

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-4577-F

Appeal PA22-00565

Cabinet Office

November 29, 2024

Summary: A journalist made a request under the *Freedom of Information and Protection of Privacy Act* for access to the call logs from the Premier of Ontario's (the Premier's) personal cell phone. Cabinet Office denied the journalist access to the call logs, claiming it does not have custody or control of them. In this order, the adjudicator finds some of the entries in the call logs are under Cabinet Office's control. She orders Cabinet Office to obtain these entries from the Premier and issue an access decision to the appellant.

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

Orders and Investigation Reports Considered: Orders MO-3068 and MO-4447.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306; *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559.

OVERVIEW:

[1] The appellant, a member of the media, filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with Cabinet Office for the call logs of the Premier of Ontario's (the Premier's) personal cell phone between October 31 and November 6, 2022. The appellant requested the name of each caller, phone number, time of call, and length of call.

[2] Cabinet Office advised the appellant the responsive records are not in its custody or control because the cell phone number is not assigned to a government account. The cell phone number identified in the request is the personal cell phone number of the Premier.

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

[4] Mediation did not resolve the appeal, and it was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*. The adjudicator originally assigned to the appeal decided to conduct an inquiry; she sought and received representations from Cabinet Office and the appellant.

[5] The appeal was then transferred to me to continue the inquiry. I decided to notify the Premier as an affected party (the affected party) and invited him to submit representations. The affected party submitted representations and raised some procedural issues which I addressed in Interim Order PO-4532-I and then proceeded with the inquiry. I received representations from the appellant in response to the non-confidential portions of the affected party's representations.

[6] In the discussion that follows, I find the entries in the call logs relating to government business are under the control of Cabinet Office. I order Cabinet Office to obtain the relevant information from the affected party and issue an access decision to the appellant.

RECORDS:

[7] The records at issue are the call logs for the affected party's personal cell phone number between October 31 and November 6, 2022. The IPC does not have a copy of the records at issue, given Cabinet Office's position regarding custody or control.

DISCUSSION:

[8] The sole issue to be determined in this appeal is whether the call logs are "in the custody" or "under the control" of Cabinet Office under section 10(1) of the *Act*.

[9] Section 10(1) provides a general right of access to records in the custody or under the control of an institution governed by the *Act*. It reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless....¹

[10] Under section 10(1), the right of access applies to a record that is in the custody *or* under the control of an institution; the record does not need to be both.²

[11] There are exceptions to the general right of access either by reason of applicable exemptions or exclusions.³ However, if the record is not in the custody or under the control of the institution, none of the exclusions or exemptions need to be considered since the general right of access in section 10(1) is not established.

[12] The courts and the IPC have applied a broad and liberal approach to the custody or control question.⁴ In deciding whether a record is in the custody or control of an institution, the IPC has developed a non-exhaustive list of factors to be considered in the particular context of a request and in light of the purposes of the *Act*.⁵ These factors include the circumstances in which a record is created and by whom, its use and whether the content of a record relates to an institution's mandate and functions.⁶ Also relevant to the issue is whether an institution has physical possession and whether possession of the record is more than "bare possession."⁷

[13] The factors applicable to a particular case will depend on the facts. In addition to these factors and relevant to this appeal is the two-part test adopted by the Supreme Court of Canada in *National Defence* to determine an institution's control of a record in cases where it is not held by the institution. In these cases, the two questions to be considered are:

1. Do the contents of the record relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?⁸

¹ Subsections 10(1)(a) and (b) identify exceptions to the right of access, specifically, where an exemption applies or where the request is deemed frivolous or vexatious.

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

³ The exemptions to the right of access are found at sections 12 through 22 and section 49 of the *Act*. The exclusions are enumerated under section 65.

⁴ *Ontario (Criminal Code Review Board) v. Hale*, 1999 CanLII 3805 (ON CA), [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

⁵ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011, Doc. M39605 (C.A.)).

⁶ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited in footnote 1; *City of Ottawa v. Ontario*, cited above.

