Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 120

Appeal 890087

Ministry of Government Services

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I N T E R I M O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this appeal and procedures employed in making this Interim Order are as follows:

1. The requester in this appeal was an unsuccessful candidate for the position of Senior Policy Advisor, Justice Unit, Ontario Women's Directorate.

2. On December 28, 1988, a solicitor representing the requester wrote to the Ministry of Government Services (the "institution") requesting access to "...documentation from the hiring process to which she is entitled under Freedom of Information, specifically: the list of questions asked in the interview, the score sheets relating to her interview (of all four panel members), her score, and the score of the successful candidate."

3. On January 17, 1989, the institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") responded to the requester, providing access to the list of questions asked in the interview, the score sheet relating to the requester's interview, and her own score. Access to the interview schedule was given, subject to severances of certain individuals' names, pursuant to subsection 21(2)(f)

of the Act. Access was denied to the score sheets of the other candidates in the competition, including the score of the successful candidate under subsections 21(3)(d) and (g) of the Act.

4. On February 21, 1989, the requester's solicitor wrote to the Co-ordinator asking for access to the following additional information:

1. The document entitled "Qualifying Guide" which should include the list of qualifying factors as well as the list of candidates, and how they were initially ranked vis-a-vis the qualifying factors. In order to meet your concerns about not releasing personal information about the other candidates, we would be satisfied to receive the completed document with the names of all candidates except [the requester]'s whited out. In particular:

2. The weighting of each of the qualifying factors;

3. Expected response to the interview questions, and rating criteria against which candidates' responses were measured as required under the O.W.D. recruitment checklist (p.2);

4. The ranking of [the requester]'s total raw score of 307 points. (You have already provided [the requester]'s ranking with each of the selection panel members, but not the ranking of her raw score);

4.(a) The raw scores of the other top candidates (without naming those candidates);

5. Names of [the requester]'s references who were contacted, the dates they were contacted, and the information that was asked and received about [the requester] in those reference checks, as well as the criteria that were used to determine which references to call, if not all of them were contacted;

6. The comments of [the chairman of the interview panel] about [the requester] in [the chairman]'s capacity as

a reference (I understand from [the requester] that [the chairman] appointed herself as a reference, and gave input in that capacity);

7. Without revealing the other candidates' names, the number of references which were checked for other candidates; the dates those references were contacted, and the list of questions they were asked;

8. Any other relevant information which was considered in the determination of who would be the successful candidate;

9. Any other relevant information which was considered in the determination not to hire [the requester];

10. Any other information that mentions [the requester]'s name or relates to her, in this competition file.

5. On February 24, 1989, the Co-ordinator responded to the second request as follows:

Item 1 & 2

Access is provided to the Qualifying Guide which includes the list of qualifying factors, the list of candidates, and how the candidates were initially ranked vis-a-vis the qualifying guide. The names of the other candidates have been severed pursuant to subsections 21(1) and 21(3)(d)(g) of the Act.

Item 2

This record does not exist on the competition file.

Item 3

These records do not exist on the competition file.

Item 4 & 4(a)

There is no record of the ranking of your total raw score. The raw scores of the other top candidates are severed pursuant to subsections 21(1) and 21(3)(g) of the Act.

Whiting out names does not sufficiently protect privacy as the information released could be linked to an identifiable individual.

Item 5

Access is granted to the names of the individuals contacted for a reference about you and the information that was received. There are no records of the dates individuals were contacted, the information that was asked, and the criteria used to determine which references to call.

Item 6

This record does not exist on the competition file.

Item 7

The documents on file reveal references were checked for two other candidates. There are no records of the dates individuals were contacted and the list of questions they were asked.

Items 8 & 9

As far as the Freedom of Information and Privacy Office can ascertain, there does not appear to be any other relevant information on the competition file which was considered in the determination of who would be the successful candidate or in the determination not to hire you as the successful candidate.

Item 10

Access if provided to letters of reference about you (apparently supplied by you), a copy of your thesis, and your resume on the competition file. There are no other records on the competition file that mention your name or relate to you.

6. On March 28, 1989, the requester met with the Co-ordinator to clarify her request. In a letter dated April 4, 1989, to the requester, the Co-ordinator characterized the clarification as follows:

> In our meeting, you clarified your request in two categories namely; your ranking as a candidate in relation to the others and, the number of references checked for each candidate. In addition, you requested another copy of the acknowledgement letter for receipt of your resume and, any other information that may have been used which is not necessarily housed in the competition file.

The Co-ordinator advised the requester that "...access is denied to the ranking and the number of references checked for each candidate pursuant to subsection 21(3)(g). This provision applies because the information requested relates to personal evaluations of individuals other than yourself."

