Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3044

Appeal PA10-274

Office of the Public Guardian and Trustee

January 30, 2012

Summary: The appellant submitted a request to the Office of the Public Guardian and Trustee for a list of outstanding monies paid into court, which was held by the Accountant of the Superior Court of Justice. The PGT responded by stating that the requested records were not in its custody or control as they were court records that fell outside the scope of the *Act*. This order upholds the PGT's decision, and confirms that the requested records are not in the custody or control of the PGT.

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

Orders and Investigation Reports Considered: P-994, P-1089, P-1151, PO-2739.

Cases Considered: *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.); *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072.

OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request on behalf of the Ontario Public Guardian and Trustee[1] (the PGT) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

[1] Though a separate institution under the *Act*, the PGT is part of Ontario's Ministry of the Attorney General. I will refer to the institution as the PGT throughout this order, even though the custody and control issues also involve the ministry.

> A list of outstanding monies paid into court, including the party, amount, date of payment and court file number, which we understand to be held by the Accountant of the Superior Court of Justice.

[2] The request was subsequently narrowed to include only the list of outstanding monies paid into court having a value of $20,000 or greater, and which has been held by the court for five years or more, including the names of the parties and the court file numbers.

[3] The PGT responded to the request by stating:

> This is to advise that records held by the Accountant of the Superior Court of Justice are court records that fall outside the scope of the *Act*. Indeed, court records are not under the custody or control of the Ministry. The information may exist in individual, publicly-accessible court files that are not subject to the *Act*.
>
> … you may wish to contact the Courthouse directly. The disclosure of court records is under the direction and supervision of the court.

[4] The appellant appealed the PGT's decision.

[5] After various discussions at the intake stage of the appeal process, this file was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the PGT, initially, and the PGT provided representations in response. I then sent the Notice of Inquiry, along with a copy of the PGT's representations, to the appellant, who also provided representations to me.

[6] In the appellant's representations, she referred to a recent decision of this office (Order PO-2739). A judicial review of that decision had been initiated and, while the appellant was in the process of providing her representations, the Divisional Court issued its decision in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 O.J No.939 (Div. Ct) [*A.G. v. Ontario*]. As a result, I provided the appellant with the opportunity to submit supplementary representations in this file because of the issuance of that decision. The appellant submitted supplementary representations. I then shared the appellant's initial and supplementary representations with the PGT, who provided representations by way of reply.

RECORDS:

[7] This office was not provided with a record responsive to the request. However, in correspondence with this office (copied to the PGT), the appellant stated:

> I understand from my discussions with the Ministry of the Attorney General that the Accountant of the Superior Court of Justice has a database from which the requested list could be extracted.

[8] The PGT has identified the nature of the information contained in the database, which is described in greater detail below.

DISCUSSION:

CUSTODY AND CONTROL

[9] As noted above, the PGT takes the position that the records responsive to the appellant's request are held by the Accountant of the Superior Court and are court records that are not under the custody or control of the PGT, and therefore fall outside the scope of the *Act*. The sole issue in this appeal is whether these records are under the custody or control of the PGT.

[10] Where a request is made to a body recognized as an institution under the *Act*, the threshold question for the application of the *Act* is whether the institution (in this case, the PGT) has custody or control of the records within the meaning of section 10(1). This section 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 . . .

[11] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[2]

[12] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it (Order PO-2836). A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 though 22 and section 49).

[13] The courts and this office have applied a broad and liberal approach to the custody or control question.[3] In order to provide context for the parties' submissions in this appeal, it is helpful to first outline the indicia of custody and control that have been

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

[3] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251.

developed by this office, as well as the manner in which "court records" have been viewed in previous orders.

Indicia of custody and control

[14] This office has developed a list of factors to consider in determining whether or not a record is in the custody or under the control of an institution [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the following listed factors may not apply in a specific case, while other unlisted factors may apply.

- Were the records created by an officer or employee of the institution? [Order P-120]

- What use did the creator intend to make of the records? [Orders P-120, P-239]

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the records? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]

- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]

- Does the content of the records relate to the institution's mandate and functions? [Orders P-120, P-239]

- Does the institution have physical possession of the records, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]

- If the institution does not have possession of the records, are they being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]

- Does the institution have a right to possession of the records? [Orders P-120, P-239]

- Does the institution have the authority to regulate the records' use and disposal? [Orders P-120, P-239]

- Are there any limits on the use to which the institution may put the records, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the records? [Orders P-120, P-239]

- How closely are the records integrated with other records held by the institution? [Orders P-120, P-239]

- What is 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? [Order MO-1251]

[15] The following factors may apply where an individual or organization other than the institution holds the record:

- If the records are not in the physical possession of the institution, who has possession of the records, and why?

- Is the individual, agency or group who or which has physical possession of the records an "institution" for the purposes of the *Act*?

- Who owns the records? [Order M-315]

- Who paid for the creation of the records? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the records?

- Are there any provisions in any contracts between the institution and the individual who created the records in relation to the activity that resulted in the creation of the records, which expressly or by implication give the institution the right to possess or otherwise control the records? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the records were not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the records, to whom were they 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 records by the institution?

