] 1 SCR 857 and *MAG v. IPC*, in support of its position.

requirements does not include the information at issue in this appeal, nor is that information broken down by region.

[49] The ministry acknowledges that requested records may be the source documents that inform its financial reports, however, it says it does not have access to, possession of, or custody or control of, these source documents which reside with the Office of the Chief Justice. Accordingly, the ministry states that it is unable to extract information from the Integrated Financial Information System (IFIS) in order to create a responsive record.

[50] In particular, the ministry explains that:

> The processing of judicial expense claims directly by the Office of the Chief Justice is facilitated by an IT tool called "MAG Org", which is a special extension of the Integrated Financial Information System ("IFIS"). IFIS is used provincewide by all ministries for financial matters. Normally, the input and processing of expenses in IFIS is done through a centralized government agency. In order to support judicial independence and confidentiality, and consistent with the MOU, there is an exception to this centralized process for judicial expenses.
>
> MAG Org allows the Office of the Chief Justice to input and process judicial expense claims directly into IFIS without the source documents leaving the Office of the Chief Justice or being accessible to any entity outside of the Office of the Chief Justice, including the ministry. Only staff at the Office of the Chief Justice acting under the direction of the Chief Justice have access to MAG Org.
>
> Neither IFIS nor MAG Org capture the specifics of the judicial expenses claimed. For example, neither system records hotel names (for lodging claims) or location travelled to and from (to support travel claims). Information about travel expenses incurred by judges for travel to a specific region or location is not part of the data captured in IFIS.
>
> As part of the ministry's public accounts reporting requirement, Court Services Division must report annually on aggregate judicial expenditures across all categories. In order to meet this requirement, certain authorized ministry employees view limited IFIS reports pertaining to judicial expenditures, with the consent of the Office of the Chief Justice as outlined below. However, information about expenses incurred by judges for travel to a specific region or location is not captured in IFIS and is not accessible in these IFIS reports. The authorized ministry employees do not have access to any source documentation, nor are they able to identify judicial expenses associated with travel to a specific region or location.

[51] The ministry submits that even the general expense information provided by the Office of the Chief Justice to the ministry is available to the ministry only with the consent of the Office of the Chief Justice and only for the limited purpose of aggregate financial reporting. The ministry submits that pursuant to section 4.4 of the MOU, it is not permitted to release this information to any person or organization (including any person within the ministry or the Government of Ontario) without the prior consent of the Office of the Chief Justice. Accordingly, it says that any request for access to the reports would be subject to the consent of the Office of the Chief Justice. Given the ministry's possession of the reports is for a limited purpose and the Office of the Chief Justice has not waived supervisory control over disclosure of the reports, the ministry asserts that the reports are not in its custody or control.

[52] The ministry also states:

> We are not aware of who created the records, if they exist. If they exist, and if they were created by staff with the Office of the Chief Justice, those staff are ministry employees. However, they act under the direction and supervision of the Chief Justice or the judiciary in carrying out their duties. If the records exist and were created by staff with the Office of the Chief Justice, then pursuant to the MOU, such information remains within the sole custody and control of the court at all times.

[53] With respect to the two-part test set out in Canada (Information Commissioner) v. Canada (Minister of National Defence) (National Defence), the ministry submits that:

> The contents of individual judicial expense and costs claim records do not relate to a ministry matter. The MOU assigns responsibility for the oversight of judicial expense allowances to the Office of the Chief Justice. Expenditures related to travel for judges sitting at a given court location are closely connected with the court's core function of assigning judicial duties and directing and supervising sittings of the court across the province.
>
> As such, the records, if they exist, are within the exclusive supervisory control of the OCJ. Although the ministry could in theory make a request for the records, there would be no authority to do so and the ministry could not reasonably expect to receive these records, given the MOU's explicit division of responsibilities between the ministry and the court, and the assignment of responsibility for judicial expenses allowances to the Office of the Chief Justice.