7. On March 31, 1989, the requester wrote to me appealing the institution's decisions, and I gave notice of the appeal to the institution on April 12, 1989.

8. The Appeals Officer assigned to this case obtained and reviewed the records maintained in the competition file. As well, he interviewed each of the four panelists who participated in the job competition in question. During the course of one of these interviews, the Appeals Officer learned of the existence of two additional records. They can be described as: (1) a chronology of events relating to the competition process authored by one of the panel members; and (2) a memo authored by the same panel member and sent to the Assistant Deputy Minister of the Ontario Women's Directorate, to which an excerpt of the aforementioned chronology was attached.

9. During the course of mediation, the appellant accepted the severances of names of individuals from the list of persons

interviewed by the panel. As well, the Co-ordinator agreed to provide the appellant with information relating to the reference checking procedure followed by the institution.

10. As settlement of the other issues arising in this appeal was not possible, I sent notices to the appellant and the institution that I was conducting an inquiry to review the decisions of the head. Enclosed with these letters was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appeared to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the report.

11. Because the institution had not yet advised the appellant of its position with respect to the disclosure of either of the two additional records referred to in paragraph 8 above, the head was asked to consider the application of the Act to these records and issue a decision.

12. On August 1, 1989, the panelist who authored the two additional records met with the Co-ordinator. This meeting was arranged so the panelist could provide the Co-ordinator with a copy of the full text of the chronology (the institution already having a copy of the memorandum and attachment) in order to enable the head to make a decision regarding access. During the course of this meeting, the

panelist sought assurances from the Co-ordinator that the chronology would not be given to other individuals without her consent, and that she would not be disciplined as a result of anything that might be contained in the record. The Co-ordinator did not provide the requested assurances, and also did not insist that the record be produced. Shortly after this meeting, a member of my staff was contacted by counsel representing the panelist who raised the issue of whether or not the institution had custody or control of these two additional records.

13. The panelist was added as an affected third party to the appeal (the "third party"), and supplementary Notices of Inquiry were sent to the appellant, the institution and the third party on August 11, 1989. The purpose of these supplementary Notices of Inquiry was to advise all parties that the third party had raised a preliminary issue respecting the institution's custody or control of the chronology and the memorandum with attachment. Representations from all parties were requested in regard to this preliminary issue.

14. On August 21, 1989, the head of the institution wrote to the appellant denying access to the memorandum with attachment pursuant to subsection 21(2)(i) of the Act. In the head's view, this provision applied because the record contained personal information about individuals other than the appellant and the disclosure could unfairly damage the reputation of persons referred to in the record. The head did not make a decision regarding the chronology because she did not have a copy of the record.

15. Representations regarding the issue of care or control of the two additional records have been received from the institution, the appellant and the third party, and I have considered them in making this Interim Order.

Although a number of issues will be addressed in my Final Order in this appeal, this Interim Order deals only with the preliminary issue of whether the following two records are "in the custody or under the control of an institution" as those words are used in subsection 10(1) of the Act:

1. A chronology of events authored by the third party outlining her experiences in respect of the job competition covering the dates November 9, 1988 to January 3, 1989.

   Neither the head nor I have seen the full text of this record. Only an excerpt, described below, has been produced for consideration by the head and for my review. In her representations, the third party states that this chronology is an outline of her experiences during the job competition and covers the dates November 9, 1988 to January 3, 1989. It should be noted that the chronology was originally recorded on a computer disc maintained by the third party. When she produced a hard copy of this chronology, she entitled the record "Documentation Re: Competition WD-19/88". However, according to the third party, this title was not used when the chronology was originally created and stored on the computer disc.

2. A three-page memorandum from the third party to the Assistant Deputy Minister of the Ontario Women's

Directorate, dated December 30, 1988, with an excerpt from the above-noted chronology attached.

This memorandum contains the reference "Competition #WD-19/88 Senior Policy Advisor, Justice". It outlines some of the third party's specific concerns relating to the job competition. Appended to the memorandum is a 2 1/2 page excerpt from the third party's chronology. The excerpt is dated December 21st and contains the following handwritten notation at the top of the excerpt:

> This is an excerpt from my personal documentation and not to be shared with anyone without my consent. It is for your information only in discussion of what course of action you need to take regarding it. I would also request that any discussions you have concerning this matter with external sources, that you do not use my name without my consent.

Before beginning my discussion of the preliminary issue which is the subject of this Interim Order, I think it would be helpful to refer to the general principles contained in the Act, and to also provide some background information regarding the creation of the two records which are under discussion.

