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

ORDER PO-2739

Appeal PA07-37

Ministry of the Attorney General

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NATURE OF THE APPEAL:

Request and Exchange of Representations

A request was submitted, by a member of the media, to the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to annual and monthly reports generated by the Ontario Ministry of the Attorney General entitled "Offence Type Statistics by Location" for the period from 2000 to the date of the request.

The Ministry denied access to the responsive records pursuant to section 10 of the *Act*. In its decision, the Ministry stated:

> The Offence Type Statistics by Location report was prepared for the judiciary in the Ontario Court of Justice at their request. Consequently, in our view the reports you are seeking fall outside the scope of the *Act* and the Ministry is not the appropriate body from which to obtain access to them.
>
> As you may be aware, the purpose of the *Act* is to provide a right of access to "information under the control of institutions" according to defined principles as set out in section 1. Section 2 of the *Act* defines an "institution" as a ministry of the Government of Ontario and any agency, board, commission, corporation or other body designated as an institution in the regulations. Section 10 of the *Act* provides a right of access to a record or part of a record in the custody or under the control of an "institution". Please note that the courts are not an "institution" under the *Act*, and the Ministry does not have custody or control of these reports for purposes of the *Act*.

The requester (now the appellant) appealed the Ministry's decision to this office. During mediation, a sample copy of the responsive records was provided to this office. Mediation did not resolve the issues in this appeal so the matter was moved to the adjudication stage of the appeal process.

I began my inquiry by issuing a Notice of Inquiry to the Ministry inviting it to make representations on the issues identified in the notice and on any other relevant issues. Among other things, the notice invited the Ministry to make representations in the alternative, on the possible application of any exemptions, in the event that I find that the requested records are within its custody or control. I received representations from the Ministry in which it stated, among other things, that it claims no alternate exemptions in the event that it is found to have custody or control of the record.

Subsequently, I issued a modified Notice of Inquiry to the appellant inviting him to submit representations on the issues in the notice and in response to the representations of the Ministry, which were shared in full. I also decided to invite the Office of the Chief Justice of Ontario (the CJO) to submit representations on the basis that it may have an interest in the records at issue in this appeal. I provided the CJO with a complete copy of the Ministry representations.

I received correspondence from the CJO in which it stated that it would not be submitting representations in this appeal. I also received representations from the appellant. In his representations, in addition to addressing the issues in the appeal, the appellant requested that the record be disclosed to him at no charge. Staff in this office contacted the appellant and advised him that if he wished to claim a fee waiver in this appeal, he must make his request for such directly to the Ministry. As a result, the appellant then wrote to the Ministry requesting a fee estimate and a fee waiver.

Following my review of the appellant's representations, I provided a complete copy to the Ministry and invited it to submit representations in reply. I received reply representations from the Ministry.

I had a number of questions arising out of my review of the Ministry's reply representations and decided to write to the Ministry and invite further representations in response to my specific questions. The Ministry submitted further representations.

Subsequent Release by the Ministry

In June of 2008, the Ministry issued a press release announcing its *Justice on Target* strategy and announcing the disclosure to the public of criminal court statistics. That press release read in part:

> Under the province's new *Justice on Target* strategy, Ontario is setting targets to reduce court delays and appearances by 30 per cent over the next four years.
>
> This is the first time the province has set targets to reduce the provincial average of days and court appearances needed to complete a criminal case.
>
> To ensure transparency and accountability, the province is also making available criminal court statistics to the public for the first time. The public will be able to follow the progress of the strategy and see the impact on courthouses in their local communities.
>
> The multi disciplinary *Justice on Target* implementation team will be led by Regional Senior Justice Bruce Durno and Senior Crown Attorney Kenneth Anthony. The team will work with justice sector partners in local courthouses to develop and implement new initiatives that improve coordination, focus justice resources and move cases through the justice system faster.
>
> The first two initiatives being implemented as part of the *Justice on Target* Strategy are expansions of programs that have proven successful in reducing court appearances and delays.

A copy of the press release was posted on the Ministry website and a link was provided to "the criminal court statistics" referred to in the release. The criminal court statistics disclosed on the website include information and statistics that are also contained in the records at issue in this appeal.

Shortly after the date of the press release, the Ministry wrote to the appellant and advised him that it was prepared to disclose portions of the responsive records to him. Other portions were being withheld on the basis that the disclosure of the withheld information "would compromise the independence of the judiciary." In its letter, the Ministry explained:

> I am now pleased to inform you that the Office of the Chief Justice of the Ontario Court of Justice has consented to the release of most of the available data you have requested. The only information for which consent was denied is data that would compromise the independence of the judiciary.
>
> Enclosed please find copies, and a CD in PDF format, of the Offence Type Statistics by Location report. This information consists of yearly reports for the period 2000 to 2004, and quarterly reports for the period 2005 to December 2007. Please note that the report was never issued on a monthly basis and so quarterly reports are provided instead. No quarterly reports were created prior to 2005 and so annual reports are provided for this period….

A copy of the information disclosed to the appellant on CD was provided to this office.

I instructed staff in this office to contact the appellant and determine whether he wished to pursue access to the information that was severed from the responsive records. The appellant advised that he wished to pursue access to this information.

As the Ministry had not responded to the appellant's request for a fee waiver in this appeal, staff in this office contacted the Ministry to determine what its position was with respect to the fee waiver request. The Ministry advised that if it was ordered to disclose the information remaining at issue from the database to the appellant it would waive the fee. Therefore, fee waiver is not at issue in this appeal.

RECORDS:

The responsive records are statistical reports entitled "Offence Type Statistics by Location". They include provincial, regional and local level statistical information about criminal law proceedings. All of the information in the database at the provincial and regional level was disclosed to the appellant in June of 2008. The information severed was statistical information at the local level namely, information in a field headed "Disposed At Trial With Trial." This field includes 5 separate columns of information, entitled:

1. Total
2. Dismissed at Trial

3. Stayed at Trial
4. Committed for Trial at Preliminary Hearing
5. Plead Not Guilty/Found Guilty at Trial

The information under the column entitled "Total" was disclosed to the appellant therefore the information remaining undisclosed is the information under the other four columns. However, I intend to make a determination as to whether the entire report is in the custody or under the control of the Ministry as that is the issue before me.