[54] The ministry adds that:

> This request differs in a number of important respects from the request in *Ontario* (*Ministry of the Attorney General*) *v. Ontario* (*Information and*

> *Privacy Commissioner*).[33] There, the requester sought a specific statistical report, which had been created for the Office of the Chief Justice from court databases maintained by the ministry and was subsequently shared by the OCJ with the ministry for unlimited purposes. Because the report had been shared by the OCJ with no limitation and used widely in the ministry, the Court found that the ministry did have "custody" but not "control" over that report.
>
> Here, the requester seeks records of judicial travel expenses in a particular region. This information is not contained in the IFIS database. The OCJ has sole custody and control over any such records and, if they exist, has never shared them with the ministry.

[55] With reference to the list of factors identified by the IPC to be considered in determining whether a record is in the custody or control of an institution, the ministry also submits that:

> The activity in question, overseeing judicial travel expenses and costs, is not a core, central or basic function of the ministry; rather it is a function of the Office of the Chief Justice.
>
> The contents of the records, if the records exist, do not relate to the ministry's mandate and functions. As set out above, the MOU specifically assigns the responsibility for overseeing judicial expense allowances to the OCJ. The records, if they exist, are judicial information in the possession of the OCJ. The OCJ would have ownership of the records, if they exist.
>
> The requester has sought regional judicial expense records, not aggregated records. While the OCJ has shared certain judicial expense information from IFIS with authorized ministry staff to enable the ministry to meet its aggregate financial reporting requirements in the public accounts, this information does not include the requested information, and in any event the OCJ has retained custody and control of this information and has placed strict limits on ministry access to and use of it.
>
> The ministry has no right to possession of the records, if they exist. Approving and overseeing these expenditures are responsibilities of the OCJ.
>
> The ministry has no authority to regulate the records' content, use or disposal, if they exist.
>
> The ministry does not have access to or possession of the records and therefore, has not relied on them.

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[33] *MAG v IPC*.

> The ministry does not have possession of the requested records or information, if it exists, and therefore it is not integrated with other records held by the ministry.
>
> The applicable MOU specifically assigns the responsibility for the overseeing of judicial expense allowances to the Office of the Chief Justice. The ministry has no authority in relation to the requested records.
>
> Under the provisions of the MOU, the ministry is not entitled to possession of these records.

[56] The ministry adds that authorized ministry employees who are permitted to view the IFIS reports pertaining to judicial expenditures cannot share them with other ministry staff or use them for any other ministry purposes.

The appellant's representations

[57] The appellant submits that determining whether a record is in the "custody or control" of an institution requires the consideration of numerous factors, which must be considered contextually in light of the purpose of *FIPPA*, set out in section 1 of the *Act*. The appellant submits that this does not engage judicial independence and the ministry's approach to the issue is "overbroad".

[58] The appellant also submits that neither the budgetary operations or financial arrangement of the court nor the maintenance of public accounts and allocation of expenses generated by the court engage judicial independence. The appellant adds that the requested records do not bear directly on the exercise of a judicial function.

[59] Furthermore, the appellant argues that the ministry relies on a flawed reading of the *CJA* and his access request to reach its conclusion that it does not have custody or control of responsive records. Regarding the ministry's claim that "the MOU specifically assigns the responsibility for overseeing the judicial expense allowances to the Office of the Chief Justice", the appellant says that judicial expense allowances are not responsive to the request. He says that this is because he did not ask for information about "judicial expense allowances" or the management of the operations and human resources of the Office of the Chief Justice, nor did the request seek individual judicial expense claims. Rather, he sought aggregate financial data for the requested region that the Office of the Chief Justice has inputted to a ministry system.

[60] He submits that:

> The financial transparency of government budgets and their aggregated line items is a core, central, and basic function of the state in a free and democratic society. In fact, the federal and provincial government have gone to great lengths to embolden this principle, with the creation of various Auditors General, the Parliamentary Budget Officer, and audit and

> performance measurement requirements for various government ministries, departments, and other arms-length divisions, including provincial tribunals.
>
> In fact, the Auditor General of Ontario ["AGO"] has recently found the court's financial transparency woefully inadequate. In 2019, when the AGO attempted to audit court operations, it was obstructed and reported as follows:
>
> > During our audit, we experienced a significant scope limitation with respect to access to information [...] The courts are public assets, supported and financed by the people of Ontario, and the administration of justice is a public good. Therefore, while we respect the independence of the judiciary and the confidentiality due to participants in legal matters, we nevertheless believe that it is within our mandate to review information that would be needed to assess the effectiveness of court operations and the efficient use of resources, given that taxpayer monies support court operations.[34]
>
> Even so, to the extent that OCJ's internal financial systems may be rightly obscured from the public, the aggregate figures made available to MAG for budgeting and expenditure purposes should not be. By extension, disclosure of these records recognizes that the purpose of their generation is a core function of government accountability to its taxpaying citizens.