⁷ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

⁸ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306. (*National Defence*)

[14] There are additional factors that may be relevant considerations in determining the custody or control issue even when another individual or organization holds the record. These additional factors include the reasons for another entity having physical possession of the record and whether that other entity is an “institution” for the purposes of the *Act*,⁹ ownership of the record;¹⁰ the circumstances surrounding the creation, use and retention of the record;¹¹ any contractual arrangement giving the institution the express or implied right to possess or otherwise control the record and arrangements relating to the record’s confidentiality¹²; and, whether a finding that the records are outside the institution’s control would undermine the purposes of the *Act*.¹³

Cabinet Office’s representations

[15] Cabinet Office submits that the call logs requested are not in its custody or under its control. Cabinet Office submits that the cell phone number is not assigned to a government account and Cabinet Office does not monitor, pay for, or otherwise have any responsibility for the cell phone number because it is the affected party’s personal cell phone number. Cabinet Office asserts it does not have physical possession of any records relating to the personal cell phone number, including any call logs.

[16] While Cabinet Office concedes there have been instances in which personal records were found to be under an institution’s control, it submits that the circumstances of this appeal are different and should be distinguished for the following reasons:

- The affected party’s personal cell phone logs are not in the physical possession of Cabinet Office.
- The appellant’s claims that the contents of the call logs are related to Cabinet Office matters are speculative and do not meet the *National Defence* test for control. Cabinet Office refers to Order MO- 3607 in which the IPC held that general or speculative statements are not sufficient evidence that responsive records exist in a personal account. Cabinet Office submits that the call logs are inherently personal in nature and, therefore, have no concrete link to institutional business.
- There is a clear expectation of privacy with respect to the call logs. As such, it would be unreasonable and unwarranted for Cabinet Office to ask the affected party to provide Cabinet Office with his personal cell phone logs. Cabinet Office refers to Order MO-3068, in which the IPC determined that disclosing the City of Vaughan’s call logs between the city and the personal phone numbers of the City’s former mayor and manager would be an unjustified invasion of personal privacy.

⁹ Order PO-2683.

¹⁰ Order M-315.

¹¹ Order PO-2386.

¹² *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC), Orders M-165 and MO-2586.

¹³ Order MO-4447.

In that decision, the IPC found that calls from the former mayor and manager were made from their personal phone numbers and therefore, disclosing the information would reveal personal information.

[17] Cabinet Office submits there is nothing that indicates the call logs at issue would relate to a departmental matter. As such, Cabinet Office takes the position that the first part of the *National Defence* test has not been satisfied.

[18] Cabinet Office further submits it is not reasonable for a senior official in Cabinet Office to request a copy of the personal call logs. Cabinet Office claims there is no basis to request a copy of these call logs and it does not have any authority over any record relating to the affected party's personal phone number and cannot access, retain or retrieve records relating to personal phone accounts. As a government institution, Cabinet Office submits it cannot reasonably expect to obtain a copy of personal cell phone call logs upon request. Further, Cabinet Office argues a Deputy Minister could not reasonably ask the affected party to produce his personal call logs because there is no business or operational need, as contemplated by *National Defence*, that would be fulfilled by requiring the affected party to produce his personal cell phone call logs.

The appellant's representations

[19] The appellant claims the call logs are under the control of Cabinet Office. The appellant accepts that Cabinet Office does not have physical custody of the call logs, and that the affected party pays for his own personal cell phone. However, the appellant claims the affected party has consistently and regularly used his personal cell phone to conduct a "wide range of government business and, as such, the record of his phone calls and text messages inherently represents a core, central and basic function of the Cabinet Office as an institution."

[20] The appellant submits the affected party makes his personal cell phone number available publicly for citizens to contact him and uses that number in his official capacity.¹⁴ The appellant identifies instances in which the affected party publicly confirmed he provides his personal cell phone number to members of the public and, when individuals call, the affected party addresses their concerns and attempts to bring forward the ideas they provide.

