Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4575-I

Appeal PA23-00253

Ministry of the Solicitor General

November 28, 2024

Summary: An individual made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* for access to a pre-sentence report. The ministry claimed the report is not in its custody or under its control. The adjudicator finds the report is in the custody or under the control of the ministry and orders the ministry to submit representations on the application of the exemptions originally claimed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 10.

Orders and Investigation Reports Considered: Order PO-2798.

Cases Considered: *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner),* 2018 ONCA 559.

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General (the ministry) for a pre-sentence report prepared in August 2021 in relation to a specific sexual assault where the perpetrator was convicted. The appellant also sought access to other records relating to probation supervision services provided to the perpetrator.

[2] The ministry located responsive records and granted the appellant partial access

to them. The ministry withheld portions of probation and parole records under the discretionary exemptions in sections 49(a), read with sections 14(1)(l) (facilitate the commission of an unlawful act or hamper the control of crime) and 14(2)(d) (correctional records), 49(b) (personal privacy), and 49(e) (correctional records) of the *Act*.

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

[4] During mediation, the appellant advised they continue to seek access to the pre-sentence report only and raised the application of the public interest override to it. The ministry confirmed its exemption claims and advised it did not believe the public interest applied to the pre-sentence report.

[5] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I began my inquiry by inviting the ministry to submit representations. I also notified an individual whose interests may be affected by the disclosure of the report (the affected party). Both the ministry and the affected party submitted representations.

[6] In its representations, the ministry revised its access decision. The ministry now claims the records are not in its custody or under its control under section 10(1) of the *Act*. Given these circumstances, the only issue to be considered in this order is whether the pre-sentence report is under the custody or control of the ministry within the meaning of section 10(1) of the *Act*. I invited and received representations from the appellant and further representations in response from the ministry on this issue.

[7] In the discussion that follows, I find the pre-sentence report is in the custody or under the control of the ministry. During the inquiry, the ministry made the decision to change its decision from withholding the records under exemptions to claiming the records were outside of its custody or control. Due to the inordinate delay that resulted, I have decided to order the ministry to submit representations on the exemptions it originally claimed. I remain seized of the appeal to deal with any issues arising from this order.

RECORD:

[8] The record is an eight-page pre-sentence report.

DISCUSSION:

[9] The sole issue to be determined in this appeal is whether the pre-sentence report is "in the custody" or "under the control" of the ministry under section 10(1) of the Act.

[10] Section 10(1) provides for a general right of access to records 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 in the custody or under the control of an institution unless…

[11] 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]

[12] 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.

[13] 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]

Parties' representations

[14] The ministry submits that it prepared the pre-sentence report "solely for the court, at the sole request of the court, to assist the judge in sentencing the offender." The ministry submits the pre-sentence report is filed with the court and becomes a court record. The ministry notes that, if the court did not request the pre-sentence report, it would not exist.

[15] The ministry submits the pre-sentence report is authorized pursuant to section 721 of the *Criminal Code*.[6] The ministry refers to the following subsections:

- Subsection 721(1) specifies the "probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose for assisting the court in imposing a sentence or in determining whether the accused should be discharged."

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[1] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[2] Order PO-2836.
[3] 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] R.S.C., 1985, c. C-46.

- Subsection 721(3) specifies the kinds of information that must be in a report "unless otherwise specified by the court…." The ministry submits this means the court has final decision-making as to what goes in the report. The ministry submits subsection 721(4) affirms this claim by stating "the report must also contain information on any other matter required by the court."

- Section 721(5) indicates who is to be provided with a copy of the report by the clerk of the court. The ministry submits this section removes control over the record and its distribution from the ministry. As such, the ministry claims it cannot decide whether the appellant should have access to it under the *Act*.

[16] The ministry refers to Order PO-2798 in which the adjudicator found the Ministry of the Attorney General did not have custody or control over records "relating to a court action in a court file." The ministry submits the pre-sentence report is a court record prepared for a specific court matter, and the court has the right to supervise and to protect it, as it sees fit. The ministry submits the court has "significant and substantive control over what will be in the record and how it will be used." The ministry submits it has "bare possession" over the pre-sentence report and does not have sufficient authority to decide whether the appellant can have access to the record under the *Act*. The ministry submits only a court can decide whether the appellant can have access to the record.

[17] The appellant submits the pre-sentence report was produced by the Correctional Services Division of the ministry. She further submits the ministry is responsible for maintaining and operating provincial correctional institutions for adult offenders who are serving a sentence of up to two years less a day or are awaiting criminal proceedings. The appellant submits the ministry is also responsible for the community supervision of individuals on probation, conditional sentences, and provincial parole.