[61] The appellant disagrees with the ministry's contention that the expenditures pertaining to judicial travel are related to the Office of the Chief Justice's core function of scheduling judges to preside in various locations. He says the reality is that the aggregated costs associated with doing so do not interfere with any exercise of that function or judicial independence, nor do they provide any window into that decision-making process by judges. He submits that the MOU only applies to judicial expense allowances, not to the accounting for a broader range of judicial expenses and their reporting to the public.

[62] The appellant submits that section 72 of the *CJA* makes it clear that the ministry "shall superintend" all matters connected with the administration of the courts except for those which fall within the discrete list of exceptions. He submits that applying a broad and liberal approach to the issue of custody or control, the analysis must err in favour of a finding the ministry has custody or control of a responsive record,[35] "unless a request clearly aligns with a defined exception." He states that his request does not

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[34] The appellant references AGO, 2019 Annual Report, Volume 3: Reports on Correctional Services and Court Operations at pages 83 and 84.

[35] In support of this submission the appellant refers to *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada* (*Ministry of Public Works*), (1995), 30 Admin. L. R. (2d) 242 (Fed. C.A.) and Order MO-1251.

match any such exception, and the ministry has tendered no reasonable explanation to the contrary.

[63] The appellant submits that the activity relating to the responsive records is a core, central, and basic function of governmental accountability. He states that the ministry's representations attempt to narrow the purview of this element to the function of Office of the Chief Justice, which is not of direct relevance to the records requested and erroneously narrows the scope of inquiry for the IPC.

[64] The appellant submits that the contents of any responsive records relate to the ministry's mandate and functions. He states that compiling and tracking aggregate amounts of various amounts inputted to MAG Org by the Office of the Chief Justice is a financial planning function of the ministry.

[65] He takes the position that the ministry has custody and control of responsive records because data that has been inputted into IFIS and MAG Org by the Office of the Chief Justice, systems that are designed to contain and aggregate that data. Furthermore, he submits that the ministry has a right of possession of the record as a result of its MOU with the Office of the Chief Justice and the process for expense registration within IFIS and MAG Org.

[66] The appellant also submits that the ministry, and the government of Ontario more broadly, rely on the requested information to track government spending in support of Office of the Chief Justice and to make budgetary projections on an ongoing basis. He adds that the ministry owns the aggregated data that is inputted to its system by the Office of the Chief Justice. He submits that the ministry owns MAG Org and that *FIPPA*- governed institutions own IFIS.

[67] The appellant further submits that even if the ministry does not have possession of responsive records, it is in control of them. Relying on the test set out by the Supreme Court of Canada in *National Defence*, the appellant submits that:

> First, it is clear that general financial data about the expenditures of the OCJ are a matter germane to the function of the MAG, which has a significant role in supporting and financing court operations. Again, the appellant did not ask for individualized expense claims of judicial officials. The request relates to aggregated data that is inputted to a MAG-maintained financial system and presumably has to be relied upon on a regular basis to set budgets and publish public accounts.
>
> Second, because MAG has entered into an MOU with the OCJ, it has acknowledged that certain matters related to court administration relate to a matter of concern to it and otherwise within its administrative mandate. Sections 72 and 77 clearly contemplate that other than specifically defined subject matter, courts administration is the domain of

> MAG. While the MOU remains a tool available to MAG and OCJ to delineate administrative responsibilities, the need to negotiate the MOU to begin with clearly establishes that the areas it devolves to the MOU are, by default, "departmental matters".
>
> Finally, even if MAG did not have automatic access to the records which were requested, it is obvious that it could obtain access to this type of information. In fact, it probably does so on a regular basis, as it would need to in order to set budget levels for court operations (which it funds) and to develop information technology (like MAG Org), forms, and other tools to support the operations of the court.