DISCUSSION:

CUSTODY OR CONTROL

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

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

If the answer to that question is yes, then this office has jurisdiction to make a determination regarding the records.

Previous orders of this office have found that the courts are not institutions under the *Act* and therefore, applying section 10(1), if records are found to be in the custody or under the control of the courts and not in the custody and/or under the control of the Ministry, then the *Act* does not apply. [Order P-994]. In this appeal, the Ministry claims that while its employees may have possession of the responsive records, the records are not in its custody or under its control because the records are "judicial information" which is in the custody or under the control of the courts.

As noted above, the Ministry indicates that if the *Act* is found to apply, it does not claim that any exemptions under the *Act* apply in the alternative to its argument that the records are not in its custody or under its control. Therefore, the only issue before me is whether the Ministry has custody or control of the records. Subject to the application of any mandatory exemptions, I will order that the information be disclosed to the appellant, if I find that the records are within the custody or under the control of the Ministry.

The courts and this office have applied a broad and liberal interpretation to the custody and control issue. In Order 120, former Commissioner Sidney Linden stated that the concepts of custody and control should be given a broad and liberal interpretation in order to give effect to the purposes and principles of the *Act*. A purposive interpretative approach was found to be appropriate in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 where the Court of Appeal for Ontario adopted the

following passage from the Federal Court of Appeal judgement in *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L. R. (2d) 242 (Fed. C.A.), at 244-245:

> The notion of control referred to in subsection 4(1) of the *Access to Information Act* is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or de jure and de facto control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.
>
> It is, in my view, as much the duty of courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the *Act* or otherwise circumventing the intention of the legislature as "it is the duty of boards and courts," as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the *Canadian Human Rights Act* "to give s. 3 a liberal interpretation and purposive construction, without reading limiting words out of the *Act* or otherwise circumventing the intention of the legislature." It is not in the power of this court to cut down the broad meaning of the word "control" as there is nothing in the *Act* which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the *Act* to government information.

A "purposive" interpretation of section 10(1) is therefore mandated by the Court of Appeal's decision in *Criminal Code Review Board* (cited above). This requires a consideration of section 1 of the *Act*, which states:

> 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 government 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.

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

- Were the records created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the records? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the records? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
- Does the content of the records relate to the institution's mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the records, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- If the institution does not have possession of the records, are they being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]
- Does the institution have a right to possession of the records? [Orders P-120, P-239]
- Does the institution have the authority to regulate the records' use and disposal? [Orders P-120, P-239]
- Are there any limits on the use to which the institution may put the records, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the records? [Orders P-120, P-239]
- How closely are the records integrated with other records held by the institution? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

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

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

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

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

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

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

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

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

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the records by the institution?

- Was the individual who created the records an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

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

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

Previous orders of this office have considered the question of whether or not the Ministry has custody or control of "court records". For example, Order P-994 dealt with an application to the Ministry for access to a copy of the "Information" regarding an assault charge initiated by the appellant against a named individual. The Ministry argued that the records were "court records" in the custody or under the control of the courts. Adjudicator Laurel Cropley noted that "court records" are not specifically identified as a category of records to which the *Act* does not apply. For that reason, she concluded that the relevant question is whether the records are within the custody or under the control of the Ministry.

In Order P-994, Adjudicator Cropley began her analysis of the issues with a consideration of whether the courts are institutions under the *Act*. She stated:

> In my view, the discussions surrounding the evolution of the Act clearly contemplate that the courts and the judiciary (that is, the judicial branch of government) are to be set apart from other types of institutions and from the other branches of government generally. The unique function the courts fulfil within our society is distinct from the usual perception of "government." Accordingly, I find that the courts are not part of any Ministry and are not included in paragraph (a) of the definition of "institution."
>
> Since I have found that the courts are not included in either paragraph (a) or (b) of the definition of "institution," they are not institutions under the Act.

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

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

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

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

> *a court file, the question remains, does the Ministry have custody and/or control over these records for the purposes of the Act.* [Emphasis added.]

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

> The record at issue was generated by the appellant, not the Ministry, for the purpose of placing the matter before a court. Although the Ministry may become involved once process is issued, in this case, process was not issued, and the Ministry had no role to play in the matter.
>
> As I indicated above, the Ministry submits that it has possession of the record as a "custodian" only and any authority it has over the record's use is subject to supervision by the courts.
>
> Moreover, the Ministry submits that the record does not relate to its mandate and functions, but rather relates to the court proceedings for which the record was created. Further, the record is not integrated with Ministry records in any way.
>
> With respect to the disposition of the record, section 95a of the Courts of Justice Amendment Act, 1989, S.O. 1989, c.55 [section 79, Courts of Justice Act, 1990] provides that court records are to be disposed of in accordance with the directions of the Deputy Attorney General. However, these directions are subject to the approval of the chief judge of the relevant court.
>
> Further, in this regard, the Ministry indicates that the responsibility for making decisions about access is vested in the "head". The head of the Ministry is the Attorney General. The Ministry submits that if court records were subject to the access requirements of the Act, the Attorney General would be responsible for making access decisions and this would alter the common law approach, which vests judges with this authority. This could, the Ministry argues, impair the constitutional separation between the courts and the executive branch of government.
>
> I have carefully considered the Ministry's representations, and I find that although the Ministry is in "possession" of records relating to a court action in a court file, its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to "custody" for the purposes of the Act. Nor do I find, in applying the factors set out in Order 120 to the evidence before me, that there are indicia of "control" over these records by the Ministry.
>
> For these reasons, I find that the Ministry does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the Act and, accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the Act.

