Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4655

Appeal PA21-00565

Infrastructure Ontario

May 9, 2025

Summary: Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* for records about an IO review of a named employee and infrastructure projects. IO located a letter, but claimed that it was excluded from the *Act* under section 65(6) (employment or labour relations). IO said that additional responsive records existed, but claimed they were not in IO's custody or control.

In this order, the adjudicator upholds IO's decision. He finds that section 65(6) excludes the letter from the *Act*, and that the other records are not in IO's custody or control.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 10(1), 24 and 65(6).

Orders Considered: Orders PO-4613, MO-1589-R, MO-4447, and P-912.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306; *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA).

OVERVIEW:

[1] The Ministry of Infrastructure (the ministry) transferred a request it received under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Infrastructure Ontario (IO). The request related to a "Report to the Special Committee of the IO Board of Directors" (the special committee report) which dealt with an investigation into the conduct of an IO employee and IO's procurement practices. Specifically, the request was

for the following:

1. All reports from the forensic accounting firm(s) hired by the infrastructure ministry to investigate the activities of [named individuals] and/or [a named company], as well as the integrity of the St. Michael's hospital project and/or other projects [named individuals or named company] may have been involved with, as referenced in [specified minister #1]'s response to a question by [named Member of Provincial Parliament] on September 29, 2015.

2. All reports from the third-party adviser(s) appointed by the ministry in relation to the same matters, as referenced in the same response by the minister on September 29, 2015. (During the meeting of the Legislature's Standing Committee on Estimates on November 17, 2015, [specified minister #1] identified the third-party adviser as [named individual]).

3. A copy of the letter written by [specified minister #2], apparently received by IO on August 2, 2016, requesting further information regarding the June 23, 2016 report of IO's Special Committee on these matters (the minister's letter was mentioned in the August 12, 2016 letter from [a named individual], attached to the published Special Committee Report).

4. If not included in #1, a copy of the forensic audit(s) referenced in Part C of the Special Committee Report, entitled "[named individual] and [named company] Projects Forensic Audit.

[2] IO issued a decision stating that the ministry would respond to part 2 of the request and that IO would respond to parts 1, 3, and 4.

[3] IO located two records responsive to parts 1, 3 and 4 and denied access to them under section 19 (solicitor-client privilege) of the *Act*.

[4] The requester (now the appellant) appealed IO's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, IO conducted another search for records and issued a supplementary decision, where it stated that the two records in its previous decision were identified in error. In response to part 1 of the request, IO advised that it did not have custody or control of the forensic reports. In response to part 3 of the request, IO located the specified letter and took the position that it is excluded from the *Act* under section 65(6)2 (employment or labour relations). In response to part 4 of the request, IO advised that it did not have custody or control of the responsive records.

[5] The appellant confirmed that he is not seeking access to the information identified in error in response to the request, but stated that records responsive to parts 1 and 4 of his request are in IO's custody or control and that further records responsive to parts 1 and 4 should exist. He also disputed IO's claim that the letter responsive to part 3 of the request was excluded from the scope of the *Act*.

[6] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeals process. The adjudicator originally assigned to the appeal conducted an inquiry where she sought and received representations from IO, the appellant, and an affected party (a law firm involved with the matter underlying the request). The appeal was then assigned to me to complete the inquiry. I reviewed the representations of the parties and sought and received additional representations from each party on the issue of custody or control of the records.

[7] For the reasons that follow, I uphold IO's decision and dismiss the appeal.

RECORDS:

[8] A two-page letter identified as responsive to part 3 of the request is at issue in the appeal. Also at issue is whether the record responsive to parts 1 and 4 of the request (identified as a forensic report) is within IO's custody or control.

ISSUES:

A. Does the section 65(6) exclusion for records relating to labour relations or employment matters apply to the letter?

B. Is the record responsive to parts 1 and 4 of the request (the forensic report) "in the custody" or "under the control" of the institution under section 10(1), and did IO conduct a reasonable search for these records?

DISCUSSION:

Issue A: Does the section 65(6) exclusion for records relating to labour relations or employment matters apply to the letter?

[9] Section 65(6) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.[1]

[10] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[2]

[11] IO relies on sections 65(6)2 and 65(6)3. Below, I find that section 65(6)3 applies, and accordingly I will not address section 65(6)2.

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[1] Order PO-2639.
[2] *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107 (CanLII).