[68] The appellant submits that the ministry's representations obscure its role in financing and resourcing the Office of the Chief Justice and receiving budgetary and financial information as part of that process. He submits that the request for access to aggregate records is related to this ministry function and that to "suggest that these records do not exist - that court funding by the government is done through a lump-sum, consolidated, and entirely unparticularized amount - is entirely unreasonable." He states that the ministry itself admits that judicial expense claims are funded from the province's Consolidated Revenue Fund and that, whether or not the Office of the Chief Justice manages its own budget, the expenses are drawn from a provincial fund external to the court.

[69] The appellant also points to section 3.4 of the MOU as calling for third party financial oversight of the Office of the Chief Justice. The appellant submits that in reading sections 72 and 77 of the *CJA*, and the MOU contemplated therein, the IPC needs to account for the fact that the court itself has acquiesced to being publicly accountable for its financial and administrative affairs.

[70] The appellant adds:

> It is concerning that despite entering into this specific agreement with MAG, which has the force of law under the *CJA*, and thus attorning to the role of the AGO in auditing the court, the OCJ has declined to cooperate with efforts by the AGO to review its financial and operational matters. [footnote omitted]
>
> The intransigence of the court on this point and inability to satisfy the AGO that it had appropriate systems in place to monitor and report on its administrative affairs should highlight the need for reasonable disclosure, through *FIPPA*, of aggregate records [of] which MAG has custody or control.

[71] The appellant submits that the ministry has admitted that the records in question were created by employees of the ministry. He submits that it can be reasonably

inferred that ministry staff are the individuals who make the necessary data entries and generate the records in question on behalf of judicial officials across the province.

[72] The appellant further submits that:

> … it is also obvious that the aggregated data and records sought by the request are within the purview of MAG, and not judicial officials. MAG admits this as well, in specifying that expense claims are facilitated by a ministry- wide technology platform called MAG Org, which is a special extension of the Integrated Financial Information System ["IFIS"]. IFIS is used province- wide by all ministries.
>
> MAG indicates that "the input and processing of expenses in IFIS is normally done through a centralized government agency", but that there is an exception to this process to support judicial independence. This explanation, again, conflates individual expense claims with the actual aggregate data sought by the appellant.

[73] The appellant states that this is an important factor, because the IPC's analysis of this issue needs to take stock of the precise nature of the records described in the request. The appellant submits that his request seeks access to only "the total amounts of all travel, mileage, airfare, accommodations, meal, incidental, parking, and related costs and expenses paid for or incurred by" judges travelling in certain regions. He says he does not seek copies of individual receipts or expense claim forms that may or may not have been completed or signed by judicial officials that might be inputted to MAG Org Rather, he seeks aggregate data that he says is stored, generated, and maintained by ministry staff in a ministry system.

[74] The appellant submits that the clear purpose of IFIS and similar financial tracking systems is to facilitate accounting and budgeting processes and generate financial statements and projections. He states that:

> … More broadly in the public sector, these systems are intended to facilitate policymaking and to inform decision-making about administrative procedures and resource allocation.
>
> MAG's position is that the existence of a system for aggregating expenses in various budget categories is entirely arbitrary and that there is no intended purpose for these records. Obviously, that is untenable.
>
> Again, the request seeks nothing more than aggregated data that meets certain criteria. It is the entire purpose of systems like MAG Org and IFIS to be able to assemble this type of data. The appellant seeks the information for the same purpose it is being compiled by MAG to begin with.

[75] He submits that the ministry's statement that it lacks the statutory authority to carry out the activities which resulted in the creation of responsive records is mistaken. He argues that this is because the record requested is a creation of MAG Org and IFIS, not the judiciary, and these platforms relate to the ministry, not the OCJ. He states that the ministry specifically states MAG Org is "a special extension" of IFIS created for its ministry and that MAG Org, not judicial chambers is the source of the records requested.

The ministry's reply representations

[76] The ministry submits in reply that although the appellant indicates that he is only seeking "aggregate" information, he is in fact seeking very particular information that is both location-specific and purpose-specific: records relating to listed types of costs and expenses "to travel to and from the Rainy River District to preside or perform judicial or official duties at the Fort Frances Courthouse or the satellite court locations in Atikokan and Rainy River."