[18] The appellant submits the pre-sentence report was produced by a probation officer, who is an employee of the ministry. The appellant submits the record was prepared first to provide information to the court for consideration during the sentencing of a convicted sex offender. The appellant submits the record is also used by probation officers to:

- monitor and enforce probation and conditional sentence orders, and parole certificates

- conduct comprehensive assessments

- make effective case management decisions for offenders

- determine rehabilitative interventions for offenders, such as referral to internal or community-based counselling and treatment programs

[19] The appellant submits these uses of the record by probation officers demonstrates the record is under the control of the ministry.

[20] The appellant submits the record has a "bifurcated use." First, the appellant submits the record was created for a Justice of the Ontario Court of Justice's consideration for the purposes of determining a sentence after a finding of guilt at a trial. Second, the appellant submits the record was created to be used by the ministry in its role of supervising the specific offender. The appellant submits the record was created and used as "an integral component to assist the Ministry personnel in the supervision of the offender while on probation."

[21] The appellant also submits the ministry has the statutory power or duty to carry out the supervision of the offender on probation, and the record is a core and central part of that duty. As such, the appellant claims the record relates to the ministry's mandate and function. Further, the appellant submits the ministry has physical possession of the record. The appellant also claims the ministry has substantially more than "bare possession" of the record because it is an "integral and required component of a required record in [the ministry's] legislated duty in the supervision of the offender while on probation and house arrest."

[22] In addition, the appellant claims the ministry has an obligation to deal with the record by creating and disseminating to the Court and retaining it for the legislated probation services it provides. Further, the appellant submits the ministry was responsible for the creation and retention of the pre-sentence report, and the report is in the possession of a ministry employee for the purposes of their duties to retain all relevant documents relating to the offender.

[23] Finally, the appellant submits the circumstances in this appeal are distinguishable from those in Order PO-2798 referenced by the ministry in its representations. In Order PO-2798, the adjudicator found that records relating to the proceeds of municipal tax sales for property owners whose property was sold for non-payment of taxes, held by the Accountant of the Superior Court of Justice, which was under the auspices of the Office of the Public Guardian and Trustee, were not in the custody or control of the Office of the Public Guardian and Trustee. The adjudicator found the Accountant acted solely as an officer of the court and had no authority to do anything more than file the records and secure the funds until the Court makes an order to have all or part of the money paid out to an entitled individual. In this case, the adjudicator found the Accountant's limited ability to use, maintain, dispose of and disseminate the records outside of orders issued by the Court does not amount to custody. The adjudicator found the records held by the Accountant were records that remained under the Superior Court of Justice's overriding supervision while in his possession. The adjudicator concluded these records were in the custody of neither the Accountant nor the Office of the Public Guardian and Trustee.

[24] The appellant submits that, in this case, the probation department of the ministry does not act solely as an officer or personnel of the Court. Rather, the record was produced by and is under the control of the Correctional Services Division of the ministry under its legislated mandate to supervise offenders.

[25] I shared the appellant's representations with the ministry for its response. The ministry maintained its position that the pre-sentence report is not in its custody or under its control. The ministry submits the purposes of the pre-sentence report are:

- To "supply a picture of the offender as a person in society. The report is intended to be an accurate, independent, and balanced assessment of an offender, his background and prospects for the future."[7]
- To "provide information about the accused's background and circumstances."[8]
- To "assist the court by providing background on the offender and offering opinion as to the form of disposition that may or may not be remedial in all the circumstances."[9]

[26] The ministry submits the "broad assessment of an offender that is captured in a pre-sentence report is not needed by the Ministry as such to supervise the offender, given that the role of the Ministry when it is supervising to ensure that the offender complies with the conditions on the conditional sentence order, which are directive, precise, and narrow." Rather, the ministry claims the pre-sentence provides the court with a broad range of information, but the ministry itself does not necessarily need this information for supervision purposes.

Analysis and findings

[27] I have reviewed the parties' representations and the circumstances in this appeal. Upon that review, I find the pre-sentence report is under the custody or control of the ministry.

[28] As stated above, the courts and the IPC have applied a broad and liberal approach to the custody or control question.[10] There is no dispute the record is in the ministry's possession because the ministry has a copy of the record in the probation file of the identified individual. However, the ministry claims it does not have control over the record because it was prepared solely for the court's use. Therefore, I will consider whether the ministry has more than bare possession of the record.

[29] 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.[11] In this analysis, I will consider the ten questions the Court of Appeal applied in *Ontario*

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[7] *R. v. Anstie*, 2020 ONSC 5505 at para 99.
[8] *R. v. Nelson*, 2015 BCCA 371 at para 9.
[9] *R. v. Nguyen*, 1995 CanLII 384 (BCCA) at para 31.
[10] *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.
[11] Orders 120, MO-1251, PO-2306 and PO-2683.

