

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4522-I

Appeal PA22-00533

Ministry of the Solicitor General

June 10, 2024

Summary: The requester sought access under the *Act* to records about a correctional centre. The Ministry of the Solicitor General (the ministry) granted full access to responsive records that were located. The ministry also advised that some of the requested records could not be located and suggested the requester make a request to another institution for those records. The requester believes that the ministry should have additional responsive records in its custody or under its control.

In this order, the adjudicator finds that the ministry has not established that additional records are not in its custody or under its control. She orders it to conduct another search.

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

OVERVIEW:

[1] The requester made a request to the Ministry of the Solicitor-General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records about a correctional centre. The requester specifically sought access to the following information:

Planning / Site Servicing / and Transportation reporting that have been completed at the proposed site for the Eastern Ontario Correctional

Complex in Kemptville for the time period covering March 1, 2020, to January 31, 2022.

[2] The ministry identified a number of records responsive to the request and granted full access to them. In addition, the ministry stated the following in its decision letter:

Please be advised that access to parts of the requested records cannot be granted, as the information does not exist at this location. Experienced staff familiar with the record holdings of the ministry conducted a records search. No responsive records were located. You may wish to contact Infrastructure Ontario [IO] to ascertain if they have the requested records.

[3] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner (the IPC).

[4] During mediation, the appellant advised that she believed additional responsive records must exist, including correspondence, meeting notes, studies and information slides arising from public consultation sessions in 2020 and 2021. She maintains that these records should be in the ministry's custody or under its control.

[5] The ministry responded that it conducted a thorough search and provided the appellant access to all responsive records that were found. The ministry explained that additional responsive records might exist with IO, however the ministry takes the position that these records are not in its custody or under its control.

[6] As a mediated resolution was not reached, this appeal moved to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and sought and received representations from both parties.

[7] In this interim order, I find that the ministry has not established that additional records are not within its custody or control. As a result, I order the ministry to conduct another search for responsive records.

DISCUSSION:

[8] As the ministry claims that additional responsive records would not be in its custody or control the sole issue before me is whether the records sought by the appellant are "in the custody" or "under the control" of the ministry under section 10(1)?

[9] Section 10(1) provides for a general right of access to records that are in the custody or under the control of an institution governed by the *Act*. It reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[10] Under section 10(1), the right of access applies to a record that is in the custody **or** under the control of an institution; the record need not be both.¹

[11] There are exceptions to the general right of access set out in section 10(1).² The record may be excluded from the application of the *Act* by section 65, or may be subject to an exemption from the general right of access.³ However, if the record is not in the custody or under the control of the institution, none of the exclusions or exemptions need to be considered since the general right of access in section 10(1) is not established.

[12] The courts and the IPC have applied a broad and liberal approach to the custody or control question.⁴ In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.⁵

[13] The IPC has established a non-exhaustive list of factors to consider when deciding if a record is in the custody or under the control of an institution.⁶ Some of these factors may not apply in a specific case, while other factors not listed may apply.

[14] The factors that the ministry claims apply and those that I find to be relevant in the circumstances will be discussed in greater detail below.

The ministry's representations

[15] The ministry states that it has conducted a thorough search for records, and it does not have any additional records that are responsive to the request. It submits that if additional records exist, they are not under its 'custody or control' in accordance with section 10(1) of the *Act*. The ministry contends that it does not even know if additional responsive records exist at all.

[16] The ministry provided an affidavit from its Project Team Lead of the Corporate Services Division (the team lead), which is part of the ministry's Facilities and Capital Planning Branch. He explains that in this position, he provides leadership to project managers managing various projects, mainly large capital projects on behalf of the ministry.

[17] The team lead states in his affidavit that he searched on the branch's shared and

¹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

² Order PO-2836.

³ Found at sections 12 through 22 and section 49 of the *Act*.