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

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

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

I adopt the approach taken in these previous decisions, including Order P-994, and will apply it in this appeal.

Representations

In its representations, the Ministry provided the following background information regarding the responsive records:

> The *Offence Type Statistics by Location* report ("the report") was produced at the request of the Chief Justice of the Ontario Court of Justice in 2004.
>
> During discussions in 2003 between the ministry and the Ontario Court of Justice about court activity statistics and tracking of cases in the Ontario Court of Justice, the judiciary expressed a desire to have a comprehensive report that integrated specific data measures by offence type. No such reports existed. The Office of the Chief Justice required more detailed reporting of offence data by court location for its own purposes.

> Instructions on the desired data elements and format for the report were provided by the Office of the Chief Justice to ministry staff who maintained the databases of court based information.
>
> Ministry Court Services Division staff are responsible for maintaining court activity information databases as part of the ministry responsibility to support the judiciary and the administration of the courts. To minimize duplication of resources, ministry staff provide support to the constitutionally independent judiciary and to the ministry.
>
> The ministry submits that the preparation of this report is an example of "judicial information", in this case judicial management information, which the constitutionally independent judiciary requires in order to properly and effectively fulfill its role in the administration of the court system in Ontario.
>
> The first report was produced for the Chief Justice in 2004 and is produced on a quarterly basis. No reports exist for the period 2000-2004, although such reports could be prepared at the direction of the judiciary.
>
> In order to properly monitor and effectively administer the operation of the Ontario Court of Justice, the Chief Justice has agreed to the report being made available to senior court staff and senior Crown Attorneys in order to inform their planning and management decision-making to support court operations.

As noted above, the Ministry states that the record is "judicial information of the Ontario Court of Justice" and therefore is not "in the custody" or "under the control of an institution" as the courts are not an institution under the *Act*.

The Ministry argues that the constitutional independence of the judiciary is of paramount importance in its consideration of the appellant's request. It refers to the decision of the Supreme Court of Canada in *Valente v. R.* [1985] S.C. R. 673 where the court considered the relationship between the provincial criminal court and the Ministry, and identified three essential conditions of judicial independence for the purposes of s. 11(d) of the *Charter of Rights and Freedoms*. One of the conditions is institutional independence "with respect to matters of administration bearing directly on the exercise of its judicial function." The Ministry states:

> The "fine line" between interference and management controls in court administration is often quite nuanced but it must be based on a fundamental respect for the constitutional independence of judiciary, including the protections afforded judicial information required by the court to effectively and appropriately fulfill its separate role in the administration of the court system.

The Ministry also refers to *Attorney General of Nova Scotia v. Maclntyre*, [1982] 1 S.C.R. 175 and *Vickery v. Nova Scotia Supreme Court (Prothonotary),* [1991] 1 S.C.R. 671 which the Ministry states "recognize the overall protecting and supervisory power of the court over all court records and documents."

The Ministry describes the information at issue in this appeal as "judicial information." It states:

> Judicial information is a kind of court record that is information gathered, produced or used for judicial purposes, but does not include, for example, exhibits, affidavits and other written evidence filed with the court or judgments and reasons for judgment that have been issued. Judicial information is created by judges or judicial staff. (*Canadian Judicial Council Blueprint for the Security of Judicial Information*, November *2004, pp.* 10 and 11)

In support, the Ministry refers to the *Canadian Judicial Council's Model Policy for Access to Court Records in Canada* (2005), (the CJC Model Policy). The Ministry states:

> The Council's Model Policy also makes clear that access to court records policies and over all control over court records and documents rests with the judiciary alone.
>
> > Any access policy developed by the judiciary on the basis of this model policy will be founded upon the **inherent jurisdiction of the judiciary to maintain supervisory and protective power over its own records.** Thus, it must be clear that any reference made in this policy to the "court" does not include the administrative aspects of the court for which the executive branch of the government is responsible, but only the judiciary in the exercise of a judicial function such as its supervisory and protective powers regarding court records. [Emphasis added.] (p.1)

Elsewhere in its representations, the Ministry characterizes the responsive records as "court activity data" and seems to suggest that although it had the "implied right" to use and disclose this information in the past, its rights are now subject to the terms of an "implied consent to use this information" as the information is now in the control of the courts. The Ministry states:

> Following the release of the Council's model policy and as a result of a national and international trend among courts to more closely consider the use of court based information, the ministry and the courts have instituted active discussions concerning access to court records, including electronic access and access to court information and data, such as this record. The courts have asked that the terms of the implied consent to use this information be documented.
>
> The Ontario Court of Justice takes the position that all information and statistics based on court information is in the control of the courts. In the past it was not explicitly understood by the ministry that the information held by the ministry was

> not in its custody and control nor were the terms of any implied consent documented. The ministry exercised responsible judgment in handling past requests for court activity data.
>
> Since engaging in the recent discussions with the courts on this issue and having the court's position clearly articulated, the ministry has been careful to respect the court's position and the independence of the judiciary. As a result the ministry does not currently provide access to data or records that previously the ministry felt it had implicit judicial consent to release or distribute, without explicit judicial consent.
>
> …
>
> The ministry submits that it is exclusively within the constitutional jurisdiction of the judiciary to develop policies and practices with respect to both court records and judicial information. While respecting openness as the core principle in determining access to court record policies (balanced with protection of privacy and the administration of justice), the court is likely to be more protective about policies related to access to judicial information.

Regarding the Ministry's role in court administration, the Ministry refers to section 71 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which provides "statutory authority to the Attorney General to superintend the administration of the courts '…other than matters that are assigned by law to the judiciary.'" It states:

> The Supreme Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, *supra*, confirms that provincial jurisdiction over court administration contains "an implied limitation that the independence of those courts cannot be undermined." (para. 108)

The Ministry also states:

> Inappropriate release of judicial information would seriously jeopardize the ministry's relationship with the courts and would likely be perceived as a breach of the judiciary's constitutionally protected independence.
>
> [T]the courts alone are free to determine policies concerning release of judicial information – or to agree to the release of individual requests. Inappropriate ministry sharing of judicial information could have serious long-term consequences on the court's willingness to rely on, or share information with, the ministry, which would have a serious negative impact on the effective operation of the courts.