(Children's Lawyer) v. Ontario (Information and Privacy Commissioner),[12] which were derived from the factors developed by the IPC.

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

[30] There is no dispute that the record was prepared by the ministry. This factor weighs in favour of a finding that the pre-sentence report is in the ministry's control.

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

[31] According to the ministry, the pre-sentence report was prepared solely for the court, at the sole request of the court, to assist the judge in sentencing the offender. The ministry submits the pre-sentence report is filed with the court and becomes a court record. The ministry submits that if the court did not request the pre-sentence report, it would not exist.

[32] On the other hand, the appellant claims the pre-sentence report is used by the ministry's probation officers in their supervision and assessment of offenders on probation or parole or conditional sentences. The appellant also submits the ministry is required to maintain physical possession of the record after its creation to supervise the offender in the community.

[33] I note the ministry does not refute the appellant's claims that the pre-sentence report is used by the ministry's probation officers. It merely argues the pre-sentence record is not needed by the ministry to supervise the offender when it can rely on other information such as the conditional sentence order. Further, the ministry identified the purposes of the pre-sentence report, including: to supply a picture of the offender as a person in society; to provide information about an accused's background and circumstances; and to provide background and opinion to the court on the offender. While the third purpose refers to the court specifically, the first two do not. There is no indication that the record is or may *only* be used by the court; rather, it appears the record can be referred to for relevant background information about the offender by both the court and probation officers.

[34] I accept the ministry's position that the primary purpose of the record is to provide the court with information regarding the offender so the judge may issue an appropriate sentence. However, the fact that the court has control over the copy of the report it receives from the ministry does not mean the ministry does not have control over the copy of the report it retains for its own records. The pre-sentence report is placed into the ministry's file holdings and it is reasonable to believe that it serves to provide probation or parole officers with additional, while not strictly necessary, background information on the offender. Therefore, I find this factor weighs in favour of a finding that the pre-sentence report is under the control of the ministry.

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[12] 2018 ONCA 559, paras 113-125. (*Children's Lawyer*)

Does the ministry have possession of the record?

[35] There is no dispute the ministry has possession of the record. This factor weighs in favour of a finding the ministry has control over the record. However, because the ministry claims it has bare possession over the record, I will weigh this factor with the other factors set out by the IPC.

If the ministry does not have possession of the record, is it being held by a ministry officer or employee for the purposes of their duties as officer or employee?

[36] I do not need to consider this factor because the ministry has possession of the record.

Does the ministry have a right to possession of the record?

[37] The ministry created the record and retains a copy of the record in its file holdings. The ministry did not claim that it does not have a right to possess the record nor is their any indication that it does not have such right. As such, I find the ministry has a right to possess the record because it created the record and incorporated it into the offender's file.

Do the contents of the record relate to the ministry's mandate and functions?

[38] According to the ministry, the pre-sentence report is intended to provide a comprehensive picture of the offender as a person in society. It is intended to provide an accurate, independent and balanced assessment of the offender, their background and prospects for the future. In addition, the ministry submits the pre-sentence report provides the court with background on the offender and offers the ministry's opinion as to the form of disposition that may or may not be remedial in consideration of the circumstances.

[39] I acknowledge the ministry's submissions that the *Criminal Code* provides some guidelines as to the information that should be contained in the pre-sentence report. I also acknowledge the court can require certain information to be included in or omitted from the pre-sentence report.

[40] One of the ministry's core mandates is to oversee adult offenders under parole supervision and to maintain, operate and monitor the parole and probation program.[13]. As the ministry states, it prepares the pre-sentence report to provide the court with the ministry's assessment of an individual offender, their background, their appropriate sentence, and prospects for the future. Upon review, I find the information in the record relates entirely to the ministry's mandate and function of overseeing offenders and their

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[13] See the ministry's website.

sentencing even though the record itself may have been prepared to guide the court.

[41] I find the circumstances before me are distinguishable from those before the adjudicator in Order PO-2798, where the Accountant simply received municipal tax statements and filed them with the Court. In that order, the adjudicator noted the "Accountant acts solely as an officer of the Court" and their involvement with the records was "purely administrative." That is not the case here. Here, the probation officer who completed the pre-sentence report does not act solely as an officer of the Court and is not acting in a purely administrative manner. Rather, the pre-sentence report reflects the officer's expertise and opinions regarding the offender form the basis of the information in the record. Based on my review, I find the assessment of the offender contained in the record would require more evaluative skills than the ministry acknowledges in its representations. Finally, the information and assessments contained in the record relate to a core function of the ministry, which is to supervise offenders in correctional institutions or on parole or probation. As such, I find the content of the record relates to the ministry's mandates and functions and this factor weighs greatly in favour of a finding that the ministry controls the record.

