

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3814

Appeal PA16-483

Cabinet Office

February 15, 2018

**Summary:** The appellant submitted three access requests to Cabinet Office under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for certain communications or other records that were sent or received by a specific member of provincial parliament (MPP). In response, Cabinet Office sent a decision letter to the appellant claiming that it does not have custody or control of such records for the purposes of section 10(1) of the *Act*. The appellant appealed that decision to this office. In this order, the adjudicator finds that the records sought by the appellant are not in the custody or under the control of Cabinet Office for the purposes of section 10(1) of the *Act*, and he dismisses the appeal.

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

### OVERVIEW:

[1] Under section 10(1), the *Freedom of Information and Protection of Privacy Act* (the *Act*) only applies to records that are in the custody or under the control of an institution. The issue to be resolved in this appeal is whether certain communications or other records that were sent or received by a specific member of provincial parliament (MPP) are in the custody or under the control of Cabinet Office for the purposes of section 10(1) of the *Act*.

[2] The appellant, which requested these records, is a company that provides digital solutions, including an online campground reservations system for governments. In

2009, the appellant won a competitive bidding process to provide Ontario Parks with such a system and signed a contract with the Ontario government. However, in 2010, the Ontario government terminated its contract with the appellant and awarded it to another company. This latter company was the former provider for the Ontario Parks reservation system before losing it in the competitive bidding process in 2009. The appellant believes that there may have been political interference in the process that led it to lose the contract and is suing the Ontario government.

[3] The appellant submitted separate access requests under the *Act* to three committees of the Legislative Assembly of Ontario (the Assembly) for “any communications or records either verbal, written, emails, etc. sent and received between . . . [Liberal Party MPP] Liz Sandals to . . . her constituency office regarding any communications with [a list of specific individuals for various time periods].” The requested records related to Ms. Sandals’ role as:

- Member of the Select Committee on Mental Health and Addiction for the period of February 24, 2009 to August 26, 2010;
- Member of the Standing Committee on Public Accounts for the period of December 10, 2007 to September 7, 2011; and
- Member of the Standing Committee on Government Agencies for the period of December 10, 2007 to September 15, 2009.

[4] However, the *Act* only has a limited application to the Assembly. Although the Assembly is defined as an “institution” under paragraph (0.a) of the definition of that term in section 2(1), section 1.1(1) limits its application by stating, “This Act applies to the Assembly, but only in respect of records of reviewable expenses of the Opposition leaders and the persons employed in their offices and in respect of the personal information contained in those records.”

[5] It appears that the appellant’s three access requests were either transferred or re-submitted to Cabinet Office, which is a ministry of the Ontario government that provides the Premier and her Cabinet with advice and analysis to help the government achieve its priorities.<sup>1</sup> Cabinet Office also qualifies as an “institution” under the definition of that term in section 2(1) of the *Act*.<sup>2</sup>

[6] Cabinet Office then sent a decision letter to the appellant, which stated:

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<sup>1</sup> [www.ontario.ca/page/ministries](http://www.ontario.ca/page/ministries)

<sup>2</sup> Under paragraph (a) of that definition in section 2(1) of the *Act*, “institution” includes a ministry of the Government of Ontario.

The records you have requested, should they exist, relate to Ms. Sandals' role as a member of the Legislative Assembly and are therefore not in the custody or control of Cabinet Office.

For your information, the Supreme Court of Canada in **Canada (Information Commissioner) v. Canada (Minister of National Defence)**, 2011 SCC 25, [2011] 2 S.C.R. 306 ("National Defence"), established a test to determine when records are subject to access to information legislation. Consistent with the Supreme Court's decision, records that relate to legislative assembly business fall outside of the scope of [the *Act*] as they do not relate to the administration of government and a senior member of the public service would not be expected to access the information in relation to the administration of government.

[Emphasis in original]

[7] The appellant appealed Cabinet Office's decision to the Information and Privacy Commissioner of Ontario (IPC). Its appeal letter, stated, in part:

We dispute this matter is a legislative matter.

We are simply investigating [whether] Ms. Sandals communicated with any of these people in regards to a civil suit.

Ms. Sandals has stated in a sworn affidavit that she did not know [name of individual] who is the owner of [appellant's competitor who was awarded contract in 2010]. Her constituency office says all communication was destroyed after they were informed it pertained to lawsuit. We are trying to ascertain if these communications exist anywhere else.

We simply want to explore whether there is in fact communication from Ms. Sandals and anyone else regarding [name of appellant's competitor] as it pertains to this legal matter . . . .

[8] The IPC assigned a mediator to assist the parties in resolving the issue in dispute. However, this appeal was not resolved during mediation and was moved to adjudication for an inquiry.

[9] I sought and received representations from the parties on the issue to be resolved in this appeal. In this order, I find that the records sought by the appellant are not in the custody or under the control of Cabinet Office for the purposes of section 10(1) of the *Act*, and I dismiss the appeal.