First, it should be noted that section 1 of the Act sets out the purposes and general principles to be followed in considering requests for records held by the government. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information

should be available to the public and that necessary exemptions from the right of access should be limited and specific.

Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions, and should provide individuals with a right of access to their own personal information.

By way of background, the third party is an employee of the Ontario Women's Directorate, holding the position "Human Resources and Employment Equity Co-ordinator". It was in her employment capacity that the third party served as a panelist in job competition #WD-19/88. During the course of this appeal, the third party advised the Appeals Officer that she had had concerns about the conduct of this job competition, and had decided to document them. According to the third party, it was her intention to place a dissenting opinion in the job competition file, and she in fact went so far as to contact the appropriate staff at the institution to determine the format dissents should take. As well, the third party advised the Appeals Officer that she had discussed some of her concerns with the appellant. The precise nature and timing of these discussions is unclear.

Turning now to the issue under consideration in this Interim Order, my decision turns on of the question of whether or not the chronology and the memorandum with attachment prepared by the third party are "in the custody or under the control of an institution", as defined by subsection 10(1) of the Act.

Subsection 10(1) reads as follows:

> 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 the record or the part of the record falls within one of the exemptions under sections 12 to 22.

The Oxford dictionary defines "control" as the "power to direct; command." "Custody" is defined as "guardianship; care."

Black's Law Dictionary (5th Edition) defines "control" as meaning "power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee."

"Custody" is defined in Black's as "the keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected."

Although these definitions provide some guidance, they are broad in scope and in themselves are insufficient to determine whether a particular record is in the custody or control of an institution within the context of the Act.

The parties in this appeal have provided me with detailed interpretations of the words "custody" and "control" as they are used in various legal contexts such as property law, insurance law, and family law. While these submissions are of some help, their usefulness is limited by the fact that they do not take into account the use of the terms "custody" and "control" within the context of the unique purposes and principles of the Freedom of Information and Protection of Privacy Act, 1987. At this early stage in the development of the Act, I feel it is important

that these terms be given broad and liberal interpretation in order to give effect to these purposes and principles.

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

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

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

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

8. To what extent has the record been relied upon by the institution?

9. How closely is the record intergrated with other records held by the institution?

10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of a institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

Turning to the two records which are the subject of this Interim Order, I must now decide whether either or both of them satisfy the requirements of custody or control by the institution.

Because this is an Interim Order, it would not be appropriate for me to discuss the contents of the two records in anything but the most general terms. I must simply determine whether these records can be made the subject of an access request under the Act. The proper treatment of these records, should I decide they

fall under the purview of the Act, will be the subject of my Final Order in this appeal.

As far as the first record is concerned, the third party submits that the full text of her chronology is not within the institution's custody or control. According to counsel for the third party, 80% of the chronology was produced by the third party on a computer while at work, outside of normal working hours. The remaining 20% was created at home on the third party's personal computer. According to her counsel, the chronology was always maintained on a separate computer disc owned by the third party, and this disc was always in her personal possession. The institution does not have a copy of this record and the head has never seen the full text of third party's chronology.

In her submissions, counsel for the third party submits that:

> [the chronology] was not created in the course of [the third party's] employment duties and responsibilities. ...[The chronology] was prepared for her own personal use in justifying and defending the actions she took to deal with... concerns [about job competition #WD-19/88]. As such, the notes were written to provide her with a contemporaneous account of her actions and the actions of others involved in the job competition, as well as documenting her thoughts and opinions about these matters. Such thoughts and opinion are set out in a full and frank manner, and have not been edited with a view to either a diplomatic or more restrained presentation which would have been appropriate had the document been intended for review by third parties. Also, included in the notes are descriptions of actions which [the third party] characterizes as taken in pursuit of her duties as a personnel officer.

I have had an opportunity to review an excerpt of the chronology and the content of that excerpt clearly relates to information

obtained by the third party in the context of her employment. None of the information contained in the excerpt could have been known by the third party had she not been an employee of the Ontario Women's Directorate participating as a panelist in job competition #WD-19/88.

Assuming that the excerpt is a representative sample of the entire chronology, which, in my view, is a reasonable assumption in the circumstances of this case, it is clear that the record was created to document the third party's concerns regarding the conduct of the job competition. During the course of this appeal, the third party advised the Appeals Officer that she felt her position as a Human Resources and Employment Equity Co-ordinator required her to document concerns regarding hiring practices of the Directorate, a position which, in my view, is inconsistent with her argument that the record was prepared for her own personal use. Also, the third party's decision to document her concerns, to discuss them with the appellant, and to provide the Assistant Deputy Minister with the memorandum were, in my view, motivated by her perception of her employment responsibilities.