The Ministry provided the following representations in response to the specific questions set out in the Notice of Inquiry:

> **Was the record created by an officer or employee of the institution? (OrderP-120)**
>
> Ministry staff created the report under the specific direction of, and for the use of, the Chief Justice of the Ontario Court of Justice. As noted above, Canadian jurisprudence recognizes the delicate and nuanced role ministry staff have in working for both the executive branch of government but also serving the needs and providing services for the constitutionally independent judiciary. Employees of the ministry routinely undertake tasks under the direction of the judiciary. The mere fact that an employee of the ministry undertakes a task cannot be considered evidence that the ministry (institution) has directed the task or controls the resulting document, report or information.
>
> **What use did the creator intend to make of the record?**
>
> The creator intended to provide the report for the use of the Chief Justice of the Ontario Court of Justice. The ministry is not aware of the Chief Justice's specific intentions for the use of the report. The ministry considers the report to be judicial information, specifically judicial management information, for the use of the Chief Justice.
>
> **Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the records?**
>
> The *Ministry of the Attorney General Act*, *supra*, gives the Attorney General the duty to "superintend all matters connected with the administration of justice in Ontario". Further the *Courts of Justice Act*, *supra*, provides the authority to the Attorney General to superintend the administration of the courts "…other than matters that are assigned by law to the judiciary."
>
> …
>
> The ministry's statutory authority to provide support to the judiciary means that ministry staff routinely provide services and undertake tasks under the direction and control of the constitutionally independent judiciary. The preparation of judicial information based on court records and data is one such service the ministry provides to the courts.

Is the activity in question a "core", "central" or "basic" function of the institution?

The administration of justice and the courts are core, central and basic functions of the institution. However, as noted above, Canadian jurisprudence is very clear that any provincial statutory authority to carry out the ministry's duty for the administration of justice and courts administration must be exercised within the context of constitutionally protected judicial independence, including court control over court records and documents. Any suggestion that ministry staff exercising their core function in support of the judiciary might be interpreted to compromise the institutional independence of the judiciary would have grave consequences for the ministry and the administration of the court system in the province.

Does the content of the record relate to the institution's mandate and functions?

The report relates to the ministry's mandate and function to provide support to the independent judiciary in their administration of the courts in Ontario.

Does the institution have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement?

The ministry has possession of the report as ministry staff are responsible for compiling the report for the Chief Justice. The Office of the Chief Justice has also agreed to the report being made available to senior court staff and Crown Attorneys for the purpose of planning and decision-making to support court operations.

…

Employees of the ministry routinely undertake tasks, including the preparation of handling of judicial information, under the direction of the judiciary.

…

Possession of the report is with the consent of the court, whose report it is. The ministry submits that mere possession of the report by the ministry does not place the report in the custody or under the control of the ministry.

If the institution does have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or an employee?

Employees of the ministry have access to the report to assist the court in the effective administration of justice and court administration in Ontario. The court does not consider the ministry's possession of the report to interfere with its definition as constitutionally protected judicial information.

Does the institution have a right to possession of the record?

The ministry has no right to possess the report.

The ministry has possession of the report in one instance as staff support to the courts (as compiler of the report) and in another capacity (senior court staff and senior Crown Attorneys in order to support their planning and decision making to support court operations) at the discretion of the Chief Justice of the Ontario Court of Justice.

Does the institution have the authority to regulate the record's use and disposal?

The ministry does not have the authority to regulate the use or disposal of the report. The report was created for, and at the direction of, the Office of the Chief Justice. Only the court can regulate the use or disposal of the report.

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

The ministry is not free to independently determine uses of or limits on the report. Only the court can determine any limits on the use of the report.

As noted above, the ministry is actively engaged in discussions with the judiciary on a range of issues related to access to court records and information. The discussions will assist in determining principles and approaches to be used in making court records and court based information publicly available.

To what extent has the record been relied upon by the institution?

Senior court officials and Crown Attorneys use the report, in conjunction with the judiciary, to support the effective administration of justice in the province.

The report is considered an effective tool, among others, to support senior ministry staff in their planning and decision making to support court operations.

How closely is the record integrated with other records held by the institution?

The report is independent of other records the ministry holds. The report is available to a limited set of senior court officials and Crown Attorneys. Data used to compile the report is used by the ministry for other court administration purposes.

What is the customary practice of the institution and the institutions similar to the institution in relation to the possession or control of records of this nature, in similar circumstances?

As noted above the ministry respects the overall protecting and supervisory power of the court over all court records and documents, including judicial information.

…

Prior to the current discussions with the court, initiated in 2006, the ministry believed it had the implied consent of the courts to share the court based information and data on a limited basis. As noted above in paragraph 31, the courts have taken the position that court based information and statistics based on court information is in the control of the courts. As a result of these discussions, the ministry has been careful to respect the court's position and does not currently provide access to data or reports, without explicit judicial consent.

The Ministry adds:

The report is in the possession of the judiciary and selected ministry staff, with the implied consent of the judiciary. No other individual or organization has possession of the report.

…

The report has no distinct costs associated with it. Ministry staff undertakes the compilation of the data and the report itself in their capacity supporting the constitutionally independent judiciary. Ministry funding supports the staff cost associated with the data and report compilation, as it does for all court staff. The ministry submits that given the previously noted unique role ministry staff play in both supporting the judiciary in their independent administration of the courts, as well as functioning as part of the executive branch of government, the funding of the staff positions ought not to be a significant factor in establishing ministry care [sic] or control of the report.