- Was the individual who created the records an agent of the institution for the purposes of the activity in question? If so, what was the scope of that

agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the records and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

- To what extent, if any, should the fact that the individual or organization that created the records has refused to provide the institution with a copy of the records determine the control issue? [Order MO-1251]

Previous IPC decisions regarding custody and control of "court records"

[16] In Order PO-2739, Assistant Commissioner Brian Beamish reviewed the manner in which previous orders have considered information in "court records." He stated:

> Previous orders of this office have considered the question of whether or not the Ministry of the Attorney General has custody or control of "court records". For example, Order P-994 dealt with an application to the ministry for access to a copy of the "Information" regarding an assault charge initiated by the appellant against a named individual. The ministry argued that the records were "court records" in the custody or under the control of the courts. Adjudicator Laurel Cropley noted that "court records" are not specifically identified as a category of records to which the *Act* does not apply. For that reason, she concluded that the relevant question is whether the records are within the custody or under the control of the ministry.
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> In Order P-994, Adjudicator Cropley began her analysis of the issues with a consideration of whether the courts are institutions under the *Act*. She stated:
>
> > In my view, the discussions surrounding the evolution of the Act clearly contemplate that the courts and the judiciary (that is, the judicial branch of government) are to be set apart from other types of institutions and from the other branches of government generally. The unique function the courts fulfil within our society is distinct from the usual perception of "government." Accordingly, I find that the courts are not part of any Ministry and are not included in paragraph (a) of the definition of "institution."

> Since I have found that the courts are not included in either paragraph (a) or (b) of the definition of "institution," they are not institutions under the Act.

Having found that the courts are not "institutions" under the *Act*, Adjudicator Cropley states:

> In its representations, the Ministry [of the Attorney General] has acknowledged that it has a special relationship with the courts. *In my view, this special relationship impacts on the issue of whether or not records in a court file are in the custody and/or control of an institution.*

With respect to the relationship between the ministry and the courts, Adjudicator Cropley noted:

> I have found that the courts are not institutions under the Act. Moreover, I recognize that the independence of the judiciary is well established in the common law and reflected in the [*Courts of Justice Act*]. In my view, the objectives of the Act as set out in section 1 are, to a certain degree, met by the "public" nature of court proceedings and the ability of the judiciary to control the dissemination of sensitive information. *In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those records which are directly related to this function. However, because of the administrative relationship of the Ministry to records in a court file, the question remains, does the Ministry have custody and/or control over these records for the purposes of the Act.* [Emphasis added.]

After reviewing the indicia of custody and control set out by former Commissioner Linden in Order 120, and the representations of the parties, Adjudicator Cropley stated:

> The record at issue was generated by the appellant, not the Ministry, for the purpose of placing the matter before a court. Although the Ministry may become involved once process is issued, in this case, process was not issued, and the Ministry had no role to play in the matter.
>
> As I indicated above, the Ministry submits that it has possession of the record as a "custodian" only and any

authority it has over the record's use is subject to supervision by the courts.

Moreover, the Ministry submits that the record does not relate to its mandate and functions, but rather relates to the court proceedings for which the record was created. Further, the record is not integrated with Ministry records in any way.

With respect to the disposition of the record, section 95a of the *Courts of Justice Amendment Act, 1989*, S.O. 1989, c.55 [section 79, *Courts of Justice Act, 1990*] provides that court records are to be disposed of in accordance with the directions of the Deputy Attorney General. However, these directions are subject to the approval of the chief judge of the relevant court.

Further, in this regard, the Ministry indicates that the responsibility for making decisions about access is vested in the "head". The head of the Ministry is the Attorney General. The Ministry submits that if court records were subject to the access requirements of the *Act*, the Attorney General would be responsible for making access decisions and this would alter the common law approach, which vests judges with this authority. This could, the Ministry argues, impair the constitutional separation between the courts and the executive branch of government.

I have carefully considered the Ministry's representations, and I find that although the Ministry is in "possession" of records relating to a court action in a court file, its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to "custody" for the purposes of the *Act*. Nor do I find, in applying the factors set out in Order 120 to the evidence before me, that there are indicia of "control" over these records by the Ministry.

For these reasons, I find that the Ministry does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the *Act* and, accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the *Act*.

> I am not satisfied, however, that this conclusion extends to copies of such records which exist independently of the "court file". Accordingly, to the extent that copies of these records also exist independently of the "court file", they would fall within the custody and/or control of the Ministry and, therefore, would be subject to the *Act*.

This office has considered the issue of custody or control of "court records" in a number of other orders, including: Order PO-2446 (informations); Orders P-995, P-1397 (tape recordings of testimony and evidence); and Order P-1151 (jury roll information). With the exception of Order P-1151, the records at issue in these orders were all records that related to specific proceedings in the courts and were contained in the court file relating to the proceeding, and for those reasons the records were found not to be in the custody or under the control of the Ministry.

The information at issue in Order P-1151 was postal code information of jurors that was located in a Ministry database relating to the jury roll. In that order, former Assistant Commissioner Tom Mitchinson found that the information contained in the jury roll was prepared under the *Juries Act* by the Sheriff who was an employee of the courts. He also found that the responsibility for the preparation and the administration of the jury list, and the supervision and management of the jury selection process is under judicial control. Most significantly, he found that the information contained in the database was not integrated with other records held by the Ministry. Having regard to all of these circumstances, Assistant Commissioner Mitchinson found that the information requested was not in the custody and/or under the control of the Ministry. This order is an important illustration of the manner in which the *Act* respects judicial independence over court records and over administrative matters under judicial control.