## DISCUSSION:

### CUSTODY OR CONTROL

#### ***Are the records sought by the appellant "in the custody" or "under the control" of Cabinet Office for the purposes of section 10(1) of the Act?***

[10] Section 10(1) 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.<sup>3</sup> The courts and the IPC have applied a broad and liberal approach to the custody or control question.<sup>4</sup>

[12] The Notice of Inquiry that I sent to the parties provided a list of factors to consider in determining whether or not a record is in the custody or control of an institution.<sup>5</sup> The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. In determining whether records are in the custody or control of an institution, these factors must be considered contextually in light of the purpose of the legislation.<sup>6</sup>

[13] 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.<sup>7</sup> 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 through 22 and section 49).

#### *Custody*

[14] I will first determine whether the records sought by the appellant are "in the custody" of Cabinet Office for the purposes of section 10(1) of the *Act*. A key factor in making this determination is whether Cabinet Office has physical possession of these

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<sup>3</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>4</sup> *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.); and Order MO-1251.

<sup>5</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>6</sup> *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.)

<sup>7</sup> Order PO-2836.

records, because physical possession is the best evidence of custody.<sup>8</sup>

[15] For the reasons that follow, I find that Cabinet Office does not have physical possession of the records sought by the appellant and they are not in its custody for the purposes of section 10(1) of the *Act*.

[16] Cabinet Office submits that it does not have custody of the records sought by the appellant. It states that the appellant is seeking records for the period ranging from December 10, 2007 to September 7, 2011. During these time periods, Ms. Sandals was not a member of Cabinet but simply an MPP. Subsequently, she was appointed Minister of Education from February 11, 2013 to June 13, 2016, after which she became the President of Treasury Board. However, the records sought by the appellant do not fall within the time periods during which she was a member of Cabinet.

[17] Cabinet Office submits, therefore, that should these records exist, they would concern Ms. Sandals' role as an MPP and a member of the legislative committees identified in the appellant's access requests, not her subsequent role as a minister. In addition, it submits that it does not have physical possession of such records because they would have belonged to Ms. Sandals in her capacity as an MPP.

[18] The appellant alleges that the original versions of the records it is seeking were destroyed. In particular, it claims that legal counsel from Crown Law Office Civil, which is defending the Ontario government against the appellant's civil suit, stated that staff in Ms. Sandals' constituency office destroyed the requested records, including "the letter from [the appellant's competitor] addressed to [her] and couriered to her on or around June 27, 2010. . . ." However, the appellant further asserts that such records "would have been copied or forwarded to other email locations that Ms. Sandals used."

[19] I do not find the appellant's arguments to be persuasive with respect to whether the records it is seeking are "in the custody" of Cabinet Office for the purposes of section 10(1). Cabinet Office denies having physical possession of such records and has supported its position by pointing to the fact that Ms. Sandals was simply an MPP, not a member of Cabinet during the time periods identified in the appellant's access requests. In my view, Cabinet Office's submissions are both logical and credible and have not been effectively rebutted by any of the arguments made by the appellant.

[20] Although the appellant asserts that copies of the records allegedly destroyed by Ms. Sandals' constituency office would have been forwarded to other email locations used by her, it has not provided any evidence to support this speculative assertion. In addition, even if I were to accept that Ms. Sandals or her staff forwarded copies of these records to "other email locations" that she used, Ms. Sandals subsequently became the Minister of Education and then President of the Treasury Board. She was not the minister responsible for Cabinet Office and she would not have any email

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<sup>8</sup> Order P-120.

address associated with that ministry.

[21] Consequently, I find that there is no evidence before me to support a finding that Cabinet Office has physical possession of the records sought by the appellant. I find that such records are not “in the custody” of Cabinet Office for the purposes of section 10(1) of the *Act*. However, they may still be subject to the *Act* if they are “under the control” of Cabinet Office for the purposes of section 10(1).

*Control*

[22] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,<sup>9</sup> the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[23] For the reasons that follow, I find that part one of this test is not met in the circumstances of this appeal, and the records sought by the appellant are therefore not “under the control” of Cabinet Office for the purposes of section 10(1) of the *Act*.

(1) Do the contents of the records relate to a Cabinet Office matter?

[24] To satisfy part one of the two-part test in *National Defence*, the records sought by the appellant must relate to a Cabinet Office matter.

[25] Cabinet Office states that such records do not relate to a Cabinet Office matter. It submits that:

. . . Ms. Sandals’ roles as a member of the Select or Standing Committees would not be matters in which Cabinet Office would be involved. Importantly, Ms. Sandals’ role as a member of the Committees does not relate to the administration of government. Ms. Sandal was not a Minister or part of the Executive Council during the relevant time frame. Further, any records that Ms. Sandals would have created during the requested time frame in her role as a member of the Committees would have been generated in accordance with the mandate of the respective committees, not the mandate of a ministry of Executive Council.

[26] In its representations, the appellant does not address either part of the two-part

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<sup>9</sup> 2011 SCC 25, [2011] 2 SCR 306.

test set out in *National Defence*.

[27] Cabinet Office is a ministry of the Ontario government that provides the Premier and her Cabinet with advice and analysis to help the government achieve its priorities.<sup>10</sup> There is no evidence before me to show that the records sought by the appellant relate to a Cabinet Office matter. In addition, given that the three access requests are for records that cover time periods when Ms. Sandals was simply an MPP and not a member of Cabinet, I find that there is no reasonable basis to conclude that such records relate to a Cabinet Office matter.