In conclusion, the Ministry states:

> The ministry submits that the impact of finding judicial information being within the scope of the *Act*, would have far reaching implications for the administration of the court system and the ministry's relationship with the constitutionally independent judiciary.
>
> The courts alone are constitutionally charged with determining access to judicial information, including court records, data and statistics. Administrative information and data about court administration that is in the custody and control of the ministry is publicly available and is routinely made available through the *Act*.

The appellant submitted representations in response. He states:

> The data in those reports are housed by, controlled by, updated by, administered by, relied on by, crunched by, acted on by, and reflective of the work of the Crown (Ministry). Both the data, and the reports, are in the Ministry's custody and possession, given that senior managers in MAG prosecutions and Ministry staff with the Court Services division rely on this information.
>
> …
>
> In paragraph 14, the Ministry contends that the "preparation of this report is an example of judicial information" thus placing it beyond the reach of the public. … The act of collating Ministry data does not fundamentally change the information. It is all well and good the judiciary will use the MAG statistics to better manage the courts. But that ought not make it beyond the reach of me, or [named media outlet] (as the "eyes and ears of the public") for our purposes – which are journalistic – to observe, expose, cast light on, call in to account the issues raised by the information.

The appellant argues that although the judiciary has an interest in the objective measurement of how caseloads and prosecutions are being handled, the Ministry also has an interest. He states:

> The Ministry has both a statutory power and a duty to collect these data and monitor them.
>
> The monitoring function is a core, central and basic function of the Ministry, relating directly to the Ministry's prosecutions, and Court Services mandates and responsibilities.
>
> The Ministry has physical possession of both the data, and the reports in question, and has a right to possess both. (The data is collected by Court Services,

> regardless of whether the judiciary requests the creation of specific reports. There is nothing stopping the Ministry from generating its own similar reports from its databases, or for members of the public requesting the information.)
>
> The Ministry relies heavily on this data to better manage prosecutions and court staffing in Ontario.
>
> The Ministry has the right to regulate the data (if not the records), subject to its legal, ethical and moral obligations as a public institution – including the Freedom of Information Act.
>
> …
>
> This is a matter of common sense. The Ministry gathers data in the course of its work supporting the administration of justice in Ontario. Whether the Judiciary asked for some of that data, or the CBC asks for a version of similar information – it is the Ministry's to provide.
>
> …[T]his is not about 'court documents' or data about the judiciary, or trends in judicial findings. It is about access to the Ministry's own tracking data of court prosecutions

As noted above, following receipt of the appellant's representations, I invited the Ministry to submit representations in reply. In its reply, the Ministry repeated that, although its staff may have possession of the reports, the Ministry does not have custody and control of the report. It also acknowledged that Ministry staff do make use of the report, without providing details, but it argued that they do so under the control and direction of the Ontario Court of Justice.

Following my review of the reply representations, I wrote to the Ministry and asked it to provide me with answers to a number of questions. In response, the Ministry stated:

> *The Ministry has been producing court activity statistical reports for over a decade* in order to support management decision making about the justice system and to support the Chief Justices of the Ontario Court of Justice and the Superior Court of Justice. The reports based on these earlier statistics were not satisfactory, however, and were terminated. Subsequently in 2004, the "Offence Type Statistics by Location" report was prepared at the request of Chief Justice Lennox.
>
> Prior to 2004, the Ministry gathered and used statistical data about offences to support management decision-making by the judiciary and the Ministry.
>
> *The report is available to management in the Court Services Division and the Criminal Law Division and to senior Crown Attorneys to support management decision making such as resource planning and allocation.*

> Crown and court staff use statistics on a local basis for planning and scheduling purposes to support timely case processing.
>
> *Crown Attorneys use the statistical data and reports to monitor trends such as increases/decreases in charges and court activities over time. Statistical data and reports are also used to assist in allocating resources.*
>
> …
>
> *Criminal Law Division posts this report on its intranet with restricted access to Divisional Management Committee, Directors of Crown Operations, Crown Attorneys (not Assistant Crown Attorneys) and a few analysts in the Corporate Branch Divisional Planning and Administration.* The Court Services Division posts the report on its intranet site and it is available to directors, Managers and Supervisors of Court Operation and to the 7 Managers of Business Support.….. [Emphasis added.]

I also asked whether the Ministry had any written correspondence between the courts and the Ministry relating to the collection, maintenance and use of the statistical information and/or the report. The Ministry responded that it did not understand the question and it sought clarification. Staff in this office provided Ministry staff with the clarification. The Ministry responded that it frequently exchanges electronic communications with the court about specific requests for access to court information; however, it did not provide me with copies of any communications regarding the collection, maintenance and use of the reports and/or the statistical information in the reports at issue here with the exception of a blank template that it uses when consulting with the CJO about access requests.

Analysis and Findings

Having carefully reviewed the representations of the parties and the records, I find that the records are in the custody of the Ministry and also under its control. The reasons for my decision follow.

Ministry Role and Mandate

One of the factors to be considered in an analysis of the custody and control issue is whether there is a relationship between the core, basic and central functions of the Ministry and the record at issue. I will therefore begin my analysis with a review of the Ministry's mandate.

The Ministry has the responsibility for, among other things, the support of and administration of the constitutionally independent courts, as well as responsibility for other aspects of the administration of justice in Ontario, and the conduct of litigation for and against the Crown. As the Ministry supports the statutory mandate of the Attorney General, it derives its authority through the Attorney General. The statutory responsibilities of the Attorney General are set out in section 5 of the *Ministry of the Attorney General Act*, which states:

The Attorney General,

> (a) is the Law Officer of the Executive Council;
>
> (b) shall see that the administration of public affairs is in accordance with the law;
>
> (c) shall superintend all matters connected with the administration of justice in Ontario;
>
> (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, until the Constitution Act, 1867 came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature;
>
> (e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him or her by the Government;
>
> (f) shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature;
>
> (g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies;
>
> (h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature;
>
> (i) shall superintend all matters connected with judicial offices;
>
> (j) shall perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant Governor in Council.