[17] Furthermore, in Order PO-2798, Adjudicator Catherine Corban 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 had been placed under the operations of the PGT, were not in the custody or control of the PGT. Referring to previous orders of this office, she stated:

> The reasoning applied by Adjudicator Cropley in Order P-994 was subsequently followed by Senior Adjudicator John Higgins in Order P-1089. In Order P-1089 Senior Adjudicator Higgins found that writs of seizure and sale issued by the Court and subsequently filed with sheriffs' offices were not subject to the *Act*. He identified the following findings as relevant to his determination of the matter:

(1) in issuing and dealing with writs of seizure and sale, the Registrar and the Sheriff act as officers of the Court;

(2) writs of seizure and sale result from judgments of a court and remain under the court's overriding supervision while in the possession of the Sheriff;

(3) despite the Ministry's administrative involvement with writs of seizure and sale, including the manner in which searches for them are conducted by members of the public, the Ministry does not have sufficient powers relating to the acquisition, retention and disposal of writs of seizure and sale by the sheriff to give it "control" over such writs in the hands of the Sheriff;

(4) the Ministry's possession of writs of seizure and sale in the hand of the Sheriff is a "bare" possession, and does not include sufficient rights to deal with them to amount to "custody" for the purpose of the *Act*;

(5) accordingly, the Ministry does not have custody or control of writs of seizure and sale in the hands of the Sheriff and I find that they fall outside of the scope of the *Act*.

I agree with Senior Adjudicator Higgins' findings and find that there are relevant in the present appeal.

I have carefully considered the parties' representations and the particular circumstances of this appeal. Although I acknowledge that the Accountant has possession of statements filed by the municipality, which accompany payments of the proceeds of municipal tax sales into Court, I find that they are not under his "custody" or "control" for the purposes of section 10(1) of the *Act*.

Specifically, I accept that with respect to the statements received relating to the proceeds of municipal tax sales, the Accountant clearly acts solely as an officer of the Court. Although, as the depository for all monies paid into Court, the Office of the Accountant receives statements filed with the Court relating to the proceeds of municipal tax sales, the Accountant's rights with respect to the use of such records are purely administrative in nature. The Accountant has 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 my view, although the Accountant is in possession of records responsive to the appellant's request, it amounts to "bare" possession as he does not have sufficient powers to give him "custody" or "control" for the purposes of the *Act*. I find that 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". Nor do I find, on the evidence before me, that there are sufficient indicia of "control" over these records by the Accountant, as they are court records which remain under the Court's overriding supervision while in his possession. I conclude, therefore, that the records at issue are court records that are under the custody or control of neither the Accountant nor the OPGT for the purposes of section 10(1) of the *Act*. Accordingly, there is no right of access to the records under the *Act*…

[18] Lastly, as I indicated above, both parties referred to Order PO-2739 in their representations. A judicial review of Order PO-2739 resulted in the recent decision of the Divisional Court in *A.G. v. Ontario*. As noted above, this decision was issued at the time that the parties were in the process of providing representations in this appeal, and the parties were invited to provided additional representations in light of the decision, which I will discuss further below. At this point, it is helpful to review the decision in some detail.

A.G. v. Ontario

[19] This decision of the Divisional Court dismissed an application by the Ministry of the Attorney General (the ministry) and upheld the decision of Assistant Commissioner Brian Beamish in which he ordered the ministry to disclose certain "Offence Type Statistics by Location Reports." The records at issue in that appeal were prepared by ministry staff at the request of the Chief Justice of the Ontario Court of Justice for his own use. They were subsequently made available to and were used by crown prosecutors in the Criminal Law Division for ministry resource allocation and planning purposes.

[20] In his decision, the Assistant Commissioner found that the ministry had custody and control of the records at issue. In arriving at this decision, he found that the records contain information relating to the timely processing of criminal proceedings, the types of charges and their disposition, and he concluded that this information relates to the core function of the ministry's court services and criminal law divisions. He also found that the records did not contain "judicial information;" nor were they court records as they did not relate to a specific court proceeding or "more generally to the adjudicative function of the courts." He found further that due to the "high degree of integration and co-mingling of the report in [the ministry] operations across divisions and among staff" the ministry had more than "mere possession." He also found that there was no evidence that the ministry's access to and use of the records was

controlled by the judiciary and concluded that a finding that the ministry had custody and control of the records would not interfere with the independence of the judiciary.

[21] In its judicial review of the Assistant Commissioner's decision, the Divisional Court reviewed the origins of "Judicial Independence," noting the "judicial independence consists of three core components: security of tenure, financial security and administrative independence." The Divisional Court pointed out that "judicial administrative independence requires judicial control with respect to matters of administration bearing directly and immediately on the exercise of the judicial function," and indicated that the Chief Justice of the Court plays a central role in this regard.

[22] The Divisional Court referred favourably to the following comments made by Adjudicator Laurel Cropley in Order P-994 regarding the "special relationship that exists between [the ministry] and the judiciary:"

> In acknowledging that the responsibility over records in a court file is divided between the Ministry and the judiciary, the Ministry maintains that such records are central to the adjudicative process of the courts and are, therefore, intimately related to the judicial function of the courts. Further, the Ministry submits that while recognizing the administrative role the Ministry plays in maintenance of these records, the common law has expressly recognized the right of the courts to supervise and protect their own records [see: *Re London Free Press Printing Co. Ltd. and Attorney General of Ontario* (1988), 66 O.R. (2d) 693 (H.C.)].
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> In this regard, the Ministry recognizes that it has possession of such records in that they are housed in Ministry premises and are cared for by Ministry staff, and that, as administrator of the courts, it has a limited right to possess these records, in that responsibility for administrative decisions regarding the establishment of procedures for accessing the records may lie with the Ministry. The Ministry submits, however, that it possesses the records as a "custodian" only and any authority it has over the records' use is subject to supervision by the courts.
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> I have found that the courts are not institutions under the *Act*. Moreover, I recognize that the independence of the judiciary is well established in the common law and reflected in the *CJA*. In my view, the objectives of the *Act* as set out in section 1 are, to a certain degree, met by the "public" nature of court proceedings and the ability of the judiciary to control the dissemination of sensitive information. In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those records which are directly related to this function. However, because of the administrative relationship of the Ministry to records in a court file, the question remains,

> does the Ministry have custody and/or control over these records for the purposes of the *Act*.