[77] The ministry submits that while it can identify limited aggregate information through IFIS, that information is not court location-specific or differentiated in terms of the purpose of the expense (e.g., travel to preside or perform judicial duties, travel to conferences, travel to meeting, etc.). It submits that there is no ability for the ministry to disaggregate that information from IFIS into the location or purpose-specific data sought by the appellant.

[78] It submits that any records that could respond to the location and purpose-specific information requested by the appellant could only be identified by the Office of the Chief Justice.

[79] The ministry adds that if ministry employees in the Office of the Chief Justice are working on matters of judicial administration under the supervisory control of the judiciary and have access to responsive records, this would merely amount to "bare possession" by the ministry, and would not give it custody or control of such records.

[80] In that regard, with respect to the appellant's assertion that judicial information is in the ministry's custody or control because staff of the Office of the Chief Justice are paid by the ministry, the ministry submits that:

> This argument has consistently been rejected by the IPC in a number of decisions dealing with court or judicial documents that are managed by court staff who are ministry employees working under the direction of the judiciary. […]
>
> Staff who work in the Office of the Chief Justice are employed by the ministry, but they work at the direction of and under the supervision of the Chief Justice and support that office in carrying out its judicial administrative responsibilities.

> That a record is created or accessed by the Office of the Chief Justice's internal judicial support staff who are employed by the ministry is not sufficient to bring a record within the ambit of the *Freedom of Information and Protection of Privacy Act* … .
>
> To the extent that the work of court staff employed by the ministry for the court affords them access to documents or information that relate to matters within the scope of judicial responsibilities, such access constitutes limited "bare possession" by MAG.[36]

[81] The ministry also submits that the appellant has incorrectly inferred from the fact that the ministry can identify a broad category of aggregate data for the purposes of financial reporting that it must be able to identify or refer to the specific expenditure information he has requested:

> More specifically, in order to support the annual expenditure reporting requirement, certain authorized MAG employees (outside of the Chief Justice's Office) can identify limited aggregate IFIS information pertaining to judicial expenditures. They do so with the consent of the court. These MAG employees cannot identify, and therefore cannot isolate, judicial expenditure records to the level of specificity sought by the requester.

[82] The ministry says it does not dispute that IFIS is used to facilitate accounting and budgeting processes. However, it submits that it does not follow from this premise that ministry employees outside the Office of the Chief Justice can or must identify location and/or purpose-specific judicial travel expenditures. The ministry submits that the Office of the Chief Justice, and not the ministry, determines how or whether travel expenditures can be further aggregated, or rolled up, in IFIS.

Analysis and finding

[83] The information at issue in this appeal consists of travel expenses incurred by the Office of the Chief Justice specifically with respect to travel for judges to perform judicial or official duties in specific regions. I accept that those expenses could be generated from a review of the source materials provided by a judge for reimbursement, which as stated by the ministry, remain in the Office of the Chief Justice. While more general expenses may be the ministry's responsibility and would not engage the principles of judicial independence, I find that the same cannot be said for expenses more closely related to the activities of judges and decisions of the Chief Justice regarding resource allocation. As I explain below, the type of expenses sought by the appellant are the exclusive responsibility of the Office of the Chief Justice and engage the principles of judicial independence.

[84] In the reasons that follow I first address whether the ministry has custody of the

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[36] The ministry references paragraphs 41 and 43 of *MAG v. IPC* in support of this submission.

records at issue and then I discuss whether the ministry has control of them.

Custody

[85] Based on the evidence before me, I find that the ministry does not have custody of records that would be responsive to the request.

[86] The appellant says he does not seek copies of individual receipts or expense claim forms input to MAG Org. I am satisfied, however, that it is only through the examination of records containing the specific information about the purpose and location of travel, that records responsive to his request can be identified. In that regard, I accept the ministry's evidence that the source records relating to these travel expenses remain at the Office of the Chief Justice, and that neither IFIS nor MAG Org capture the details of the judicial expenses claimed. I also accept that expense information that does not contain all the travel details is then input by staff working at the office of the Chief Justice in to the MAG Org database, to which only the Office of the Chief Justice, and not the ministry, has access.