The organizational chart that is available on the Ministry website reveals that the Ministry is divided into eight distinct divisions: Court Services, Criminal Law, Legal Services, Corporate Services, Family Justice Services, Victim Services Secretariat, Policy and Communications.

The information at issue in this record includes information relating to the timely processing of criminal proceedings, the types of charges under consideration and the disposition of the charges. This is all information that relates to the Ministry's mandate to superintend matters connected with the administration of justice (5(c)) and the conduct and regulation of litigation for and against the Crown (4(h)). Accordingly, I find that the information contained in the records does relate to the Ministry's core, central and basic functions. I also find that the information is relevant to the mandate and functions of both the Court Services division and the Criminal Law division, a factor which I will discuss in more detail below.

Characterization of the Records

The Ministry acknowledges that the records at issue here are not "court records" (that is, they are not records found in a court file relating to a particular proceeding – or, put slightly differently, "court records in a court file" as referred to in Order P-994) and I agree with that position.

In Order P-994 Adjudicator Cropley distinguished between records that were located in the court file and that related to the court proceeding and records that might have been copied from the court file that exist independently in another location. She stated:

> For these reasons, I find that the Ministry does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the Act and, accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the Act.
>
> I am not satisfied, however, that this conclusion extends to copies of such records which exist independently of the "court file". Accordingly, to the extent that copies of these records also exist independently of the "court file", they would fall within the custody and/or control of the Ministry and, therefore, would be subject to the Act.

In British Colombia, "record[s] in a court file" are expressly excluded from the *Freedom of Information and Protection of Privacy Act* (BC FOIPPA). In the Alberta legislation (Alberta FOIPPA), "information in a court file" is excluded. While these terms are neither defined nor used in the *Act*, a review of the definitions and the treatments of these records in British Colombia and Alberta is of some guidance. Adjudicator Cropley noted:

> Both the Alberta and British Columbia Freedom of Information and Protection of Privacy Acts (FOIPPA) contain similarly worded sections which outline the types of records that are subject to their legislation. Section 3(1)(a) of the British Columbia FOIPPA provides, for example, that:
>
> > This Act applies to all records in the custody or under the control of a public body, **including court administration records**, but does not apply to the following:
> >
> > > a record in a **court file**, a record of a judge of the Court of Appeal, Supreme Court or Provincial

> Court, a record of a master of the Supreme Court, a record of a justice of the peace, a **judicial administration record** or a **record relating to support services provided to the judges of those courts**. [emphasis added]

Both Alberta and British Columbia distinguish between "court administration records" and records in "court files". British Columbia defines court administration records in its Policy and Procedures Manual, Volume I, produced by the Information and Privacy Branch of the Ministry of Government Services as those files pertaining to non-judicial staffing which deal with personnel issues, position competitions and office management. Although what constitutes a "court file" has not been defined and is, therefore, not clear, I agree, in general, with the distinction between court administration records and other court records.

Alberta and British Columbia have expressly excluded records in a court file from the application of their respective legislation. Although this may provide some guidance in analyzing this issue in the current appeal, it is not, in my view, determinative of the issue.

It is possible that a "court file" may contain many types of records, such as administrative records, records directly related to the action, and records relating to enforcement of orders. The factual circumstances of this appeal do not facilitate extensive discussion of the scope of what constitutes a record in a court file. This issue may, in fact, have to be determined on a case by case basis depending on the nature of the records requested. In my view, future decisions regarding this issue might also include discussion of the distinction between court administration records and records which are normally found in court files, as well as other types of records that find their way into a court file. Generally speaking, however, I am prepared to accept that, what the Ministry refers to as "court records", consist of those records which relate to a court action and which are found in a court file.

Consistent with the comments of Adjudicator Cropley in Order P-994 quoted above, the British Columbia Information and Privacy Commissioner has found that *copies* of records in the possession of other government institutions that are also located in a court file, are not "record[s] in a court file" and therefore are within the scope of the British Columbia FOIPPA [see Orders 234, Order 01-27].

These provisions are not determinative of the issue before me, but these approaches to the characterization of records provide some guidance in analyzing the custody and control issue in this appeal.

I agree with the approach taken in British Colombia and suggested by Adjudicator Cropley in Order P-994, that copies of records contained in a court file but found in a different location within the Ministry's records should be treated differently from the actual records in the court

file. In my view, generally, copies of records found in the possession of the Ministry should not be treated in the same way as records that are located in a court file that directly relate to the court proceedings and the adjudicative function.

Turning to the records before me, I note that the "Offence Type Statistics by Location" report includes statistics, by offence and location, relating to the number of charges received, charges disposed of, average number of appearances, the disposition of the charges and the time involved to process criminal cases. In my view, the best description of the information in the report is the one used by the Ministry in its press release of June 3, 2008 in which it described this information as "criminal court statistics" since the information in the records is general statistical information gathered or obtained from the processing of criminal cases.

Although the precise source of the information contained in the records is not clear, the Ministry submits:

> Ministry Court Services Division staff are responsible for maintaining court activity information databases as part of the ministry responsibility to support the judiciary and the administration of the courts.

Elsewhere the Ministry suggests that the information in the records is based on information contained in court records. It states:

> The preparation of judicial information based on court records and data is one such service the ministry provides to the courts.

In my view, the records at issue here are analogous to copies of court records outside the "court file" that are in the custody of the Ministry and found in its other record holdings. Although they are prepared based on information that may be contained in the court files, they are prepared, maintained, manipulated, produced and used by the Ministry staff whose responsibility is the administration of the courts. They are also used by other Ministry staff whose responsibility is the administration of justice and the prosecution of offences. Although they are analogous to *copies of court records*, they are even farther removed from the actual contents of any court file because they are not in fact copies. They consist of aggregate information and data relating to the progress of criminal cases that might originate from information that is also located in court files, but this information has been manipulated and formatted to create a statistical report.