[21] The appellant disagrees with Cabinet Office's argument that it is speculative or hypothetical to claim that the affected party uses his personal cell phone for government business. The appellant submitted a second request to Cabinet Office to release the call logs for the affected party's government-issued cell phone for the same period as the current request. The appellant states Cabinet Office disclosed a phone bill with no calls included. The appellant further states Cabinet Office confirmed no phone calls were made on the affected party's government-issued cell phone during the period in question. The

¹⁴ I note the appellant refers to specific media articles that describe instances in which the affected party knowingly provided his personal cell phone number to the public.

appellant notes the period of October 31 to November 6, 2022 was a period of significant activity with the government and submits it is hard to believe the affected party made no telephone or text contact with staff, advisors or Cabinet ministers. The appellant also submits the affected party publicly stated he was on the phone “all night” in public reports during the period in question. In the absence of any call activity on the government-issued cell phone, the appellant submits the affected party must have used his personal cell phone to make these calls. Therefore, in the absence of call activity on the affected party’s government-issued cell phone, the appellant submits the call logs at issue must contain entries that relate to a departmental or institutional matter thereby satisfying the first part of the *National Defence* test.

[22] The appellant submits he provided sufficient evidence to link the affected party’s use of his personal cell phone with institutional matters. The appellant submits he provided evidence to demonstrate the affected party uses his personal cell phone in a professional capacity to inform his political decisions and to hear directly from stakeholders.

[23] The appellant acknowledges some of the information in the call logs may contain personal information. However, the appellant submits Cabinet Office can make specific and limited redactions to the records to remove personal information if the call logs are found to be in its custody or under its control.

[24] The appellant submits the circumstances in this appeal are distinguishable from those in Order MO-3068 because, in this case, there is evidence to demonstrate the affected party used his personal cell phone number in a professional manner. The appellant submits that “while it may be uncomfortable, it is entirely reasonable for senior Cabinet Office officials to request the [affected party’s] personal cell phone call log.”

[25] The appellant refers to the IPC’s guide for governments to meet their obligations to staff using personal email address and instant messaging services.¹⁵ While this guide does not address personal cell phone use, it does address personal emails and instant messaging tools. The appellant submits the guidance is relevant to the question of whether Cabinet Office can request the affected party’s personal cell phone log. The appellant refers to the guide’s strong recommendation that institutions not allow their staff to use instant messaging or personal email accounts for business purposes. The appellant states they asked Cabinet Office if it had briefed the affected party on the importance of avoiding using personal devices to conduct government business, but Cabinet Office did not respond.

Cabinet Office’s reply representations

[26] Cabinet Office acknowledges the affected party’s personal cell phone number has been made available to the public “on occasion.” Cabinet Office submits the affected party

¹⁵ Information and Privacy Commissioner of Ontario, “Instant Messaging and Personal Email Accounts: Meeting Your Access and Privacy Obligations”, June 2016. Available [online](#).

"has many different roles", and in this respect "may make and receive any number of telephone calls in any of those capacities." Cabinet Office also notes the affected party is "always on-duty" in order to fulfil his many roles. However, Cabinet Office asserts that any personal calls are not subject to the *Act*, nor are calls relating to constituency matters.¹⁶

[27] Cabinet Office submits it is likely that "many" of the affected party's personal cellphone calls were for a personal purpose or constituency matters. Cabinet Office submits it is "entirely speculative that all the telephone numbers on the [affected party's] cellphone log are related to 'core, central and basic functions of Cabinet Office.'" Further, Cabinet Office claims it is impossible to determine from the face of the call logs what a specific call is about and what exemptions in the *Act* may apply. Cabinet Office submits the appellant has not demonstrated how Cabinet Office can reasonably determine whether the bare information in the call logs relate to institutional or departmental matters. Cabinet Office submits the affected party "receives an overwhelming amount of calls on his personal phone." As such, it would be "impossible to ascertain with certainty" whether a telephone number related to a particular call involves a personal matter, a political party matter, a constituency matter or an official, departmental, ministry matter. Cabinet Office refers again to Order MO-3068 in which the IPC found as follows:

Since the nature of the calls cannot be determined from the information contained on the records, it cannot be concluded that they do or do not pertain to city council or its committees. ... telephone calls to the mayor's office can be made for a wide variety of reasons, including general city business and very personal concerns or complaints. It is reasonable to expect that telephone calls made to a city employee may well relate to matters that would not necessarily go to the counsel or its committees.

[28] Cabinet Office submits these findings "illuminate the reality that there is no way to clearly decipher which telephone number involved a call related to a personal, political, constituency or departmental matter." Further, Cabinet Office submits the individuals who spoke with the affected party in personal or constituency contexts would have a reasonable expectation of privacy. As such, Cabinet Office submits the "blanket release" of the affected party's personal cell phone call logs would be "highly invasive" to both the affected party and the individuals who called the affected party.