[23] Noting that Order P-994 dealt with records in court files, the Divisional Court found that the reasoning was applicable to the records at issue in that appeal. The Court found that:

> …Given the Ministry's and the Court's shared mandate over Court administration, the Act must be interpreted in a way that allows the judiciary to use Ministry resources for generating reports that bear directly and immediately on the exercise of the judicial function without having those reports be there upon considered to be in the "custody" or "control" of the Ministry.

[24] Recognizing that ministry staff collect, store and manipulate data for the courts, the Divisional Court raised the question whether the database from which the reports were compiled is in the custody or control of the ministry. However, the Divisional Court noted that this issue was not put before the Assistant Commissioner, nor was it sufficiently argued before the court. The Divisional Court declined to address this issue further as the records at issue in the case before it were the generated Reports, not the database used. The Divisional Court pointed out that the reports "were generated at the request of and in accordance with the instructions of the Chief Justice." The Court found that it would be inconsistent with the principles of judicial independence to require the Chief Justice to explain, in response to an access request, why they were requested. The Court concluded:

> Thus, to the extent that the decision under review finds that the Reports do not constitute judicial information because the data used to generate the Reports had been collected, prepared and maintained by the Ministry, we reject that submission. By virtue of s. 92(14) of the *Constitution Act, 1867*, it is the Ministry, not the Courts, that collects, prepared and maintains data related to the administration of justice. If the Chief Justice requests that Ministry staff access that data and manipulate it to yield certain information, the reports generated as a result of those requests should remain within the "control" of the judiciary. Thus, we find that the Commissioner erred when he found that the Reports are "under the control of" the Ministry.

[25] With respect to the issue of custody, the Divisional Court reviewed the manner in which this office has determined whether records are in the custody of government institutions, referring to Orders P-239 and 120. The Divisional Court found the reasoning in Order P-239, which dealt with records of the Ombudsman (which is not an institution under the *Act*) that were in the possession of the Ministry of Government Services (which is an institution), to be particularly helpful in analyzing whether the

records at issue in the case before it were in the custody of the ministry. The Divisional Court cautioned however, that unlike the Ombudsman's office, "the principle of preserving judicial independence must be kept in mind at every stage of the analysis."

[26] In Order P-239, the Commissioner stated:

> Although the Ombudsman's office is not listed among those entities which are to be considered "institutions" for the purposes of the Act, there is nothing in the Act which expressly excludes from its application records which originated in the Ombudsman's office.
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> Section 10(1) of the Act provides as follows:
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> > 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. [Emphasis added.]
>
> It is my opinion that to remove information originating from non-institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the Act. Therefore, it is my view that the Act can apply to information which originated in the Ombudsman's office which is in the custody or under the control of an institution. I must now determine whether the records are in the custody or under the control of the institution.

[27] After analyzing the records under the factors that assist in determining the issue set out in Order 120, the Commissioner in order P-239 found that although the records were created by the office of the Ombudsman for its own use, a copy of them was also in possession of the institution. It noted that the institution had possession of the records for over nine years and that it took responsibility for the care and protection of them. In addition, the Commissioner found that the records related to the core functions of the institution and that the institution's actions in dealing with them implied that it had a right to do so. The Commissioner concluded that the institution had more than "bare possession" of them; rather, it had custody.

[28] After reviewing previous orders on this issue and the circumstances of the appeal before it, the Divisional Court found that "to the extent that the Ministry has a right to possess the Reports because it compiled them at the request of the judiciary, we agree with the reasoning of Adjudicator Cropley in Order P-994, *supra*, at page 7, namely that 'its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to 'custody' for the purposes of the *Act*."

[29] However, the Court noted that in the case before it, the Chief Justice agreed to make the Reports available to ministry staff for their own planning and decision-making purposes "with no distinct or special limitation." The Court noted as well that the contents of the report related to the ministry's mandate and functions, that it had been relied upon and integrated with other ministry records, and concluded:

> [T]he 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*...

[30] I note that the Divisional Court was not content to leave the matter on this basis alone. In keeping with previous comments made by the Court regarding the importance of judicial independence, the Court also found that:

> 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.

Representations

[31] The PGT begins by providing background information about the role of the Accountant of the Superior Court. It states:

> The Accountant of the Superior Court of Justice holds in trust funds paid into Court pursuant to Orders of the Superior Court of Justice and various statutes of Ontario. In 1997, The Accountant of the Superior Court of Justice statutorily amalgamated with The Public Guardian and Trustee, for the purposes of facilitating investment of trust funds held by the Accountant. The Accountant of the Superior Court of Justice is a segregated program within The Office of the Public Guardian and Trustee, for the reasons explained in these submissions.
>
> The Accountant of the Superior Court of Justice is an officer of the Court. He exercises no discretion with respect to the funds paid into Court and must comply strictly with orders of the Court or the mandatory provisions of statutes of Ontario or the *Rules of Civil Procedure*. The Accountant of the Superior Court of Justice occupies a unique position within the structure of the Superior Court of Justice. His status is similar to that of the Sheriff:

> Orders P-1059 and P-1151. Funds held by The Accountant of the Superior Court of Justice do not escheat to the Crown.
>
> The database in which The Accountant of the Superior Court of Justice records payments into Court is separate from the database in which other incapable clients and estates of deceased persons are recorded in the Office of the Public Guardian and Trustee. Only the staff working with The Accountant of the Superior Court of Justice and its legal counsel have access to the records of The Accountant of the Superior Court of Justice. Other employees of the Office of the Public Guardian and Trustee do not have access to these records or the database. Access to the Accountant's records by other staff of the Office of the Public Guardian and Trustee or outside third parties is granted only to a counsel of record in a particular proceeding; or the individual for whom the trust funds are held.

