CITATION: Ministry of the Attorney General v. Information and Privacy Commissioner, 2011 ONSC 172
DIVISIONAL COURT FILE NO.: 21/09
DATE: 20110223

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, SACHS and NADEAU JJ.

B E T W E E N:	
MINISTRY OF THE ATTORNEY GENERAL Applicant	*Sarah Kraicer*, *Sara Blake* and *Arif Virani*, for the Applicant
- and -	
INFORMATION AND PRIVACY COMMISSIONER and CANADIAN BROADCASTING CORPORATION, Requester	*William S. Challis*, for the Respondent Information and Privacy Commissioner *Patricia Latimer*, for the Respondent CBC
Respondents	
	HEARD at Toronto: October 29, 2010

BY THE COURT

Overview

[1] This is an application for judicial review of Order PO-2739 (the "Order") made by the Assistant Information and Privacy Commissioner (the "Commissioner") on December 4, 2008, ordering the Ministry of the Attorney General ("Ministry") to disclose to the Canadian Broadcasting Corporation (the "CBC") certain "Offence Type Statistics By Location" reports (the "Reports") for the period from 2000 to the date of the request on October 2, 2006.

[2] The Reports were requested and designed by the Chief Justice of the Ontario Court of Justice (the "Court") for judicial management purposes. They contain judicially selected data recording activity in criminal matters in the Court. The Reports were created by Ministry staff. A journalist employed by the CBC made an Access Request under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act"), for disclosure of the Reports. The Chief Justice of the Court consented to disclose a majority of the Reports to the CBC, but did not consent to disclose certain severed portions on the basis that such disclosure would "compromise the independence of the judiciary". The severed portions of the Reports at issue contain particularized statistical data at the local courthouse level relating to judicial dispositions at trial.

[3] Subsection 10(1) of the Act provides:

> 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

[4] There is no dispute that the Court is not an "institution" within the meaning of the above provision. On the other hand, the Ministry is. The Commissioner found that the Reports were under the "custody" and "control" of the Ministry within the meaning of s. 10(1) of the Act. Therefore, the Commissioner ordered the Ministry to disclose the full Reports, including the severed portions, to the CBC.

[5] The Ministry submits that the Commissioner erred in law in his interpretation and application of the words "in the custody or under the control of an institution" in s. 10(1) of the Act by failing to take into account the principles of judicial independence. According to the Ministry, the principle of judicial administrative independence requires that the judiciary have supervisory control over judicial information created by and for the judiciary in relation to matters of administration bearing directly and immediately on the exercise of the judicial function. The Ministry argues that the severed portions of the Reports contain such information. Further, although the Ministry has physical possession of the Reports, its possession is for limited purposes, and the Court has not waived supervisory control over further disclosure of the Reports. As the Court exercises control over the Ministry's use of the Reports and any disclosure to third parties, the Reports are not in the custody or control of the Ministry. Finally, since the courts are not an "institution" under the Act, the Commissioner has no jurisdiction to review the decision of the Court not to disclose the severed portions of the Reports to the CBC.

[6] For the reasons that follow, we find that in the particular circumstances of this case the Ministry had custody, although not control, of the Reports. As such, the Reports including the severed portions must be disclosed, unless it is demonstrated that to do so would compromise judicial independence. Having reviewed the Reports, we are not satisfied that disclosing the Reports would, in this case, compromise judicial independence.

The Factual Context

[7] During discussions in 2003 between the Ministry and the Court about court activity statistics and tracking of cases, the judiciary expressed a desire to have comprehensive statistical reports that integrated specific data measures by offence type. The Office of the Chief Justice required this detailed reporting of offence data by court location for its own purposes. The Chief Justice provided instructions on the desired data elements and format for the reports to the staff of the Ministry's Court Services Division who maintain court activity information databases. The "Offence Type Statistics by Location" reports were procured as a result of these discussions.

[8] The severed portions of the Reports at issue consist of selected statistical data of court and judicial activity relating to criminal matters before the Court at the local courthouse level. The Reports were created for the Chief Justice for his own judicial management purposes. The Ministry is not aware of the Chief Justice's specific intentions for the use of the Reports.

[9] With the knowledge and consent of the Chief Justice, a number of persons within the Ministry were given limited access to the Reports to carry out Ministry responsibilities. The Reports have been made available to senior court administration staff and senior Crown Attorneys to inform their planning and management decision-making to support court operations. The Reports are used by court staff for court administration purposes.

[10] On October 2, 2006, a journalist employed by the CBC made an Access Request under the Act for "Ontario Annual/Monthly Reports – Ministry A.G. Crown 'Offence Type Statistics by Location'" from 2000 to the date of the request.

[11] The Ministry responded to the Access Request on January 3, 2007. The Ministry advised that the documents requested were prepared for the judiciary at its specific request, and consequently the documents fell outside the scope of the Act because the Ministry did not have custody or control of the Reports for the purpose of the Act. Further, the Court, which did have custody or control, is not an "institution" under the Act. The CBC appealed the Ministry's decision to the Information and Privacy Commissioner by letter dated February 2, 2007. On June 22, 2007, a Notice of Inquiry was issued.