The parties to this appeal have provided detailed representations regarding whether the chronology is a personal or an employment-related record, and whether the third party was required by the duties of her employment to create the chronology. If such an employment requirement did exist, this would add weight to the position that the record was under the control of the institution, regardless of whether the institution had physical custody of the record. However, the absence of an employment requirement, in my view, is not in itself determinative of

custody or control; it is simply one of the factors which must be considered in reaching a decision.

In the circumstances of this case, I find that the chronology produced by the third party is "under the control of the institution" as those words are used in section 10(1) of the Act. In reaching this conclusion, I am influenced by the third party's intended and actual use of the record. Regardless of whether it was originally created as a personal notation or memory aid for the third party's exclusive use in planning future action, in my view, her decision to draft a dissenting opinion to be added to the job competition file and her subsequent decision to attach an excerpt of the chronology to the memorandum sent to the Assistant Deputy Minister, clearly evidences an intent on her part to introduce the record into the employment context, notwithstanding the handwritten notation accompanying the excerpt. In my view, the chronology was created to document employment-related concerns identified by the third party in her capacity as an employee of the Directorate, and as such the record is properly under the control of the institution and governed by the Freedom of Information and Protection of Privacy Act, 1987. I want to emphasize that this finding does not mean that the record is releasable to the appellant; it simply means that the institution just now apply the provisions of the Act and decide if the record, or any part of it, should be released.

Turning now to the second record, it is a memorandum authored by the third party and sent to the Assistant Deputy Minister of the Ontario Women's Directorate. Attached to this memorandum is an excerpt from the full text of the chronology. The institution has a copy of this record in its physical possession.

The third party makes no arguments regarding custody or control of the memorandum itself, but submits that the excerpt of the chronology is severable from the memorandum and, like the full text of the chronology, is outside the institution's custody or control.

In my view, although mere possession of a record by an institution may not constitute custody or control in all circumstances, physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession. Furthermore, I feel it is inconsistent with the overall purposes and principles of the Act to enable an employee to provide an institution with a record and purport to limit the use the institution can make of the record. In my view, the third party's notation written on the excerpt of the chronology is not sufficient to remove that record from the institution's custody. The concerns of the third party which presumably caused her to make the handwritten notation can be addressed at the appropriate time through consideration of various exemptions contained in the Act.

Subsection 10(1) of the Act gives a person a right of access to records that are "in the custody or under the control of an institution". Accordingly, only one requirement must be satisfied in order for a record to be governed by the Act.
Having reviewed the representations of the parties and the excerpt attached to the memorandum, I find that both records (the full text of the chronology, and the memorandum and attachment) are within the institution's control. In the case of the memorandum and attachment, I find this record to be both within the institution's custody and under its control. As stated

earlier in this Interim Order, I feel it is important that the words "custody" and "control" be given a broad and liberal interpretation so as to give effect to the important purposes of the Act, and that is the approach I have followed in reaching my decision in this case.

Before finalizing this Interim Order I think it would be helpful to state that my findings do not mean that personal diaries to employees of institutions qualify as records which are governed by the Act. In the circumstances of this case I have determined that the records in question were created for the purpose of documenting employment-related concerns, which were directly related to the author's employment responsibilities and which were subsequently introduced by her into the employment context. The chronology produced by the third party was not a personal "diary", as the word is commonly understood, nor has there been any suggestion that it was. If the third party has concerns that her personal privacy might be compromised through the release of information contained in the chronology, there are adequate provisions in the Act to address these concerns, and it is the responsibility of the head to apply these provisions in reaching a decision on access.

In conclusion, I order the institution to obtain a copy of the full text of the chronology authored by the third party and to make a decision regarding the appellant's right of access to this record. This decision must be sent to the appellant by December 4, 1989, and a copy of that decision must be provided to me.

If the head decides that one or more exemptions contained in the Act apply to deny access to the records or any part thereof, the head is ordered to provide me with written representations in

support of this decision by December 20, 1989. In this event, written representations respecting the appellant's right of access are invited from the appellant and the third party and must be received in my office by December 20, 1989.

If, on the other hand, the head decides that access can be provided, the third party is entitled under the Act to appeal the head's decision to me.

The head has already decided not to provide the appellant with access to the memorandum and attachment and has provided my office with written representations in support of this decision. Written representations respecting the head's decision are invited from the appellant and third party and must be received in my office by December 20, 1989.

Original signed by:
Sidney B. Linden
Commissioner

November 22, 1989
Date