[12] Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[13] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*. If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.[3]

[14] The types of records excluded from the *Act* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[4] Section 65(6) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.[5]

[15] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.[6] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context.

[16] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[7] The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[8]

[17] For section 65(6)3 to apply, IO must establish that:

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[3] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.
[4] *Ontario* (*Ministry of Correctional Services*) *v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."
[5] *Ministry of Correctional Services*, cited above.
[6] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[7] *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[8] Order PO-2157.

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[18] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[9] The IPC has found that the institution that claims the section 65(6) exclusion must be the same institution that has the interest in the records as employer.[10] The records are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Matters related to the actions of employees, for which an institution may be responsible are not employment-related matters for the purpose of section 65(6).[11]

Representations

IO Representations

[19] IO describes the letter as a letter from the Minister of Infrastructure addressed to IO, and submits that it directly relates to an employment-related issue that was under investigation by IO. For part 1 of the test, it states that it was collected, prepared, maintained, and used by IO in the course of that investigation, and the exclusion continues to apply to the record.

[20] For part 2, IO submits that the letter directly relates to the meetings, consultations, discussions, and communications that were undertaken by IO during the investigation of the employee's performance and the circumstances of the dismissal, with the content of the letter specifically addressing these matters. It also states that the record is, on its own, a form of communication that is directly connected to the matter under investigation, including the termination of a former employee.

[21] For part 3, IO states that the record is directly related to employer/employee relationships, investigation, of the employee's performance and compliance with IO policies, potential consequences of the employee's conduct, and the surrounding circumstances of the employee's dismissal. Referencing Order MO-1654-I, it states that the IPC has previously found that employment-related matters include employee dismissal. It also states that the IPC has previously found that "audit reports relating to

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[9] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), cited above.
[10] See Orders PO-4204 and PO-4368. But see also Orders P-1560 and PO-2106, which found that section 65(6)3 may apply where the institution that claims the exclusion is not the same institution that originally "collected, prepared, maintained or used" the records. Order PO-4368 explicitly rejected the reasoning in Order P-1560.
[11] *Ministry of Correctional Services*, cited above.

the alleged misconduct of an employee, an employee's compliance with policies and procedures, and an employee's job performance" are "employment-related" records.[12] It also submits that records associated with former employees are considered "employment-related" records.[13]

[22] With respect to IO's interest in the matter, IO submits that although an institution's interest does not need to be a legal interest, it must be more than a "mere curiosity or concern" and must refer to matters involving the institution's own workforce.[14] Referencing Order MO-1589-R, it states that the passage of time, and whether the individual the record relates to is still an employee of the institution, are not factors when determining if an institution has an interest in an employment matter. It states that, as an employer and an agent of the Crown overseeing the project underlying the matter, IO had a direct interest in the matter. IO submits that its connection with the letter is more than superficial.

Appellant representations

[23] In response, the appellant objected to IO claiming section 65(6)3 in its representations, stating that it had previously only claimed section 65(6)2. He further submits that IO has failed to prove that it collected, prepared, maintained, or used the letter "in relation to" meetings, consultations or communications about labour relations or employment related matters. He states that the "some connection standard" must be understood in its proper context, and states that by the time IO received the record at issue, the employee had not been employed by IO for over four years.

[24] He states that IO did not "collect" the record because it was sent by a minister, nor did it "prepare" or "maintain" it, as it was only received by IO. He submits that to the extent IO "used" the record, it was not in relation to labour relations or the employment of a person, but rather was used in relation to its response to an inquiry from a minister about the adequacy of an investigation.

[25] The appellant also states that section 65(6) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions, and states that this may describe the record at issue.[15]

Analysis and finding

[26] First, regarding the appellant's claim that IO raised section 65(6)3 late, while the IPC's *Code of Procedure* does place conditions on the late raising of discretionary exemptions,[16] it does not prevent institutions from raising exclusion claims during the

[12] IO references Order PO-2073-R.
[13] IO references Order PO-2212.
[14] IO references Orders PO-2106, PO-3298, and PO-3312.
[15] The appellant cites Ontario (*Ministry of Correctional Services*) *v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[16] See section 12 of the *Code of Procedure*.

inquiry. In Order PO-4613, the Commissioner considered the IPC's mandate in the context of exclusion claims, finding that they are jurisdictional in nature, and that the IPC was obliged to consider the exclusion before it could consider other arguments.[17] Adopting this reasoning, I will address the application of the exclusion.