The Affected Party's Representations

[29] The affected party submits Cabinet Office does not have custody or control over his personal call logs. He submits that the personal mobile device, number, and call logs are not in Cabinet Office's possession and are not paid for by Cabinet Office or the government. Referring to the *National Defence* test, the affected party submits it is "difficult to fathom how Cabinet Office could ever be in control of [the affected party's]

¹⁶ Cabinet Office refers to Orders P-813 and PO-1947-F.

personal phone or on what legal basis the Cabinet Office could compel [the affected party] to simply hand over his personally owned and paid for device.”

[30] With regard to the first part of the *National Defence* test, the affected party submits the appellant did not provide evidence to support their position that the call logs could relate to a “departmental matter.” The affected party states the appellant seeks access to the raw data of telephone numbers and duration of calls. The affected party submits this information is meaningless without further information.

[31] The affected party echoes Cabinet Office’s argument that he wears “multiple hats” as an elected official and is “first and foremost an individual and a person entitled with the same protections against intrusion on their privacy as every other citizen.” Further, while the affected party may provide his personal cell phone number to members of the public, the affected party submits this does not mean the personal cell phone number was used to conduct Cabinet Office matters. The affected party submits this is “pure speculation” on the part of the appellant.

[32] The affected party submits the appellant’s submissions do not substantiate their claim that the affected party used his personal cell phone in relation to Cabinet Office matters. The affected party submits any calls or data usage on his personal cell phone are “simply not records created by the Cabinet Office.”

[33] Regardless, the affected party submits the call logs would not show whether he used his personal cell phone in relation to a departmental matter or for a core, central, and basic function of Cabinet Office. The affected party submits the call logs would show the time a call was made or received and the length of the call but does not show the substance of the call. In these circumstances, the affected party submits the second part of the *National Defence* test is not met because it is unreasonable for Cabinet Office to expect to obtain a copy of the call logs.

Appellant’s Sur-Reply Representations

[34] After the issuance of Interim Order PO-4532-I, I invited the appellant to submit representations in response to a redacted version of the affected party’s submissions. In their representations, the appellant disagrees that the evidence they provided in support of their claim that the affected party conducted official business on his personal cell phone is speculative. The appellant submits the affected party does not address the fact that he does not appear to use his government-issued phone. The appellant further notes that even if the call logs were found under the custody or the control of Cabinet Office, portions of the record could be redacted under the appropriate exemptions in the *Act*, such as the personal privacy exemption.

[35] The appellant acknowledges the affected party wears “multiple hats” as an elected officer. However, it is in light of these many responsibilities that the appellant submits the affected party should be using multiple devices, including a government issued cell

phone and not solely his personal cell phone to conduct personal, political, and official duties. The appellant acknowledges it may be cumbersome to use multiple devices. Regardless, the appellant submits “we cannot accept a black hole of accountability” inside the affected party’s office simply because the affected party is not willing to switch between multiple devices or disclose the records held on the one device he appears to use. If the affected party intends to use only one device, the appellant submits the affected party should allow privacy officials to identify the calls on his device that relate to government business.

[36] The appellant submits the affected party regularly provides his personal cell phone number to members of the public, with the most recent example being June 2024. In this recent instance, the appellant submits the affected party stated that he receives public calls on his personal cell phone and assigns the issues raised to the appropriate government official to address or lobbies relevant stakeholders on the caller’s behalf. In this manner, the appellant submits the affected party does not only make calls in his personal capacity or in relation to constituency matters, but also in his official capacity.

[37] The appellant submits the question of custody and control is simple. The question is whether the affected party has used his personal phone for government business. The appellant submits that if the answer is yes, then the record should be held by Cabinet Office and steps should be taken to preserve it.

Analysis and Findings

[38] The appellant seeks access to the call logs of the affected party’s personal cell phone for calls made between October 31 and November 6, 2022. The appellant submitted an access request for the call logs relating to the affected party’s government-issued cell phone number for the same period but was advised no calls were made on the affected party’s government-issued cell phone number. Cabinet Office and the affected party take the position that the affected party’s personal cell phone call logs are not in the custody or under the control of Cabinet Office because the call logs do not relate to government business. However, the appellant claims the affected party uses his personal cell phone to conduct government business and therefore the call logs should fall under Cabinet Office’s custody or control. Therefore, the issue is whether some or all of the call logs are in the custody or control of Cabinet Office.