I do not agree with the Ministry's position that the information at issue here falls within the term "judicial information" as defined by the *Canadian Judicial Council Blueprint for the Security of Judicial Information* (the CJC Blueprint) which states, at page 10, that "judicial information" is information that is "gathered, produced or used for judicial purposes." Given that there is a significant amount of evidence, reviewed in detail below, that the information in the records is gathered, produced and used for purposes other than judicial purposes, I do not agree that, in the hands of the Ministry, the information falls within this definition.

Moreover, in my view, the definition of "judicial information" used in the CJC Blueprint is not helpful in analysing the issues in this appeal. The CJC Blueprint describes its purpose as "provid[ing] guidelines to improve the security, accessibility and integrity of computer systems containing judicial information" (at page 5). Its recommendations address issues such as the security of remote access technologies, encryption, and anti-virus protections. In addition, the threshold for the application of the *Act* is custody or control, and as demonstrated in Order P-994, the principle of judicial independence is a factor to be taken into account in assessing whether that threshold has been met. This is discussed in more detail below. In my view, the definition of "judicial information" relied on by the Ministry is not applicable in the context of the *Act*.

As part of its argument in relation to "judicial information", the Ministry also states that, although the records were created by Ministry staff, they were created on the instructions of the CJO, given in 2004, for "judicial management purposes." However, the Ministry also acknowledges that the information contained in the records at issue has been collected and maintained by the Ministry since 2000 (elsewhere the Ministry states that it has been collecting this information for a decade) and that it was not until 2004 that the CJO requested that the existing information be compiled and formatted in a different manner. In other words, although the statistical information was placed in its current format at the request of the CJO in 2004, that information has been collected, and was available to Ministry staff, since 2000. In my view, the format of the records is not relevant to the determination of whether they are in the Ministry's custody or control in the circumstances of this appeal.

The Ministry has also relied on the CJC Model Policy regarding access to court records. As the purpose of the CJC Model Policy is to "define principles of access to court records," it is also not relevant to the issues before me which, as I have previously stated, relate to records other than "court records."

More importantly, any access scheme that the courts may have to records in their custody or under their control exists independently of the access scheme under the *Act*. Accordingly, although the courts have developed a policy regarding access to what they have defined as "court records", that policy does not override the application of the *Act* to those records which may also be in the custody or under the control of the Ministry.

I give significant weight to the fact that the statistical information in these records does not reveal in any way the substance or content of records that Adjudicator Cropley and previous orders of this office have described as "court records". Nor is the information in the report directly related to a specific court proceeding or more generally to the adjudicative function of the courts. In addition, although the contents of the records relate to the mandate of the Ministry to support the administration of the courts, the contents of the records also relate to the Ministry's mandate to manage the criminal justice system and to conduct litigation on behalf of the Crown which is in the purview of the Criminal Law Division.

Having reviewed the records and the representations of the parties, I am satisfied that they are properly characterized as relating to the management of the courts and the prosecution of offences by the Crown, and therefore relate to administrative and prosecutorial functions of the Ministry.

Other Factors

I now turn to consider the parties' representations regarding other indicia of custody and control set out in previous orders of this office.

I accept the position of the Ministry that mere possession of the reports by senior employees of the Ministry does not place the reports within the scope of the *Act*. However, the evidence before me is that staff at the Ministry have more than mere possession of the report. As analysed above, and discussed in more detail below, the records are relied on by the Ministry for its own independent purposes and relate to its core functions. Also, as previously stated, the information contained in the reports at issue has been collected, prepared and maintained by the Ministry since at least 2000, long before the CJO made its request in 2004 for a copy of this report in its current format. Although the Ministry states that it was not until 2004 that it began to prepare the report in its current *format* based on instructions provided by the CJO to Ministry staff, in fact, it acknowledges that it had the ability to generate the report based on the data previously collected and maintained by its staff.

Previous orders of this office (P-267, PO-1725) have found that where the records at issue have been integrated into the operations of the institution, they are in the custody of the institution for the purposes of the *Act*. I agree with this approach and adopt it here.

I find that there is a high degree of integration and co-mingling of this report in Ministry operations across divisions and among staff involved in other aspects of the administration of justice. Although I accept that many Ministry staff provide support to the constitutionally independent judiciary, the Ministry representations state that the primary responsibility for the support of the judiciary and the administration of the courts lies with the Court Services Division of the Ministry. Indeed, the Ministry acknowledges that this division is responsible for maintaining court activity information databases.

Most significantly, and as alluded to previously, the Ministry acknowledges that the report is also available to management in the Criminal Law Division and to senior Crown Attorneys to assist with their staff and other resource planning and allocation. The Criminal Law Division posts this report on its intranet and access is given to staff including the Directors of Crown Operations and to the Corporate Branch Divisional Planning and Administration. The Ministry's representations acknowledge that "the report is an effective tool, among others, to support senior ministry staff in their planning and decision making to support court operations." For example, these court statistics would be a valuable tool in deciding where and when to construct new court houses, a decision that would be made by the Ministry in supporting court operations and which would entail fiscal, administrative and political considerations. This is not the kind of decision that would be made by the courts. In my view, it is very significant that other staff in the Ministry

who are not directly involved in the administration of the courts *have access* to this information and *use* the information for purposes unrelated to the exercise of judicial functions or the administration of court proceedings.

The Ministry states that its use and distribution of this report was based on an "implied consent" to do so. In this regard, I found the Ministry's representations to be vague and confusing. In addition, I have not been provided with any documentation, other than the bald assertions in the representations, to demonstrate that these activities were undertaken with the judiciary's consent, nor that the judiciary was of the view that it had the authority to give or withhold consent regarding such uses of the information. I also note that the Ministry was not able to provide me with evidence of any written communication between the courts and the Ministry regarding the preparation, maintenance and use of these records, which I would have expected to exist if the courts had the degree of control over the records that is alleged by the Ministry. I find that there is not sufficient evidence before me to support a finding that the courts have exclusive control over the records in a manner that would prevent the Ministry from having custody or control of them for the purposes of the *Act.*

For these reasons, I find that the findings of Adjudicator Cropley in Order P-994 that the Ministry had "limited ability to use, maintain, care for, dispose of and disseminate" the court records, do not apply in the circumstances of the records at issue in this appeal.