[32] The PGT provides affidavit evidence, and refers to the relevant sections of the *Public Guardian and Trustee Act*, in support of its statements regarding the function and mandate of the Accountant of the Superior Court of Justice.

[33] The PGT also provides detailed representations explaining the reasons why monies are paid into court, for example:

> - Pursuant to section 36 of the *Trustee Art*, where money may be paid into Court by a trustee on behalf of a minor or mentally incapable person. Money paid into Court may only be paid out pursuant to a further Order of the Court;
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> - Pursuant to section 61 of the *Family Law Act*, here a minor becomes entitled to an award for loss of guidance, care and companionship or other damages arising out of the death or injury of a parent, grandparent, brother or sister, funds may be paid into Court on behalf of a child under age 18. Pursuant to section 61(4), a Judge by court order may postpone the distribution of money to which an Order is entitled;
>
> - Funds paid into Court by various municipalities pursuant to the *Municipal Act, 2001*, which represent the net proceeds of sales of real property for municipal tax arrears. Money paid into Court is payable within specific time frames to [a range of possible parties]. In all cases, a court order is required to direct The Accountant to pay the funds out of Court to the appropriate party.

[34] The PGT further explains the prescribed circumstances in which payments out of court are made: pursuant to court order or statute; or in accordance with the provisions of Rule 72.03 of the *Rules of Civil Procedure* and the applicable provisions depending on

the circumstances, as specified in the Rule. The PGT notes that "[o]nly the party or the party's solicitor of record may apply to the Court for an order directing The Accountant of the Superior Court of Justice to make the payment out of Court."

In addition, the PGT points out that:

> Money held for the benefit of a child under age 18 may be held for 18 years or more, depending on the age of the child at the time of payment into Court and the date on which the child is to be paid his or her trust funds. Notwithstanding the length of time that the trust funds are held and managed by The Accountant, the beneficiary of the funds is known and the funds cannot be said to be unclaimed if the child has not yet reached the age of entitlement.

[35] The PGT indicates that although not legally required to do so, the Accountant of the Superior Court of Justice provides notifications of funds held in Court in specific, defined circumstances. It provides examples of these circumstances such as at the request of a Judge or Master of the Superior Court of Justice, to a party to litigation, and to minor children immediately prior to age of entitlement.

[36] With respect to the specific indicia of custody and control, the PGT states:

> The records held by The Accountant of the Superior Court of Justice are records of the Court, held in individual files, to track, manage and facilitate payment out of Court at the appropriate time, pursuant to Court order, statute or the *Rules of Civil Procedure*.
>
> Pursuant to Order PO-2793, the paper court records held by The Accountant in respect of municipal taxes sales were found by the Adjudicator to be court records that are not under the custody and control of the Accountant as the Accountant did not create the records and had only bare possession of them.
>
> Similarly, the court records filed with The Accountant are created by municipalities (tax sales), insurance companies (insurance payments), lawyers and Judges (other litigious matters), not by The Accountant (unlike Order P-120) or another institution covered by the Act (as in Order P-239). The Accountant must comply with the court documents as directed by order or statute, but does not create the court documents: Order M-506. The Accountant has bare possession of the court records: *Walmsley and Attorney General of Ontario et al.* (1997), 34 O.R. (3d) 611; [1997] O.J. No. 2485 (C.A.).

> Similarly, the records held by The Accountant in respect of payments into Court under [a number of the circumstances identified above], are court records created by lawyers and third parties for purposes of payment into Court. The records are not created by the Accountant and are held only for purposes of tracking payments into Court and facilitating payment out of Court, as directed. The Accountant has no authority to regulate the use and control of the records. The records are copies of court documents or original court documents required to be filed with The Accountant as part of a statutory or adjudicative process. The Accountant has only bare possession of the records and does not "own" the records, contrary to Order MO-1251. The records relate to the Court's adjudicative function and the Court has a right to supervise and control their own records. The *Courts of Justice Act* prescribes the right of access to the Court's records by non-parties.

[37] With respect to the database maintained by the Accountant, the PGT states:

> The database maintained by the Accountant is used to track approximately 40,000 accounts. The information recorded summarizes the information taken from the court records when money has been paid into Court. Where possible, it includes the party entitled to the funds and the date of payment out of Court if specified in a Court order, such as in the case of a minor who will become entitled at a future specified date. In cases of litigation, the party entitled to the funds must be determined by Court order in the litigation, so the party entitled cannot be recorded as it has not yet been determined.
>
> The database accounts include trust funds which are "outstanding" in the sense that The Accountant continues to hold the funds in trust pending receipt of an Order of the Superior Court of Justice directing the Accountant to disburse the funds to a named party after adjudication or to a child who has not yet attained the age of entitlement …
>
> The information from count records is deposited in the database by staff who work with The Accountant of the Superior Court of Justice, copied from information contained in court records filed with The Accountant. The Accountant does not create the information: contrary to Order P-120.
>
> The intended use of the database is restricted to staff working with The Accountant of the Superior Court of Justice (and no other employee of the Office of the Public Guardian and Trustee). The database is not a public record - it is an administrative record of some particulars of the court records to facilitate the efficient management and control of the records and management of the trust funds held by The Accountant and, in that

regard, relates to The Accountant's functions as the "banker" of the Superior Court of Justice.