[87] As set out in the MOU, the Office of the Chief Justice is exclusively responsible for all matters affecting the financial and administrative responsibilities of the Court, which include managing the operations and human resources of the Office of the Chief Justice (section 2.2(2)(a)) and to oversee judicial expense allowances (section 2.2(2)(d)). I also note that section 4.3 of the MOU provides that JITO and the Court Services Division shall store, maintain and archive judicial information and Court information in such a way as to ensure that such information remains within the sole custody and control of the Court at all times.

[88] I find that this clearly indicates that the involvement of ministry staff in processing judicial travel expenses and having access to the source material does not result in the ministry having possession of the source material. This is because bare possession of the information does not amount to custody for the purpose of the *Act*.[37] There must be some independent right to deal with the information. Absent some right to deal with the information, which I find on the evidence does not exist in the appeal before me, the ministry's possession of any source information through staff working in the Office of the Chief Justice of Ontario amounts to bare possession only.[38]

[89] Simply put, I am not persuaded that the mere fact that ministry employees employed at the Office of the Chief Justice are able to input data into the MAG Org database in the performance of their job duties results in the requested information being within the ministry's custody.

[90] It is apparent that some expense data is provided by the Office of the Chief Justice to the ministry for the purposes of financial reporting. However, I accept the

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[37] P-239.

[38] Order P-239. See also orders PO-2836 and PO-4372.

ministry's submission that this data cannot be separated in a fashion that could be capable of creating a record that is responsive to the appellant's request. While there may be records or data at the Office of the Chief Justice that could be aggregated to produce the type of information sought by the appellant, I accept the ministry's evidence that the information entered into IFIS, is not at that granular level.

[91] In that regard, travel expenses, whether individual or in the aggregate, are potentially implicated by the various decisions the Chief Justice must make in exercising the powers and performing the duties set out in section 75 of the *CJA*. Both budgeting for and approval of travel expenses incurred in individual cases and in the aggregate are decisions that fall within the scope of these powers and duties. Budgetary considerations, in particular, may enter into the Chief Justice's decision-making in this connection. The disclosure of information concerning decisions about the allocation of judicial resources in this respect and the aggregate amounts involved may impact on judicial independence by exposing them to public scrutiny and captious comment or criticism - for example, in relation to a decision to incur travel expenses rather than build a satellite court house. Viewed in this context, it is not difficult to see how the disclosure of individual or aggregate data could potentially interfere with an important component of administrative judicial independence. To the extent that the information is shared with limited ministry staff in the Office of the Chief Justice for processing purposes, it remains "judicial information" that "continues to be constitutionally protected from disclosure"[39] under the *Act*

[92] In addition, I accept that ministry employees would not be able to gather and prepare the information sought by the appellant without the authorization of the Office of the Chief Justice, in accordance with section 4.4 of the MOU, which was not forthcoming. In that respect, this case is unlike the circumstances in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*,[40] (*MAG v. IPC*) a judicial review of an IPC decision that ordered the ministry to disclose to the Canadian Broadcasting Corporation certain "Offence Type Statistics By Location Reports". In that case, the responsive record was provided to the ministry to use for its own operational purposes. In the appeal before me, I accept that responsive information has not been provided to the ministry for its own operational purposes, or in a way that could be used to respond to the request and that, in any event, the ministry would be unable to do this without authorization of the Office of the Chief Justice.

[93] In particular, at paragraphs 44 and 45 of *MAG v. IPC*, the Divisional Court wrote:

> [44] However, the Ministry also subsequently gained possession of the Reports in another, quite different, capacity. The Office of the Chief Justice agreed to the Reports being made available to senior Ministry

[39] See in this regard *MAG v. IPC* at paragraph 46.
[40] 2011 ONSC 172.

court staff and senior Crown Attorneys for the purpose of their planning and decision making relating to support of court operations, at the discretion of the Chief Justice of the court. It is the position of the Ministry that this, too, is merely a "bare possession" that does not amount to "custody" for the purposes of the *Act*.