[39] It is important to consider the purpose, scope and intent of the legislation when determining whether records are within the custody or control of the public body.¹⁷ In all respects, a purposive approach should be adopted.¹⁸ In determining whether records are in the custody or control of an institution, the relevant factors must be considered contextually in light of the purposes of the *Act*.¹⁹ The purposes of the *Act* are set out in

¹⁷ *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 at paras. 84 to 85. *City of Ottawa v. Ontario*, 2010 ONSC 6835 at para. 21.

¹⁸ *City of Ottawa v. Ontario*, 2010 ONSC 6835 at para. 28

¹⁹ *Children’s Lawyer for Ontario v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 642 at 89.

section 1 as follows:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[40] I have reviewed the parties' representations and considered the circumstances of this appeal. Based on this review and taking a purposive approach with regard to the issue of custody or control, I find the portions of the call logs that relate to calls made about government matters are in the custody or under the control of Cabinet Office.

[41] In reaching this conclusion, I have considered the two questions posed by the Supreme Court of Canada in *National Defence*:

1. Do the contents of the record relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?²⁰

[42] In its discussion of the concept of "control" for the purposes of freedom of information legislation, the majority in *National Defence* found as follows:

["Control"] should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation.... In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "de jure" as well as "de facto" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason.... In this case, "control" means that a senior official with the government institution

²⁰ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306. (*National Defence*)

(other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "de facto" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the *Act*.²¹

[43] Turning to the two-part test in *National Defence*, I find the answer to both questions is yes, at least in part.

[44] First, I find it reasonable to conclude that some of the contents of the call logs relate to a departmental or government business matter. I accept the affected party's personal cell phone number is paid for by the affected party and not by Cabinet Office. I also accept that, by its very nature, the personal cell phone number assigned to the affected party is used in his personal capacity at least some of the time.

[45] However, I agree with the appellant it is not merely speculative that the affected party used his personal cell phone number in relation to his official or professional capacity or in Cabinet Office-related work. The appellant submitted a request for the affected party's government-issued cell phone call logs for the same period and Cabinet Office confirmed the affected party did not make any calls on the government-issued cell phone during that period. It is highly unlikely, and unreasonable to believe, that an elected official occupying the affected party's specific role in government would have conducted no official or government-related calls on either his government-issued cell phone or his personal cell phone while wearing the "multiple hats" Cabinet Office and the affected party refer to in their representations. One of the hats worn by the affected party is as an elected representative who works on Cabinet Office-related matters. As such, the affected party would likely take part in discussions or calls relating to these matters. It is also unlikely the affected party would have provided his personal cell phone number widely and at public events as the appellant referred to (and neither Cabinet Office nor the affected party refuted) and received no calls relating to government or Cabinet Office-related matters. As such, I find the parties' representations demonstrate the affected party uses his personal cell phone number to conduct government business.

[46] To be clear, I do not find all the entries in the call logs relate to departmental or government business matters. I acknowledge and accept the affected party and Cabinet Office's claims that the affected party uses his personal cell phone for personal and constituency related matters, neither of which are departmental matters and therefore fall outside Cabinet Office's custody or control. However, in the absence of any calls made on the affected party's government-issued cell phone, and given his public invitation to contact him on his personal cell phone without any apparent limitation as to purpose, it is reasonable to conclude that at least some of the calls made on the affected party's personal cell phone were made in relation to departmental or government business

²¹ *National Defence* at para. 48.

matters. Therefore, I find the entries in the call logs that relate to government matters satisfy the first part of the *National Defence* test.

[47] The second question in the *National Defence* test is whether Cabinet Office could reasonably expect to obtain a copy of the call logs. In *National Defence*, the court held as follows:

... *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder.... The reasonable expectation test is objective. If a senior official of the government, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.²²

[48] I find Cabinet Office could reasonably expect that the affected party would produce the entries in the call logs that relate to government business on his personal cell phone if requested. I acknowledge the call logs are related to the affected party's personal cell phone number which is paid for by the affected party and is also used for personal matters. As such, I agree that some of the call logs would contain the personal information of the affected party and other individuals who called or received calls from the affected party regarding personal matters.