The maintenance of the database is not a "core", "central" or "basic" function of the institution, as was found in Order P-912 and *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (1999), 47 O. R. (3d) 201 (C.A.). The core, central and basic function of The Accountant is to receive payments into Court and pay trust funds out of Court in accordance with Court orders or statutes. The database is a listing of the paper court records filed with The Accountant. Only the paper records, based on court orders and statutes, can be relied upon to determine what steps The Accountant will take in respect of trust funds paid into Court.

The Accountant does have physical possession of the database and has a right to possession of the technology in which the court information is stored.

The Accountant does not have a statutory power or duty to carry out the activity that resulted in the creation of the record, contrary to Order P-912 and *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (1999), 47 O.R. (3d) 201 (C.A.). Rather, the records are created by lawyers, judges and other parties to litigation. The Accountant must carry out a statutory duty - compliance with the Court's orders – as a result of being provided with the court records by lawyers and judges.

The court records are an integral part of the court record of a proceeding: Order P-1397.

The Accountant does not regulate the content of the database; its contents are dictated by the paper court records provided to The Accountant; The Accountant has no authority to disclose the information in the database to anyone; nor can the paper records be disclosed to any person other than the party, counsel for the party, or directly to the Court. The Court has the right to dictate disclosure of the records held by The Accountant. *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, (1999), 47 O.R. (3d) 201 (C.A.), Order P-994; Order P-1089.

The Accountant relies on the database to centrally record some particulars of the paper court records provided to The Accountant by lawyers and the Superior Court of Justice, for the efficient retrieval of the paper records and management of trust funds held by the Accountant.

> The limits of the database contain a listing of the paper court records only, in addition to a file number attached to the paper record by The Accountant. The database may only be accessed by staff who work for The Accountant of the Superior Court of Justice, because the customers of The Accountant of the Superior Court of Justice are not clients of any other program of The Public Guardian and Trustee …
>
> The Accountant's database is segregated from other records held by The Public Guardian and Trustee on behalf of its incapable clients and estates. Access to the Accountant's database is restricted to staff who work with The Accountant and controlled within the institution and other staff of the office of the Public Guardian and Trustee cannot access the information in the Accountant's database.
>
> No individual or organization, other than the Accountant, holds the database.

[38] The appellant provides a number of arguments in support of her position that the records are in the custody and/or the control of the PGT. She also indicates that one of the purposes of the request is to ensure that parties who are entitled to funds paid into court are able to access information about these monies.

[39] Although the appellant acknowledges that the paper copies of court records referred to by the PGT may be outside the PGT's custody or control, she distinguishes these records from the database maintained by the Accountant which, she argues, contains the requested information. The appellant points out that she is only interested in information from the database and the "working list" of former minors who are entitled to but have not yet claimed their funds, which she submits is distinguishable from the paper court records:

> …the Database and Working List were created by the Accountant solely for the purpose of fulfilling its statutory mandate. The Database and Working List are separate from the court records,.. Even if the court records are not in the Accountant's custody and control, the Database and Working List are.

[40] With respect to the issue of the custody or control of the records, the appellant states:

> … Applying the factors identified by [the IPC] in previous orders …, it is evident that [the ministry] has custody and control of the Database and Working list.

> The Accountant is an employee designated by the Public Guardian and Trustee. The functions of the Accountant are determined by the executive branch of government, under section 14(f) of the *PGT Act*, not the judiciary. It is true that the disposition of funds at issue in litigation must be determined by the Court; however, all [ministry] staff are required to comply with court orders that affect their duties. That does not make every document they create a "court record." Moreover, [the ministry] acknowledges that in some cases payment is governed by statute, not a court order.

[41] The appellant then reviews the PGT's description of the Database, and then states:

> The Database is … not even used by the courts. It is used by [PGT] staff for administrative purposes under the *PGT Act*. It is clearly not a "court record" within the meaning of [previous orders] relating to court files that are cited by [the PGT].

[42] The appellant then contrasts the information requested in this appeal with the paper copies of court records in the Accountant's possession, which were addressed in Order PO-2798. She states:

> The records at issue in PO-2798 were forms filed in individual court files. In such case, the judge seized of the file, or the court registrar, has jurisdiction under the *Courts of Justice Act* and *Rules of Civil Procedure* to grant or deny access to the file, depending upon whether it is subject to a confidentiality order. The effect of Order PO-2798 is that the requester must seek such records from the court files, rather than under the *Act*.
>
> In contrast, the [requested information] is not filed in any court file and is not accessible from the court registry. It is not a document created for the purpose of any particular court proceeding and is not a document of which any particular judge is seized. There is no process outside of the *Act* through which to obtain the [requested information].

[43] The appellant then provides the following representations in support of her position that the Database and Working List are in the custody and/or control of the Accountant:

> The Database and Working List were both created by the office of the Accountant with the purpose of assisting the Accountant in carrying out its statutory duties. Management of accounts and disbursement of funds to the entitled parties are "core", "central" or "basic" functions of the Accountant. The issue is not … whether "maintenance of the database is

> not a 'core', 'central' or 'basic' function of the institution." The issue is whether the activity that resulted in the creation of the Database and Working List (management of the accounts) is a "core" function. Clearly it is. Indeed, it is difficult to imagine that the Accountant could track more than 40,000 accounts without creating a database.
>
> The Accountant and staff created, has possession of and uses the Database and Working List, without restriction, for its own administrative purposes.
>
> It is the Accountant that has the authority to regulate the content that is entered into the Database and the use to which the Database is put. Although the Database includes information contained in otherwise public court records, the Accountant has distilled and summarized the information in these court records specifically for its own purposes. In doing so the Accountant has created a new record that falls within the scope of [the *Act*], and should be accessible to the public. The same is true of the Working List.