⁴ *Ontario (Criminal Code Review Board) v. Hale*, 1999 CanLII 3805 (ON CA), [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

⁵ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

⁶ Orders 120, MO-1251, PO-2306 and PO-2683.

common file drives for the requested planning, site servicing and transportation reporting records for the proposed site for the Eastern Ontario correctional complex in Kemptville. He states that the shared and common file drives is where the kinds of records or reports the appellant is seeking would be stored. He states he did not find any responsive records.

[18] The team lead advises that if the records do exist, they would be located at IO. He submits that his understanding from IO is that the responsive technical reports usually remain in draft form until closer to the date when the project is issued/tendered to market.

[19] In determining that it does not have of any responsive records, the ministry states that it considered a number of factors. It submits:

- The records have not been created by an officer or employee of the ministry.
- The ministry is not certain what use the creator intended to make of the records, as it did not 'create' the records. It imagines these records, if they exist, were created in connection with the construction of a proposed correctional institution in Kemptville.
- The ministry does not have the statutory power or duty to carry out the activity that resulted in the creation of the records. These records, if they exist, relate to the construction of a correctional institution. The ministry is responsible for operating correctional institutions (see section 5 of the *Ministry of Correctional Services Act*), but it is not responsible for constructing them. The construction of the correctional institution in Kemptville is being undertaken by Infrastructure Ontario, a Crown agency with an explicit mandate to build public infrastructure.⁷ As such, the activity in question is not a core, central or basic function of the ministry.
- The ministry does not have physical possession or the right to possession of the records.
- The ministry does not have the authority to regulate the records content, use and disposal of the records.

[20] The ministry submits that if the appellant wants to access any additional records that may exist, she should file an access request with IO,⁸ because, due to its mandate to construct public infrastructure, including correctional institutions, IO would have created these types of records. The ministry states:

⁷ The ministry refers to IO's responsibilities at: <https://www.infrastructureontario.ca/en/about-infrastructure-ontario/purpose-and-values/>

⁸ The ministry relies on *City of Ottawa v. Ontario*, 2010 ONCS 6835, (*Ottawa*).

...if the records do exist, [IO] would likely have custody or control over them and would therefore be the 'institution' to assess applicable exemptions.

The appellant's representations

[21] The appellant states that since a decision to build the Eastern Ontario Correctional Complex was announced by the Premier and the then Solicitor General, that decision must have been based on information gathered up to that time. She submits that the ministry would therefore have needed to know whether the subject property met its own stated criteria and the only way to know this would have been to receive information from staff, consultants and/or IO. She states:

Since the Planning/Site Servicing/Transportation Reporting is part of what is required to build on the subject site, [the ministry] must have had to acquire the site, give instructions to IO who could then carry out the Planning/Site Servicing/Transportation Reporting.

In [the ministry's] representations they say: "The ministry contends that it does not have custody or control over requested records, within the meaning of section 10. We do not know if the records exist at all." This last sentence would seem unlikely with respect to [the ministry's] own consultations and slide presentations that would have included information related to Planning/Site Servicing/Transportation Reporting. While the requester understands that some records will be in the custody and control of IO, it is highly unlikely that IO decided on its own accord to carry out Planning/Site Servicing/Transportation Reporting on the property without [the ministry] having some records, for example emails, related to IO's work on the property.

[22] According to the appellant, with its access decision, the ministry disclosed 10 emails. These emails were about whether the traffic study report (one of the records requested by the appellant) could be provided to a developer requesting the same traffic information. The appellant received a copy of the traffic count from the report (but not the complete report).

[23] The appellant submits that either the ministry has custody of the traffic study report or knows that it can get this report from IO. She submits that this is because in the disclosed emails IO states that the ministry can share this report with the developer.

[24] The appellant also submits that other responsive records should exist that have not been located, including correspondence prepared by ministry staff and consultants, meeting minutes, briefing notes, studies, and information slides related to the public correctional complex consultation sessions in 2020 and 2021 held with stakeholders, school boards, the local hospital, and the public.