[49] However, despite being assigned a government-issued phone number which would result in those call logs being within Cabinet Office's custody or control, the affected party chose to conduct all of his business (personal, constituency, and government) on one device. In the case where government or Cabinet Office business was conducted by the affected party on his government-issued phone, Cabinet Office would reasonably be expected to be provided with the records created in relation to Cabinet Office-related matters. Therefore, I find it is also reasonable to expect that the affected party would produce information relating to government business from the personal call logs upon request.

[50] Furthermore, I find a determination that these entries are not in Cabinet Office's control would undermine the purposes of the *Act*. I note this factor was considered by the Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*.²³ As noted above, one of the central purposes of the *Act* is to ensure the public has a right of access to government information subject to exemptions such as the personal privacy exemption. The entries in the call logs that resulted from

²² *National Defence* at para. 56.

²³ 2018 ONCA 559.

the affected party's government-related calls are the very type of information the *Act* was created to ensure public access to, subject to limited and specific exemptions. However, the affected party chose to make these calls on his personal cell phone and not his government-issued cell phone. It would be contrary to the purposes of the *Act* to permit the affected party to shield information relating to government-related phone calls by simply making or receiving those calls on his personal device.

[51] The government-issued cell phone was provided to create and log all government-related phone calls and provide a clear separation between the affected party's personal matters, his constituency matters, and his government or department-related matters. I acknowledge it can be challenging to separate the different roles the affected party plays as an elected official and private citizen. Nonetheless, it is incumbent upon elected officials to use their various devices in their various roles appropriately, to protect the public's right of access under the *Act* and to effectively separate government business from their personal and constituency matters. In this case, it appears the affected party did not make such distinctions between personal and professional matters as he made no calls on his government-issued cell phone. In light of the unique circumstances in this appeal, I find Cabinet Office has control over the call log entries that relate to government or departmental matters.

[52] I confirm this finding does not deny the affected party or other identifiable individuals privacy protection. I do not find Cabinet Office has control over the entirety of the call logs and I am not ordering a "blanket release" of the call logs as Cabinet Office and the affected party suggest. Rather, I find Cabinet Office has control over the call log entries that relate to departmental matters. Accordingly, I find Cabinet Office does not have control over the call logs that relate to any calls relating to the affected party's personal or constituency matters.

[53] Furthermore, as stated above, the entries relating to departmental matters and therefore under the control of Cabinet Office may still be excluded from the application of the *Act* by section 65 or may be subject to an exemption from the general right of access.²⁴ In other words, the information that I found under the custody or control of Cabinet Office may still be subject to the personal privacy exemption in section 21(1) of the *Act*. This would have been the case even if the affected party had made calls on his government-assigned cell phone. Therefore, despite the claims of Cabinet Office and the affected party, this order does not infringe upon the personal privacy rights of any individuals, including the affected party. Rather, this order stands for the proposition that information relating to government or departmental matters is under the control of the appropriate institution to ensure the public has a right of access to it, subject to any exemptions or exclusions in the *Act*.

[54] In conclusion, I find Cabinet Office has control over the entries in the affected party's call logs that relate to government or departmental matters. Cabinet Office should

²⁴ The exemptions are found at sections 12 through 22 and section 49 of the *Act*.

consult with the affected party to identify which entries relate to government or departmental matters. Further, I note that under section 28(1) of the *Act*, Cabinet Office shall provide written notice to the affected party of the potential disclosure of the call log entries that relate to government or departmental matters and allow him the opportunity to provide his views on their potential disclosure.

ORDER:

1. I order Cabinet Office to obtain from the affected party any government or departmental-related entries from his personal cell phone's call logs from October 31 and November 6, 2022 and to seek his views on their potential disclosure.
2. I order Cabinet Office to issue an access decision on any responsive records that are provided to it by the affected party, in accordance with the requirements of the *Act*, treating the date of this order as the date of the request for administrative purposes and without recourse to a time extension.
3. I order Cabinet Office to send me a copy of the decision letter when it is sent to the appellant.

Original Signed by: _____
Justine Wai
Adjudicator

_____ November 29, 2024