[27] The record at issue in this appeal is a letter sent regarding a former IO employee's conduct and the investigation surrounding it. The appellant submits that, understood in its proper context, the "some connection" threshold has not been met, specifically relying on the length of time between when the letter was sent, and the individual's employment with IO. However, as IO states, and as stated in MO-1589-R, the passage of time and whether the individual is still an employee of the institution, are not relevant considerations when determining if section 65(6) applies.

[28] I am satisfied that all three parts of the section 65(6)3 test have been met. On its face, IO maintained the letter as part of its record retention policies, satisfying the first part of the test. While the appellant disputes that IO "collected" the letter, stating that it was only sent to IO by the minister, I also find that receiving and retention of the letter constitutes a collection within the meaning of section 65(6)3. For the second and third parts of the test, I find that the collection and maintenance of the letter was in relation to discussions and communications about the conduct of one of IO's employees. As IO submits, the termination of an employee is an employment related matter in which the institution has an interest, and the test is therefore met.

Section 65(7) exceptions to the exclusion

[29] If the records fall within any of the exceptions in section 65(7), the records are not excluded from the application of the *Act*. IO claims that none of these exceptions apply, but the appellant submits that sections 65(7)2 and 3 may be relevant. These sections state:

> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

[30] The letter at issue is not an agreement and accordingly I find that neither of these exceptions apply to it.

[31] Having found that section 65(6)3 applies to the letter, I do not need to consider if section 65(6)2 also applies.

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[17] Order PO-4613 addressed the section 65(5.2) prosecution exclusion, but I find that this also applies to the section 65(6) employment exclusion.

Issue B: Is the record responsive to parts 1 and 4 of the request (the forensic report) "in the custody" or "under the control" of the institution under section 10(1), and did IO conduct a reasonable search for these records?

[32] The appellant claims that IO has custody or control of the record that is responsive to parts 1 and 4 of the request, specifically a report from a forensic accounting firm, and if not, IO has not conducted a reasonable search for the report. As outlined in the Overview section above, the special committee report relates to an investigation into the conduct of an employee and IO's procurement practices by a special committee. The special committee report referred to a forensic report prepared by an accounting firm, and it is this report that the appellant is seeking access to.[18]

[33] Section 10(1) provides for a general right of access to records that are 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 . . .

[34] 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 need not be both.[19] 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.

[35] The courts and the IPC have applied a broad and liberal approach to the custody or control question.[20] IO does not dispute that the reports from the forensic accounting firm exist, but states that they are not in its custody or control. The Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (*Minister of National Defence*) has 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?[21]

[36] In deciding whether a record is in the custody or control of an institution, numerous factors are considered in context and in light of the purposes of the *Act*:[22] The IPC has established a non-exhaustive list of factors to consider when deciding if a record is in the

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[18] The special committee report and associated documents were published by IO on its website.
[19] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[20] *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.
[21] *Canada* (*Information Commissioner*) *v. Canada* (*Minister of National Defence*), 2011 SCC 25 (CanLII), [2011] 2 SCR 306.
[22] *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

custody or under the control of an institution.[23] Some of these factors may not apply in a specific case, while other factors not listed may apply. The factors that the parties claim apply and those that I find to be relevant in the circumstances will be discussed in greater detail below.

Representations

[37] IO, an affected party (a law firm retained by IO for providing advice to the special committee), and the appellant provided representations on whether IO has custody or control of the forensic report. I sought and received additional representations from IO and the law firm after the appeal was assigned to me, specifically regarding if IO had requested a copy of the forensic report from the law firm, and why it would not be entitled obtain a copy of the report. Sur-reply representations from the appellant were also sought and received.

[38] In its representations and reply representations, IO and the law firm commented on several factors to support its position that it does not have custody or control of the forensic report. While I have considered all of their arguments, I have only addressed factors I determined to be relevant to this appeal, specifically the independence of the special committee and IO's evidence that it was not ever permitted to retain a copy of the forensic report.

IO and law firm representations

[39] With respect to the two-part test adopted by the Supreme Court of Canada in *National Defence*, IO concedes that the report relates to a matter that was under investigation and in which IO has an interest, satisfying the first part of the test. It submits that the second part of the test is not met, stating that all relevant factors must be considered in order to determine if a government institution can reasonably expect to obtain a copy of the record upon request.