[44] The appellant then submits representations reviewing the "broad and liberal approach" that the courts have taken to the custody or control questions. The appellant also refers to the decision of the *Ontario Court of Appeal in Ontario (Criminal Code Review Board) v. Ontario (Inquiry Officer)* [1999] O.J. No. 4072 *(C.C.R.B.)*. In that decision, which reviewed Order P-912 of the this office, the Court held that the backup tapes from a court reporter's stenographic notes of a hearing constitute a "record" that is subject to the *Act*, and that this record was in the custody and/or control of the Criminal Code Review Board (the board) for the purpose of the *Act*. The appellant argues that this decision supports its position because: 1) the purpose of creating the backup tapes was to fulfill the board's statutory mandate; 2) the board had the authority to limit the use to which the backup tapes may be put; and 3) the court applied a broad and liberal meaning to the custody and control question.

[45] The appellant distinguishes the decision in *A.G. v Ontario* as that case dealt with a record that had been requested by the Chief Justice, whereas in the current appeal, her request is for records created by the Accountant for its own purposes. She submits further that, based on her earlier arguments, this decision of the Divisional Court supports her position that the records are in the custody of the PGT. She concludes that "disclosure clearly would not compromise judicial independence. The information is being sought to facilitate motions before the appropriate courts for orders returning monies to the parties entitled to them. That is a purpose that advances the judicial role and the administration of justice in the province."

[46] The appellant also argues that the decision in Order P-994 supports her position, as it confirms that, even if records are court records and not in the custody or control of

an institution, copies of those same records that are in the custody or control of an institution, rather than a court, are subject to the *Act*. The appellant argues that this is significant because the PGT confirms that the information in the Database and Working List is copied from the court records and, in addition, is aggregated, formatted and used by the Accountant.

[47] The appellant also addresses the decision in PO-2739, which I address below.

Analysis and Findings

[48] I have carefully considered the parties' representations and the particular circumstances of this appeal.

[49] As noted above, previous orders have established that *paper records* from the courts in the possession of the Accountant are not in the PGT's "custody or control" for the purpose of the *Act*. Order PO-2798 determined that records relating to the proceeds of municipal tax sales for property owners, held by the Accountant of the Superior Court of Justice, were court records and were not in the custody or control of the PGT.

[50] In this appeal, however, the record at issue is information in *the database* created and used by the Accountant to fulfill his responsibility to administer the court records in his possession. Accordingly, the main issue before me is whether the PGT has custody and/or control of the information in the database by virtue of the fact that the Accountant of the Superior Court of Justice created the database and manipulated the data contained therein for the purposes of meeting his statutory requirements. For the reasons that follow, I find that the PGT does not have custody or control of the information in the database.

[51] Based on the evidence presented and the finding in Order PO-2798, I am satisfied that The Accountant of the Superior Court of Justice is a segregated program within The Office of the Public Guardian and Trustee. In particular, I am satisfied that the Accountant of the Superior Court of Justice is an officer of the court and holds in trust funds paid into Court pursuant to Orders of the Superior Court of Justice and various statutes of Ontario.

[52] I also accept that the Accountant exercises no discretion with respect to the funds paid into Court and that he must comply with orders of the Court. Even though, as the appellant points out, there is a dual authority for payment of monies into court (through court order or under statute), it is apparent that any distribution of the vast majority of those monies is subject to judicial order or, at a minimum, to judicial oversight. The PGT has provided significant evidence concerning the authority to distribute the monies referred to in the court records reflected in the information

contained in the database. To a large extent, the actions taken by the Accountant in dealing with the funds are done under the direct control of the courts.

[53] Although the appellant correctly points out that certain records held by the PGT are in its custody and control, I am satisfied that the Accountant of the Superior Court of Justice holds a unique position within this office. As a result, the previous orders finding that the PGT's own records are subject to the *Act* are distinguishable on this basis, notwithstanding that the Accountant has been statutorily amalgamated into the office of the PGT.

[54] In addition, based on the evidence provided by the PGT, I am satisfied that the database used by the Accountant of the Superior Court of Justice is distinctly separate from the other databases used by the PGT. The PGT has stated:

> The database in which The Accountant of the Superior Court of Justice records payments into Court is separate from the database in which other incapable clients and estates of deceased persons are recorded in the Office of the Public Guardian and Trustee. Only the staff working with The Accountant of the Superior Court of Justice and its legal counsel have access to the records of The Accountant of the Superior Court of Justice. Other employees of the Office of the Public Guardian and Trustee do not have access to these records or the database.

[55] Furthermore, I am not persuaded by the appellant's arguments that, by creating the database and manipulating the data for the purposes of meeting his statutory requirements, the information in the records changes in nature from court records to information that falls within records in the custody or control of the PGT. In order to fulfill its statutory mandate to administer the records, and given the nature and volume of the records, the Accountant is necessarily required to establish and maintain a database to administer the records. To the extent that the Accountant is aggregating or manipulating the data, I find that he is doing so in his role as an officer of the court and to administer the court records. The fact that this information is not simply filed in hard copy, but is input into a separate database used exclusively by the Accountant to administer the court records, does not change its status as court records. Accordingly, I am satisfied that the information in the database remains information which can be characterized as "court records," used to properly administer funds paid into court.