Does the ministry have the authority to regulate the record's use?

[42] The ministry takes the position that the court has "significant and substantive control" over the contents and use of the record. I do not agree with the ministry's claim that the court has control over the contents of the record because while certain types of information may be required by the court, such as relevant background information about the offender and the crime committed, there must be a certain latitude regarding the information included in the record because the parole officer is tasked with providing an assessment of the offender and their own opinion regarding the appropriate sentence.

[43] The ministry does not provide any evidence to support its claim that it has no authority to regulate the record's use beyond claiming it is a court record.

[44] Therefore, there is no evidence before me to demonstrate that the ministry does not have authority to regulate the use of the copy of the pre-sentence report that is in its record holdings. I will give this factor little weight.

To what extent has the ministry relied on the records?

[45] It is my understanding that the pre-sentence report is included in and forms part of an offender's probation file. As such, while it may not be a "necessary" part of the file because the information contained in it may be found in other parts of the file, as the ministry claims, I find it provides relevant background information that may be used and relied on by parole or probation officers and other ministry staff in their supervision and assessment of an offender. However, because the record is not the sole source of background information about an offender in an offender's file, I give this factor low weight.

How closely have the records been integrated with the other records held by the ministry?

[46] The pre-sentence report is clearly a part of the probation file of an offender. Therefore, despite the ministry's claim the record is a court record, I find it is closely integrated with other records relating to an offender. I give this factor significant weight.

Does a finding that the record is outside the ministry's control undermine the purposes of the Act?

[47] The purposes of the *Act* are set out in section 1 as follows: 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,
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> > (i) information should be available to the public,
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> > (ii) necessary exemptions from the right of access should be limited and specific, and
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> > (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
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> (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.

[48] Based on my review, a finding that the pre-sentence report is outside the ministry's control would undermine the purposes of the *Act*. One of the purposes of the *Act* is to ensure that information is available to the public subject to necessary exemptions. Therefore, the appellant should have access to information held by the ministry subject to necessary exemptions. I note the pre-sentence report contains personal information relating to the appellant; as such, a finding that the record is outside the ministry's control would greatly hamper the appellant's right of access to his own personal information held by the government.

[49] In *Children's Lawyer*, the court found that providing third parties with access to a child's records would undermine the Children's Lawyer in her role as advocate for the child. Specifically, the court found potential disclosure would "also sabotage the child's heightened privacy rights, eviscerate the work of the Children's Lawyer and seriously limit the court's ability to fully address the child's best interests."[14] The ministry has not raised similar concerns regarding the impact the potential disclosure of the record may have on its work, and I find these concerns are not relevant in this appeal. I have found the

[14] *Children's Lawyer*, para 128.

contents of the pre-sentence report relate to the ministry's mandate and function to supervise and monitor offenders on parole or probation. Based on my review, a finding that the record is under the ministry's custody or control would not impact the ministry's role and functions. In addition, while the privacy rights of the offender and other identifiable individuals are a valid concern, these concerns may be addressed by the ministry's application of any relevant exemptions to withhold certain information from disclosure. I confirm a finding that the records are under the ministry's custody or control would not remove the ministry's ability to apply any relevant exclusion or exemption to withhold the record from disclosure.

[50] For the reasons set out above, I find a determination that the record is outside the ministry's control would undermine a primary purpose of the *Act*, which is to ensure public access to government information, subject to specific and necessary exemptions.

Conclusion

[51] Upon consideration of the factors outlined above, I find the pre-sentence report is in the ministry's custody or under its control. Of particular significance are the facts that the ministry created and possesses the record, the record relates to the ministry's mandate and functions, the record is integrated with other records relating to the offender in the ministry's holdings, and it would undermine the purposes of the *Act* to find the ministry does not have control over the record.

[52] I note the ministry originally claimed the records responsive to the appellant's request, which includes the pre-sentencing report, were exempt under discretionary exemptions in sections 49(a), read with sections 14(1)(l) (facilitate the commission of an unlawful act or hamper the control of crime) and 14(2)(d) (correctional records), 49(b) (personal privacy), and 49(e) (correctional records). However, the ministry revised its decision during the inquiry which has now resulted in an inordinate delay to the appellant. Given these circumstances, I will not be ordering the ministry to issue another access decision. Rather, I will order the ministry to submit representations on the exemptions it originally claimed to deny the appellant access to the pre-sentence report.

ORDER:

1. I find the pre-sentence report is in the custody or control of the ministry.

2. I order the ministry to submit representations in response to the Notice of Inquiry dated January 24, 2024 by **December 19, 2024**.

3. I remain seized of this appeal to deal with issues arising this order.

Original Signed by:	November 28, 2024
Justine Wai Adjudicator	