



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

# ORDER P-451

Appeal P-9300014

Ministry of Health



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# ORDER

## BACKGROUND:

The Ministry of Health received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all personal information and general records containing personal information of the requester within the Penetanguishene Mental Health Centre and Oak Ridge Division (including the office of a named Nursing Co-ordinator) for the period of January 1, 1990 to November 24, 1992. The Ministry granted access to records responsive to the request. The requester appealed the Ministry's decision, claiming that the search for responsive records was inadequate.

During mediation, the appellant listed several examples of records which he believed should exist within the locations identified in his request. The Ministry responded that the offices of the Administrator and the named Nursing Co-ordinator were both searched and no other responsive records were located. The Ministry was of the view that any other records were either the personal records of the Nursing Co-ordinator and/or had been destroyed and were, therefore, not in the custody or under the control of the Ministry.

Mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and the appellant. Written representations were received from both parties.

## ISSUES:

The issues arising in this appeal are:

- A. Whether records responsive to the request are in the custody or under the control of the Ministry.
- B. Whether the Ministry's search for responsive records was reasonable in the circumstances.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A: Whether records responsive to the request are in the custody or under the control of the Ministry.**

The appellant indicates that the information he requested, which he believes should exist in the locations he identified, relates to Orders P-215 and P-216 and includes information regarding the two requests, the resulting appeals, and records relating to the judicial review of the two orders. He argues that the information contained in these records is not the personal information of the Nursing Co-ordinator or the Administrator, but was generated in their employment capacity and should, therefore, be in the custody or under the control of the Ministry. The appellant submits that although some records may have been destroyed under hospital retention schedules, some records would be recent enough to be retained.

Section 10(1) states:

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.

In its representations, the Ministry indicates that three additional records have been located which are responsive to the request, and which correspond to three examples of missing records identified by the appellant.

Of the three records, the Ministry indicated that one record was released to the appellant prior to his submitting the current request. The Ministry did not make representations respecting the other two records, but indicated that the Nursing Co-ordinator consented to their disclosure.

The Ministry has not provided a decision to the appellant with respect to access to these three records. Accordingly, I order the Ministry to comply with the requirements of the Act, and issue a decision respecting access to these three records.

With respect to other records identified by the appellant, the Ministry maintains that either no further records exist, or if they exist they are not within the custody or control of the Ministry. The Ministry indicates that other records identified by the appellant, and any other records which may exist would have existed as the result of communications between the Nursing Co-ordinator and his counsel with respect to a matter personal to the Nursing Co-ordinator. Specifically, the Ministry states:

Records such as this contain legal advice from a solicitor retained by an employee in the employee's personal capacity, to bring an action on behalf of the employee personally ... Although the matter is one which arose through the employee's course of employment, the employee is entitled to retain counsel to act for him personally. The Institution may reimburse the employee for his legal expenses, as a matter of policy, since were it not for his employment, the employee would not find it necessary to retain counsel.

The following summarizes the Ministry's representations with respect to the records at issue: They were not created as a part of the employee's duties; the Ministry has no right of possession,

by statute or otherwise; the Ministry has no authority to regulate the use of these types of records; they have never been relied on by the Ministry; they have never been in the possession of the Ministry.

In Order 120, former Commissioner Sidney B. Linden, with respect to the issue of custody or control, stated:

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.

The former Commissioner then listed a number of factors to assist in determining whether an institution has custody or control of a particular record.

I agree with former Commissioner Linden, and I have considered the types of records identified by the appellant in light of the factors set out in Order 120 and the appellant's and Ministry's representations. In my view, the types of records identified by the appellant, if they exist, would not be within the custody or control of the Ministry.

**ISSUE B: Whether the Ministry's search for responsive records was reasonable in the circumstances.**

In its representations, the Ministry outlined the steps taken to search for records responsive to the request, both prior to the appeal and during mediation:

1. The Ministry contacted the Freedom of Information Co-ordinator at Penetanguishene Mental Health Centre who asked the Nursing Co-ordinator to search his office for records responsive to the request. No records were located.
2. During mediation examples of records believed to be responsive were provided by the Appeals Officer and a further search of the Nursing Co-ordinator's office was conducted. All files relating to the appellant were pulled and searched. No records were located.
3. During mediation the offices of the Administrator and the Associate Administrator were also searched for records relating to the relevant time period. All relevant files were pulled and reviewed. No records responsive to the request were located.

The appellant requested records for a specific period of time and identified specific locations for the search. Those areas were searched prior to the appeal, and again during mediation as a result of further information provided by the appellant. In my view, the search for records was reasonable in the circumstances.

**ORDER:**

I order the Ministry to give written notice to the appellant as to whether access to the three records identified at pages 4, 5 and 6 of the Ministry's representations will be given, and to provide me with a copy of the decision within ten (10) days of the date of this order.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ May 4, 1993