[40] The core of IO's representations and reply representations is that it did not receive a copy of, and could not reasonably be expected to obtain upon request, the forensic report prepared by the accounting firm. IO submits that the forensic report was arranged by and provided to the law firm. IO states that it did not retain the accounting firm, did not order a report, did not pay for it, and did not receive a copy of it. It states that the accounting firm retained by the law firm was not required to provide the reports to IO and did not do so.

[41] IO submits that it retained the law firm to provide its legal opinion and analysis as part of the special committee investigation. It states that a forensic accounting review was undertaken by the accounting firm, pursuant to its retainer with the law firm, and any reports from the accounting firm would have been provided to the law firm, rather than to IO. Similarly, the law firm states that it retained the accounting firm, provided it with instructions, and the accounting firm reported to the law firm. The accounting firm

[23] Orders 120, MO-1251, PO-2306 and PO-2683.

also submitted its invoices to the law firm. Last, the law firm submits that there was an agreement between it and IO that IO would not be permitted to retain a copy of any records prepared by the accounting firm.

[42] In their reply representations, both IO and the law firm clarified that IO would not be permitted to retain copies of the forensic report if it were to ask. IO and the law firm state that only the law firm received the forensic report to avoid any potential risk of compromising the special committee investigation underlying the request. The law firm explains that in addition to the investigation conducted by the special committee, which the law firm provided legal advice to, IO was also conducting its own internal investigation into other aspects of the project, which fell outside of the law firm's mandate. The law firm submits that IO was not permitted to retain a copy of the report to reflect that the law firm's mandate was to advise only the special committee, and to avoid compromising the integrity of the ongoing internal investigation (or giving rise to the appearance of compromise).

[43] IO states that the law firm delivered a summary of findings and its legal analyses to IO, which was sufficient for the purposes for which the law firm was retained.

Appellant representations and sur-reply representations

[44] The appellant submits that the forensic report is under the control of IO. He submits that it was created by the accounting firm, acting under the direction of its client, the law firm, which in turn was acting under the direction of its client, IO. He submits that the forensic report was explicitly created under the ultimate direction and supervision of IO, as a "mandated component of its investigation" relating to the special committee report.

[45] The appellant submits that the special committee's mandate was to "direct the review" of the activities and conduct of the employee, as well as other aspects of the matter underlying the request, including components of the forensic audit. He states that the special committee report confirms that both the law firm and the accounting firm worked under the supervision of the committee. He also referenced a statement by the Minister of Infrastructure, where the minister claimed authority for the forensic audit as the minister responsible for IO.

[46] He states that the forensic audit was created under the control and direction of IO, as a key component of the mandate it gave to the committee, in line with the explicit statements of the minister responsible for IO. He notes that IO has not provided a copy of its contract with the law firm, nor any evidence of provisions that would prevent IO from obtaining a copy of the forensic report. He states it would be reasonable to expect that IO was entitled to receive the document.

[47] With respect to IO's claim that the law firm retained the accounting firm and paid for the reports, he submits that the law firm was presumably paid by IO, with the accounting firm retained to prepare the reports under the ultimate direction of IO. He submits that while it seems that IO chose not to ask for a copy of the forensic report,

there is no evidence that IO would not be able to obtain the document if it chose to do so, and it is therefore under IO's control.

[48] In his sur-reply representations, the appellant did not dispute IO and the law firm's claims regarding the special committee's need for independence from IO. However, he submits that their representations show that IO did not request the report, and the law firm did not refuse such a request. He also submits that it has not been explained how denying "relevant information" (referring to the forensic report) to the special committee investigating the matter would enhance, rather than limit the independence of the internal investigation or the quality of its findings. He submits that it was later shown that the internal investigation was found to have missed extensive evidence of collusion.

[49] The appellant states that IO has not claimed that it is not entitled to claim a copy of the report, or explained why it would not be entitled to do so. He submits that the law firm did not state if it would refuse to provide IO with a copy of the report if IO asked it for it today, not did it provide a detailed explanation regarding why it could not provide a copy of the report.

Analysis and finding

[50] Aside from the appellant's general claims about IO's inadequate search efforts, discussed below, neither party claims that IO has possession of the report, meaning that the parties agree that IO does not have custody of the report. Rather, the appellant claims that even if IO does not have custody of the report, it is within its control within the meaning of section 10(1) of the *Act*. IO does not dispute that the contents of the document relate to an IO matter (satisfying the first part of the *Minister of National Defence* test), but submits that it cannot reasonably obtain the document upon request. The appellant disputes this.