[45] The Ministry response to the Commissioner regarding these Reports includes the following additional details of its possession, integration and regulation of their use ...:

> • The report is available to management in the Court Services Division and the Criminal Law Division and to senior Crown Attorneys to support management decision making such as resource planning and allocation.
>
> • Crown and court staff use statistics on a local basis for planning and scheduling purposes to support timely case processing.
>
> • Crown Attorneys use the statistical data and reports to monitor trends such as increases/decreases in charges and court activities over time. Statistical data and reports are also used to assist in allocating resources.
>
> • Criminal Law Division posts this report on its intranet with restricted access to Divisional Management Committee, Directors of Crown Operations, Crown Attorneys (not Assistant Crown Attorneys) and a few analysts in the Corporate Branch Divisional Planning and Administration. The Court Services Division posts the report on its intranet site and it is available to Directors, Managers and Supervisors of Court Operations and to the 7 Managers of Business Support.
>
> • The data in the report is a record of court activity including incoming workload, court appearances, inventory of pending matters before the court and judicial disposition of cases. It is used primarily by the judiciary for its own purposes and minimally by court staff for court administration purposes.

[94] In the appeal before me, unlike in *MAG v. IPC* the information is not widely available or posted, but rather is retained by the Office of the Chief Justice and is not shared. Furthermore, unlike in *MAG v. IPC* there is no evidence before me that the expense information at issue in this appeal is used by the ministry for any of its own purposes. This stands in contrast to the facts upon which the Court relied in that case to hold the record at issue was in the ministry's custody.

[95] At paragraphs 46 to 48 of *MAG v. IPC*, the court recognized that the judiciary may choose to share or disseminate "judicial information" with the ministry that

continues to be constitutionally protected from disclosure. However, the Court found that was not the case where the information was shared by the Office of the Chief Justice without limitation, used by the ministry to perform its core functions and integrated into its own intranet site:

> [46] We acknowledge that there may well be circumstances where the judiciary may choose to share or disseminate "judicial information" with the Ministry that continues to be constitutionally protected from disclosure pursuant to the Act. Judicial independence and the shared responsibility for courts administration may dictate such a result in the appropriate case.
>
> [47] However, this is not such a case due to the nature of the information at stake and the extent to which the judicial information has been shared with, and subsequently used by, the Ministry. Possession of the severed portions of the Reports was voluntarily provided to the Ministry with no distinct or special limitation from the Office of the Chief Justice. The severed portions of the Reports have also been integrated with other Ministry records, and it certainly appears that their use has been regulated by the Ministry. Having regard to the Ministry's ability to deal with the judicial information, and the responsibility for the care and protection it has been allowed, there have not been sufficient limits placed on the Ministry to preclude it from having custody.
>
> [48] In our view, the fact that the Ministry subsequently acquired an ability to use the judicial information from the Reports for purposes relating to its core, central and basic functions relevant to the Ministry's mandate, results in these Reports being placed "in the custody" of the Ministry for the purposes of the Act. We note the integration of information from the Reports into the Ministry's intranet site for its core functions, not only in Court Services but also in its Criminal Law divisions.
>
> [49] Given such an integration and use by the institution, the record in this application for judicial review does not support the conclusion that disclosure of the severed portions to the CBC would compromise the independence of the judiciary. Further, having reviewed the Reports, we are not persuaded that the severed portions contain information that, if released, would negatively impact on the independence of the judiciary, including its administrative independence.

[96] In this appeal, on the other hand, I find that the source documentation that may contain the information sought by the appellant was not shared by the Office of the Chief Justice with the ministry.

[97] Furthermore, unlike the information at issue in *MAG v. IPC*, I find that the information at issue relates to the mandate and functions of the Office of the Chief

Justice alone and not to the ministry's mandate and functions, and has not "been obviously relied upon by the institution". In that regard, while budgeting and planning ministry expenses are part of the ministry's core functions, administering judicial travel expenses is not. Rather they are a function of the Office of the Chief Justice.

[98] With respect to the other key factors for determining custody set out above, I find as follows:

- I accept that the source responsive information, which remains at the office of the Chief Justice was not integrated in the MAG Org or IFIS databases and the ministry has no ability to deal with the source information as it does not have access to it. Simply put, there was no integration and use by the institution of the type of information that is sought be the appellant.

- The MOU specifically assigns the responsibility for overseeing judicial expense allowances to the Office of the Chief Justice, not the ministry. The Office of the Chief Justice has ownership of the source documentation.

- The Office of the Chief Justice has placed strict limits on ministry access to and the use of any judicial information.

- The ministry has no right to possession of the source records and the ministry has no authority to regulate the source documentation's content, use or disposal.

- The ministry has not relied on the information contained in the source records.