[25] The appellant also points out that the ministry initially claimed that there were

third-party interests in the records that required notification as per section 28 of the *Act*,⁹ and made no mention of custody and control. She states that now the ministry claims that it has no responsive records other than a series of emails between the ministry and IO about a developer's inquiry about a responsive traffic study. The appellant states that the ministry did not explain why it changed its position on the records in its record holdings and now insists that it does not have responding records.

[26] Despite being invited to do so, the ministry declined to reply to the appellant's representations.

Findings

[27] As set out above, the appellant's request sought access to:

Planning / Site Servicing / and Transportation reporting that have been completed at the proposed site for the Eastern Ontario Correctional Complex in Kemptonville for the time period covering March 1, 2020, to January 31, 2022.

[28] Despite having disclosed records to the appellant, the ministry's position in its representations is that it does not have any responsive records. In its representations it does not appear to acknowledge that it had located and disclosed records to the appellant in response to her request. It stated:

- The ministry has conducted a thorough search for the records, which is documented in the attached affidavit. The ministry has denied access to records because we do not have them ...
- The ministry submits that if the requested records exist, they may be under the custody or control of IO ...
- The ministry contends that it does not have custody or control over requested records, within the meaning of section 10. We do not know if the records exist at all ...
- We imagine these records, if they exist, were created in connection with the construction of a proposed correctional institution in Kemptonville ...

⁹ Section 28 reads in part:

- (1) Before a head grants a request for access to a record,
 - (a) that the head has reason to believe might contain [third party] information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information;
... the head shall give written notice in accordance with subsection
 - (2) to the person to whom the information relates.

- ...we do not even know if the records even exist ...

[Emphasis added].

[29] Therefore, the ministry has neither acknowledged or addressed the records it already located and disclosed to the appellant, nor has it specifically addressed the records the appellant submits should exist but have not been located.

[30] The ministry provided generic representations claiming that it does not have custody or control of responsive records. It did not specifically address the records identified by the appellant at mediation and in her representations as records that she believes should have been located by the ministry in its search.

[31] The ministry also did not make representations on whether it has custody or control of the responsive records identified by the appellant and referred to in the disclosed emails as being in its custody. Specifically, it did not address the fact that in one of those disclosed emails, IO told the ministry that the traffic study report referred to above could be provided to the developer, in the context of another appeal.

[32] In the absence of representations addressing either the records specifically identified by the appellant as not having been located or the record that the ministry appears to have previously considered to be in its custody for the purposes of another appeal, I am not satisfied that the ministry has established that it does not have custody or control of additional records responsive to the appellant's request.

[33] The ministry takes the position that IO should have responsive records and therefore, the appellant should make a request to IO for access under the *Act*. Although I acknowledge that it is possible that certain responsive records may be in the physical possession of IO, the ministry must still address whether the ministry itself has *control* of records in the possession of IO. It has not done so.

[34] If responsive records exist that are not in an institution's possession, the institution may still have an obligation to search for them because, under section 10(1) of the *Act*, the right of access applies to any record that is in the custody or under the control of an institution.¹⁰ For records not in the institution's possession, the question is whether the records are under the institution's control.

[35] Concerning whether it has control of additional responsive records, I asked the ministry to consider the two-part test adopted by the Supreme Court of Canada on the question of whether an institution has control of records that are not in its physical possession. For that test to be met, the ministry must explain:

¹⁰ Order P-239 and Ministry of the Attorney General v. Information and Privacy Commissioner, 2011 ONSC 172 (Div. Ct.).

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?¹¹

[36] I also asked the ministry to address the following additional factors that may be relevant considerations in determining whether another institution (in this case IO) has control of the records:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?¹²
- Is the individual, agency or group with physical possession of the record an “institution” for the purposes of the *Act*?
- Who owns the record?¹³
- Who paid for the creation of the record?¹⁴
- What are the circumstances surrounding the creation, use and retention of the record?¹⁵
- Are there any contractual provisions between the institution and the individual who created the record that give the institution an express or implied right to possess or otherwise control the record?¹⁶
- 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?¹⁷ If so, what was the precise undertaking of confidentiality given by the individual who created the record, to whom was it given, when why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- 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

¹¹ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

¹² Order PO-2683.