[51] Based on the information before me, IO retained the law firm to retain the accounting firm. I acknowledge that this differs somewhat from the Minister of Infrastructure's general statement about how the accounting firm was retained, but I accept the representations of IO and the law firm.

[52] This is supported by documents attached to the special committee report, where letters from both the law firm and the accounting firm to the Deputy Minister of Infrastructure explicitly state that the law firm, as part of the service it provided IO, retained the accounting firm.

[53] I understand and generally accept the appellant's submission that IO ultimately paid for the report through its retention of the law firm. However, this does not refute the submissions of IO and the law firm stating that, due to the nature of the retainer between IO and the law firm, IO is not permitted to retain a copy of the report. While I acknowledge the appellant's submission that IO did not specifically request a copy of the report, I accept IO and the law firm's submissions that the nature of the agreement was such that IO would not be permitted to retain a copy.

[54] In Order MO-4447, the adjudicator held that a school board did not have control over documents created by an integrity commissioner (IC) because, in part, the board's entitlement to access IC records was limited to specific functions.[24] The adjudicator considered if the board could regulate the IC records' use, and found that its inability to do so was a relevant factor in determining that it lacked control of the records. In my view, the circumstances before me are similar. Here, the report was provided to law firm for its use in advising IO, rather than to IO directly.

[55] The adjudicator in MO-4447 also considered the independence of the IC from the board. In finding that this weighed against the board having custody or control of the records, he stated that the integrity commissioner being set up as an independent contractor was intentionally done to ensure that its investigations were conducted in an impartial manner, and to avoid the IC being subjected to "undue influence."[25] Conversely, in Order P-912 (upheld on judicial review in *Ontario Criminal Code Review Board v. Hale*[26]) where the sole purpose for creating backup tapes of tribunal hearings was to fulfill the board's mandate to keep an accurate record, the records were found to be in the custody or control of the tribunal.

[56] In my view, the agreement between the law firm and IO established a separation between IO and the forensic report. The special committee had independence from ongoing IO internal investigations, and for this reason IO and the law firm established an agreement that protected this independence. The appellant argues that there may not have been a need for this kind of independence. Regardless of the specific advantages and disadvantages of the arrangement regarding the forensic audit, I accept the representations of IO and the law firm that the separation between IO and the special committee was intentional, and that this is reflected in IO's inability to obtain a copy of the report.

[57] Considering the totality of the circumstances, I find that IO cannot reasonably obtain a copy of the report upon request, and the report is not in its custody or control for the purposes of section 10(1) of the *Act*.

Reasonable search

[58] The appellant also raised the issue of reasonable search, providing general representations on IO's response to his request. He submits that IO has applied an unreasonably narrow interpretation of "custody or control" and submits that it is also possible that it applied an unreasonably narrow interpretation to other aspects of his request. He suggests that the records initially identified in error might be responsive after all, or there may be additional accounting firms that performed forensic work in the investigation. He asks that IO complete a reasonable search based on a broader

[24] Similarly, in MO-3226 Blackberry messenger Messages stored on a service provider's servers were found to not be in a school board's custody or control because the board did not have a contractual right to access them.
[25] This approach was recently upheld by the Divisional Court in *Teper v. Information and Privacy Commissioner of Ontario*, 2025 ONSC 1717.
[26] 1999 CanLII 3805 (ON CA).

interpretation of "custody or control" and a liberal interpretation of his request, and disclose all additional responsive records.

[59] In its initial representations, IO submits that an experienced employee knowledgeable in the subject matter of the request made a reasonable effort to locate records reasonably related to the request. It provided an affidavit from the employee where she outlined her search efforts.

[60] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[27] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[28] The *Act* does not require the institution to prove with certainty that further records do not exist.[29] However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[30] that is, records that are "reasonably related" to the request.[31]

[61] Here, while I appreciate that the appellant disagrees with IO's position regarding custody or control, he has not provided any evidence, aside from general assertions, to suggest that additional records responsive to his request exist. Based on IO's representations, an experienced employee made a reasonable effort to locate records reasonably responsive to the request, and I uphold IO's search efforts.

ORDER:

I dismiss the appeal.

Original Signed by: May 9, 2025

Chris Anzenberger
Adjudicator

[27] Orders M-909, PO-2469 and PO-2592.
[28] Order MO-2185.
[29] *Youbi-Misaac v. Information and Privacy Commissioner of Ontario*, 2024 ONSC 5049 at para 9.
[30] Orders P-624 and PO-2559.
[31] Order PO-2554.