[99] Having established that the ministry does not have custody of the responsive information, I now turn to consider the issue of whether the ministry has control of the responsive information.

Control

[100] In my view, the ministry also does not have control of the requested information.

[101] The relationship between the court and the ministry is set out in great detail in the MOU which they state limits the ministry's ability to obtain the information.

[102] It is useful to set out again here the powers and duties conferred on the Chief Justice under section 75(1) of the *CJA*, as follows:

1. Determining the sittings of the court.

2. Assigning judges to the sittings.

3. Assigning cases and other judicial duties to individual judges.

4. Determining the sitting schedules and places of sittings for individual judges.

5. Determining the total annual, monthly and weekly workload of individual judges.

6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.

[103] In my view, the function assigned to the Chief Justice of Ontario at section 75(1) reflect the legislature's intention to embody in the *CJA* many of the necessary components of judicial independence. The due performance of these functions would logically entail consideration of the very information sought by the appellant in this case. As set out in article 2.2(2) of the MOU, administrative responsibility for travel and other expenses associated with these functions resides with the Office of the Chief Justice as part of its financial responsibilities of the Court, which in my view, include the processing and reimbursing of the type of expense information that the appellant seeks.

[104] Exclusive judicial control by the Office of the Chief Justice over information connected with these administrative functions is in keeping with the principle of judicial independence articulated by the Ontario Divisional Court in *MAG v. IPC*. The Court wrote at paragraph 31 of its decision that:

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

[105] The appellant accepts that disclosure of individual judges' expense claims would impact judicial independence, but maintains that the disclosure of the aggregated expenses he seeks would not have that affect. I disagree.

[106] Bearing in mind that the Ontario Court of Justice is not an institution under the *Act*, I turn to the factors for assessing control where an institution does not hold a record. I find that:

- Any source documents would have been generated by a judge for the purposes of reimbursement of judicial expenses and are in the possession of the Office of the Chief Justice for that purpose.

- The source documents are judicial records retained by the Office of the Chief Justice of Ontario.

- The MOU provisions and the operation of the principle of judicial independence do not give the ministry the express or implied right to control the source document. The MOU specifically provides as follows: the Chief Justice is

exclusively responsible for all matters affecting the financial and administrative responsibilities of the Court, which include managing the operations and human resources of the Office of the Chief Justice (section 2.2(2)(a)) and to oversee judicial expense allowances (section 2.2(2)(d)), and JITO and the Court Services Division shall store, maintain and archive judicial information and Court information in such a way as to ensure that such information remains within the sole custody and control of the Court at all times.

- Unless permission was provided by the Chief Justice of Ontario, the ministry would not be able to obtain the source documents.

- Any involvement in ministry staff in the processing of the expenses did not give the ministry the right control the source documents.

[107] With respect to the *National Defence* test, the contents of the source document that reside in the Office of the Chief Justice do not relate to a ministry departmental matter, but rather relate to matters involving the responsibilities of the Office of the Chief Justice. Contrary to the appellant's position, the MOU's definition of roles does not transform anything that touches on those roles into "departmental matters." As set out above, the MOU is a mechanism to segregate those roles in a manner consistent with judicial independence.

[108] Finally, I find that the ministry could not reasonably expect to receive this information from the Office of the Chief Justice upon request. The ministry has said the court would refuse such a request and the Office of the Chief Justice has adopted and relied on the ministry's submissions. While the ministry has requested and received aggregate expense data from the court with the court's permission for budgeting purposes, there is no similar practice of the ministry requesting or the Office of the Chief Justice providing the type of specific geographic expense information sought by the appellant. Accordingly, and considering the second part of the *National Defence* test set out above, I find that in all the circumstances, the government institution (the ministry) could not reasonably expect to obtain a copy of a responsive record upon request.

Conclusion

[109] I find that the ministry does not have custody or control of the information sought by the appellant. The information sought by the appellant is within the exclusive custody and control of the Office of the Chief Justice, which is not subject to the *Act*.

[110] Accordingly, it is not necessary for me to consider whether the ministry conducted a reasonable search for responsive records. The appeal is dismissed.

ORDER:

The appeal is dismissed.

Original signed by: July 19, 2023

Steven Faughnan
Adjudicator