[56] With respect to the "Working List," the PGT has identified how it administers the information in this record, relating to monies owed to minors in trust. It appears that in certain limited circumstances, the distribution of these monies is done by the Accountant without the subsequent direct involvement of the courts. For example, when a minor entitled to funds upon reaching a certain age, attains that age, the Accountant proceeds to distribute the funds in accordance with his statutory obligations. However, I find that these additional actions taken by the Accountant also

relate directly to his duties and obligations as the Accountant of the Superior Court, under the general oversight of the Court, and that the records from which the information relating to entitlement is gleaned are court records. In these circumstances, I also find that this information is not in the custody or under the control of the PGT for the purpose of the *Act*.

[57] Accordingly, I am satisfied that the principles established in Order PO-2798 that copies of court records in the possession of the Accountant remain court records applies similarly to the information gleaned from these court records and input into a database used exclusively by and for the Accountant.

[58] I find support for this decision in the finding in Order P-1151, which is referred to in the discussion above. As noted, the information at issue in that order was postal code information of jurors that was located in a ministry database relating to the jury roll. In that order, former Assistant Commissioner Tom Mitchinson found that the information contained in the jury roll was prepared under the *Juries Act* by the Sheriff, who was an employee of the courts. He also found that the responsibility for the preparation and the administration of the jury list, and the supervision and management of the jury selection process is under judicial control. Most significantly, he found that the information contained in the database was not integrated with other records held by the ministry. Having regard to all of these circumstances, Assistant Commissioner Mitchinson found that the information requested was not in the custody and/or under the control of the ministry.

[59] I find further support for my decision in the finding in Order P-1089, also referred to above. In that order, former Senior Adjudicator Higgins found that writs of seizure and sale issued by the Court and subsequently filed with sheriffs' offices were not subject to the *Act*. He confirmed that, in issuing and dealing with writs of seizure and sale, the Sheriff acts as an officer of the Court, that the writs of seizure and sale result from judgments of a court and remain under the court's overriding supervision while in the possession of the Sheriff. He further determined that, despite the Ministry of the Attorney General's administrative involvement with writs of seizure and sale, the ministry did not have sufficient powers to give it "control" over such writs in the hands of the Sheriff. Senior Adjudicator Higgins also found that the ministry's possession of writs of seizure and sale in the hand of the Sheriff was a "bare" possession, and that the ministry did not have custody or control of writs of seizure and sale in the hands of the Sheriff.

[60] These orders, as well as the decision in *A.G. v. Ontario*, are important illustrations of the manner in which the *Act* respects judicial independence over court records and over administrative matters under judicial control. I apply these same principles to the database information at issue in this appeal.

[61] I also find that, to the extent that the Court of Appeal decision in *C.C.R.B.*, relied on by the appellant, is relevant to the issue in this appeal, it supports my finding. In that decision, in which the backup tapes held by a court reporter were found to be in the custody and control of the board, the board was an institution under the *Act*. Any records in the board's custody or control were accordingly covered by the *Act*. The Court of Appeal's decision that the backup tapes held and used by the court reporter were in the custody and control of the board reviewed the purposes for which the backup tapes were made and used. It stated that the court reporter was hired for the purpose of making an accurate record, and that she chose to use a backup audiotape process to assist her in doing so. As a result, the Court found that this record was under the control of the board. To the extent that this decision has any direct relevance to the issues in this appeal, it would support a finding that the Accountant's decision to use a database to aggregate and store information from the court records does not change the fact that the information is used for court purposes.

[62] On a final note, I have considered the decision in *A.G. v Ontario* and the impact it may have on the issues in this appeal. In my view, the Divisional Court very clearly identified the nature of information relating to the administration of the courts to be within the mandate of the courts. It also confirmed the importance of judicial independence, including administrative independence.

[63] I also note that there are significant differences between the records at issue in that decision and the information at issue in this appeal. In the *A.G. v. Ontario* decision, the records at issue were specific reports the Chief Justice of Ontario asked the ministry to prepare, based on data held by the ministry. The Court found that, except for the fact that the Chief Justice later shared the reports with the ministry, the reports would otherwise not have been in the custody or under the control of the ministry. Until the Chief Justice decided to share the reports with the ministry, without placing any distinct or special limitations on the ministry's use of the reports, the reports would otherwise have been outside the custody and control of the ministry.

[64] In this appeal, the information at issue is contained in a separate database used exclusively by the Accountant to fulfill its statutory mandate to administer the court records. As discussed above, I am not satisfied that the information in the database is in the custody or control of the PGT simply because the Accountant is a segregated program within the office of the PGT.

[65] Lastly, my finding that the information in this database qualifies as court records is consistent with the Divisional Court's decision in *A.G v. Ontario*, even though the Divisional Court in that decision distinguished the information in a database from the specific records at issue, and chose not to address the information in the database. Because the databases in the two cases are different, I find that the Court's decision not to address the issue does not impact my decision in this appeal. In the *A.G. v. Ontario* decision, the record at issue was a report prepared for the Chief Justice based

on information contained in various general databases maintained by the ministry; it was not gleaned from a distinct, separate database dedicated to administering court records, as is the information at issue in this appeal.

ORDER:

I find that the requested records are not in the custody or under the control of the PGT, and I dismiss this appeal.

Original signed by: January 30, 2012
Frank DeVries
Adjudicator