¹³ Order M-315.

¹⁴ Order M-506.

¹⁵ Order PO-2386.

¹⁶ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC).

¹⁷ Orders M-165 and MO-2586.

institution?¹⁸ If so, please explain the scope of that agency, and whether it gave the institution the right to possess or otherwise control the record.

- 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?¹⁹
- 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?²⁰

[37] The ministry did not address any of these questions in its representations.

[38] Although the ministry has repeatedly directed the appellant to seek access to responsive records from IO, it has not made any submissions that address whether it has control of these records. According to emails disclosed to the appellant, and as set out in its representations, it is clear that the ministry has communicated with IO about the correctional centre. Therefore, in my view it may have control of responsive records it claims are in IO's possession. I find the ministry has not provided sufficient evidence to establish that it does not have custody of or control over the additional responsive records sought by the appellant.

[39] Based on my review of the parties' representations, I am satisfied that additional responsive records may exist either in the ministry's custody or records that may be in IO's possession, over which the ministry has control. These additional records may include the records specifically identified by the appellant, being a traffic study report (as set out in the emails provided by the appellant), and records prepared for the public correctional centre consultation sessions in 2020 and 2021 that could include correspondence, meeting minutes, briefing notes, studies, and information slides.

[40] Therefore, I find that the ministry has not established that it does not have custody or control over additional records responsive the appellant's request.

[41] As the appellant has provided a reasonable basis that additional responsive records might exist and the ministry has not established that additional responsive records are not within its custody or under its control, I will order it to search for these records and issue an access decision to the appellant, with respect to the results of its search.

Ministry's obligation to forward the request to IO

[42] In making the findings in this order, I have considered whether the ministry should

¹⁸ *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.).

¹⁹ Order MO-1251.

²⁰ Order MO-1251.

have forwarded the appellant's request to IO under the mandatory provisions in section 25 of the *Act*, which reads:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

(a) forward the request to the other institution; and

(b) give written notice to the person who made the request that it has been forwarded to the other institution.

[43] As this provision is mandatory, if the ministry believed that it did not have custody or control of records responsive to the appellant's request and determined that IO did have custody or control of such record, it was required to forward the request to IO and give the appellant written notice. In this case, as it did not do so, the ministry was in breach of its obligations under the *Act*. The ministry is reminded of its obligations in this respect when responding to requests in the future.

[44] Ordinarily, based on the ministry's claim that IO has custody of the responsive records, I would have ordered the ministry to transfer the request to IO, as the ministry should have complied with its mandatory obligation to transfer the request under section 25. However, in this case I find there is no useful purpose to order the ministry to transfer the request to IO, as the appellant has already made an identical request to that in this appeal to IO, which is currently the subject of a separate appeal being considered by the IPC.²¹

[45] In any event, based on my review of the parties' representations, as set out above, the ministry may very well have custody of records that may not also be in the custody of IO.

ORDER:

1. I order the ministry to search for additional records in its custody or under its control that are responsive to the appellant's request, **treating the date of this order as the date of the request** for the purposes of the procedural requirements of the *Act*.
2. If the ministry locates additional records as a result of its further search(es), if it does not locate such records, or if it identifies that responsive records should exist

²¹ IPC appeal PA22-00197.

that are not in its custody or under its control, I order it to issue an access decision to the appellant, with a copy to me, in accordance with the requirements of the *Act*, treating the date of this order as the date of the request for the purpose of the procedural requirements of the *Act*.

3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed with the access decision referred to in order provision 2.

Original signed by: _____

Diane Smith
Adjudicator

June 10, 2024 _____