I have also taken into account the fact that the press release that was issued in June of 2008 announcing the disclosure to the public of some of the information contained in this report was issued by the Ministry as part of its *Justice on Target* Strategy. This evidence weighs in favour of a finding that the Ministry has custody or control of the record.

Independence of the Judiciary

The Ministry appears to argue that the application of the *Act* to the records would violate the constitutional principle of judicial independence. For example, the Ministry states:

> The courts alone are constitutionally charged with determining access to judicial information, including court records, data and statistics.

Elsewhere the Ministry states:

> Inappropriate release of judicial information would seriously jeopardize the ministry's relationship with the courts and would likely be perceived as a breach of the judiciary's constitutionally protected independence.

The Ministry's constitutional arguments are included in its representations on custody and/or control of the records. In one aspect of this argument, the Ministry suggests that in the exercise of its role and mandate, it has only bare possession of records that are not in its custody and/or under its control but are in the custody and control of the courts due to its administrative relationship with the courts. I have already addressed this argument. In addition, however, the Ministry appears to make the additional argument that, regardless of my view of the evidence of

custody and control under the *Act*, a finding that the Ministry has custody and/or control of these records would violate the constitutional independence of the judiciary.

However, I note that the Ministry stops short of arguing that the *Act* is constitutionally inapplicable to the records based on the principle of judicial independence, an argument that would require a Notice of Constitutional Question under section 109 of the *Courts of Justice Act.* As stated in Order P-994, the Ministry's special relationship with the courts "impacts on the issue" of custody and/or control because the relationship with the judiciary may result in "a limited ability to use, maintain, care for, dispose of and disseminate the records." Put slightly differently, the principle of judicial independence may have a bearing on the issue of custody or control, as I have already noted above. However, the principle of the independence of the judiciary is not engaged where the records are not directly related to the courts' adjudicative functions, and where the evidence about the ability to use, maintain, care for, dispose of and disseminate the records, along with evidence of the integration and co-mingling of the records across Ministry divisions, supports a finding that the records are in the custody and/or under the control of the Ministry.

It should be noted at the outset that the relationship between the judiciary and the Ministry is a factor that I have taken into account in my analysis of the issues in this appeal. However, in the circumstances of this appeal, and for the reasons that follow, I am not persuaded that a finding that the Ministry has custody and control of these records would interfere with the independence of the judiciary.

In this regard, the Ministry refers in its representations to the Supreme Court of Canada decision in *Valente v. R, [1985] 2 S.C.R. 673* in support of its position that disclosure of the statistics comprising the record would meet the test developed for infringing on judicial independence. In *Valente*, LeDain J. states the following:

> Howland C.J.O. drew a distinction, for the purposes of the issues in the appeal, between adjudicative independence and administrative independence, which is reflected in the following passages from his reasons for judgment at pp. 432-33:
>
> …
>
> When considering the independence of the judiciary, it is necessary to draw a careful distinction between independent adjudication and independent administration. It is independent adjudication about which the Court is concerned in this appeal.
>
> …
>
> In Ontario, the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the court rooms and the court staff. The assignment of judges, the sittings of the court, and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudicative function of the judiciary. However, there must

> necessarily be reasonable management constraints. At times there may be a fine line between interference with adjudication and proper management controls. The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration.

With respect to the elements of judicial independence, LeDain stated:

> The third essential condition of judicial independence for purposes of s. 11(d) is in my opinion the institutional independence of the tribunal with respect to matters of administration *bearing directly on the exercise of its judicial function.* The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today. (emphasis added)

In my view, the analysis in *Valente* supports a finding that the Ministry has custody or control of the records at issues in this appeal. As the Court notes, "[i]n Ontario, the primary role of the judiciary is adjudication." Having carefully considered the representations and the records, I am not persuaded that the information contained in this report relates to or impacts the independence of the judiciary, judicial functions and the adjudicative role. On the contrary, I believe that copies of this report would not be distributed as it is to senior Crown Attorneys who appear before the judiciary in the role as prosecutors of criminal proceedings if it was felt that the information in the report affected in any way the independence of the judiciary.

In Order P-994, the Ministry argued that records in a court file are central to the adjudicative process and intimately related to the judicial function of the courts. In response to this position Adjudicator Cropley recognized that:

> In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those records which are directly related to this function.

However, the records at issue in Orders P-994 and P-2446, referred to by the Ministry, are different from the record at issue in this appeal. The Offence Type Statistics by Location reports are not "central to" and "intimately related to" the judicial function, nor are they contained in a court file as was the case in both of these orders. Therefore, although these orders do reflect the balancing referred to by the Ministry and sensitivity to the relationship between the Ministry and the courts, in my view their conclusions are confined to the unique circumstances of the records at issue in those appeals.

Based on my assessment of all of the factors referred to in the parties' representations, and bearing in mind the character of the information, its lack of specific connection to the adjudicative function of the courts, its use by Ministry staff in performing administrative functions that are not the province of the courts, and its evident integration into Ministry records, I find that the Ministry has both custody and control of the "Offence Type Statistics by Location" reports requested by the appellant. The Ministry has not claimed that the information severed is

subject to any exemptions in the *Act*, and in my view, none of the mandatory exemptions apply to this information. Accordingly, I will order that it be disclosed.

ORDER:

I find that the Ministry has custody and control of the Offence Type Statistics by Location reports.

I order the Ministry to disclose to the appellant the severed portions of the "Offence Type Statistics by Location" reports for the periods from 2000 to the date of the request by **January 5, 2009**

December 4, 2008

Brian Beamish
Assistant Commissioner