[28] Consequently, part one of the two-part test set out in *National Defence* has not been met. Given that both parts of this test must be met to establish that an institution has control of records that are not in its physical possession, it is not necessary for me to consider whether part two of this test has also been met. In short, I find that the records sought by the appellant are not “under the control” of Cabinet Office for the purposes of section 10(1) of the *Act*.

### *Conclusion*

[29] I find that the records sought by the appellant are not in the custody or under the control of Cabinet Office for the purposes of section 10(1) of the *Act*.

### **ADDITIONAL ISSUE – OTHER INSTITUTIONS**

[30] I have resolved the sole issue in this appeal, which is whether Cabinet Office has custody or control of the records sought by the appellant. However, as noted above, the appellant asserts that such records “would have been copied or forwarded to other email locations that Ms. Sandals used.” Consequently, I decided to ask Cabinet Office the following question:

With the exception of Cabinet Office and the Legislative Assembly, are copies of the records sought by the appellant in the custody of any ministry or public body that is defined as an “institution” in section 2(1) of [the *Act*]? In other words, do copies of the records sought by the appellant exist elsewhere within the provincial government?

[31] Although this is not an issue to be resolved in this appeal, I have decided to set out Cabinet Office’s full response in this order,<sup>11</sup> because it provides a broader picture of the government’s position and may assist the appellant in determining whether to continue to pursue access to the records he is seeking. Cabinet Office’s response is as follows:

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<sup>10</sup> See note 1.

<sup>11</sup> In its reply representations, Cabinet Office stated that it consents to sharing these representations with the appellant.

8. In response to the question about whether these records could exist in other institutions, Cabinet Office made enquiries into several institutions.

9. Given Ms. Sandals' role as the Minister of Education, Cabinet Office contacted the Freedom of Information and Protection of Privacy Unit in the Ministry of Education, to determine whether the records could be within the institution's custody or control.

10. The Ministry of Education advised that it received an access request for communications between Liz Sandals or her constituency office and any of the named individuals. (See Appendix "A"). On July 29, 2016, the Ministry of Education issued a decision informing the requester that no records exist.

11. Based on the time frame of the records at issue, and Ms. Sandals' role as a Minister of Education, Cabinet Office respectfully submits that the only other institution where these records would have been likely to exist, would be the Ministry of Education.

12. However, given that the request names individuals that previously held positions within the Treasury Board Secretariat (formerly the Ministry of Government Services) as well as the Ministry of Northern Development and Mines, and the Ministry of Natural Resources and Forestry, Cabinet Office also contacted the respective Freedom of Information and Protection of Privacy Units to confirm whether similar requests were received by those institutions.

13. The Freedom of Information and Protection of Privacy Unit at the Treasury Board Secretariat advised that an access request for communications between Liz Sandals and any of the specified individuals was not received. However, an access request for "Any and all records in relation to any verbal or written exchanges and/or meetings from or to [former Chair of the Management Board of Cabinet] Harinder S. Takhar or any member of his office in regards to [name of appellant's competitor], [name of owner of appellant's competitor], [appellant's name], [acronym of appellant's name], the Ontario Parks Campground Reservation Service or [name of former federal MP] between May 1, 2009 and July 31, 2011" was received on February 8, 2013. In response to the request, a search conducted in the Minister's Office resulted in no records. A "no records" decision was issued to requester on March 4, 2013.

14. In response to Cabinet Office's request, the Freedom of Information and Protection of Privacy Unit in the Ministry of Northern Development and Mines searched their access request database and



advised that no requests were received for communications between Liz Sandals and any of the specified individuals. Further, the Ministry of Northern Development and Mines had not received any requests which contained the subject matter key words listed in the access requests received by Cabinet Office.

15. In addition to making enquiries with the Freedom of Information and Protection of Privacy Unit, Cabinet Office also contacted the communications unit within the Ministry of Northern Development and Mines to determine whether any correspondence related to the subject matter of the request was received. The communications unit searched its correspondence database and advised that there were no correspondence records related to the subject matter that is at issue in this appeal.

16. Lastly, the Freedom of Information and Protection of Privacy Unit in the Ministry of Natural Resources and Forestry advised that it had not received any access to information requests for communications between Liz Sandals and any of the specified individuals. However, more than 20 access requests were received which included some of the subject matter terms specified in the requests received by Cabinet Office. The Freedom of Information and Protection of Privacy Unit advised that partial access was granted in respect of all of the access requests which were not withdrawn or abandoned.

17. Based on the nature of the subject matter of the records, the time frames, and the consultations conducted by Cabinet Office with other institutions, we respectfully submit that the records are not in the custody or under the control of another institution.

**ORDER:**

I find that the records sought by the appellant are not in the custody or under the control of Cabinet Office for the purposes of section 10(1) of the *Act*. The appeal is dismissed.

Original Signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

February 15, 2018 \_\_\_\_\_