[12] On June 4, 2008, the Office of the Chief Justice consented to the disclosure of most of the Reports sought by CBC. The only information for which consent was denied was the severed portions of the Reports. The Office of the Chief Justice indicated that these portions contained data that, if released, "would compromise the independence of the judiciary".

[13] The Reports consist of annual "Offence Type Statistics by Location" reports for the period from 2000 to 2004 and quarterly reports for the period from 2005 to 2007. The Reports contain data relating to six different offence groups organized according to the following indicia:

- Offence type

- Charges received
- Charges disposed
- Average days to disposition
- Average appearances to disposition
- Charges pending
- Average days pending
- Percentage pending over eight months
- Number of charges pending over eight months
- Disposed before trial
  - Total
  - Number withdrawn before trial
  - Guilty pleas before trial
  - Other disposition before trial
- Disposed at trial without trial
  - Total
  - Withdrawn at trial
  - Guilty plea at trial
  - Other disposition at trial
- Disposed at trial with trial
  - Total
  - Dismissed at trial
  - Stayed at trial
  - Committed for trial at preliminary hearing
  - Plead not guilty/found guilty at trial
- Trial rate

[14] The severed portions of the Reports that were not disclosed to the CBC contain particularized data at the local courthouse level relating to judicial dispositions "disposed at trial with trial", for the following fields:

- Dismissed at trial
- Stayed at trial
- Committed for trial at preliminary hearing
- Plead not guilty/found guilty at trial.

The Decision under Review

[15] On December 4, 2008, the Commissioner issued Order PO-2739 finding that the Ministry had "custody and control" of the Reports and ordering the Ministry to disclose the severed portions of the Reports to the CBC.

[16] The Commissioner began his analysis by finding that the Reports contain information relating to the timely processing of criminal proceedings, the types of charges and their disposition. He found that all of this information relates to the core function of the Ministry's Court Services and Criminal Law divisions, mandated under ss. 5(c) and (h) of the *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, namely to superintend matters connected with the administration of justice, to support the administration of the courts, to manage the criminal justice system, and to prosecute offences.

[17] The Commissioner rejected the position that the Reports are "judicial information" because he found that the information in the records is "gathered, produced and used for purposes other than judicial purposes" (Order, para. 65). In reaching this conclusion, the Commissioner observed that the information in the Reports had been collected, prepared and maintained by the Ministry in its databases since at least 2000, prior to the Chief Justice's request for the Reports in their current format. In his view, the format of the information was not relevant to the question of whether the records were in the Ministry's custody or control. As put by the Commissioner:

> 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 (Order, para. 67).

[18] The Commissioner held at para. 70 that the information in the Reports was not a "court record". It did not relate to a specific court proceeding or "more generally to the adjudicative function of the courts." While the Reports may relate to the Ministry's mandate to support the administration of the courts, they also relate to the Ministry's administrative and prosecutorial responsibilities within the criminal justice system.

[19] The Commissioner rejected the submission that the Ministry staff only had mere possession of the Reports. He found that there was a "high degree of integration and co-mingling of the report in Ministry operations across divisions and among staff" (Order, para. 75). He also found that the Ministry used the Reports for Ministry purposes "unrelated to the exercise of judicial functions or the administration of court proceedings" (Order, para. 76).

[20] The Commissioner also rejected the position that the Ministry's access to and use of the Reports was controlled by the judiciary and had taken place with the consent of the judiciary. He found at para. 77 that there was no "written communication" between the Ministry and the judiciary evidencing such consent, but rather only "bald assertions" from the Ministry that this is what had occurred.

[21] Finally, the Commissioner was not persuaded that a "finding that the Ministry has custody and control of these records would interfere with the independence of the judiciary" (Order, para. 84). Specifically, he was "not persuaded that the information contained in this report relates to or

impacts the independence of the judiciary, judicial functions and the adjudicative role" (Order, para. 87).

The Standard of Review Applicable to this Application

[22] In *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611, the Court of Appeal found that the Commissioner's decision as to whether documents were within the "custody" or "control" of the Ministry within the meaning of s. 10(1) of the Act is reviewable on a standard of correctness.

[23] The Court of Appeal's rationale for applying this standard is threefold. First, s. 10(1) is a jurisdiction-limiting section in the sense that only records that are in the "custody" or "control" of an "institution", within the meaning of the Act, are subject to the provisions of the Act. Second, interpreting the words "custody" or "control" under the Act is not an exercise that requires the specialized expertise of the Commissioner. Third, the Act does not contain a privative clause.

[24] The Order of the Commissioner is therefore to be reviewed on the standard of correctness.

Analysis

Judicial Independence

[25] Judicial independence has a number of constitutional origins. The independence of the judiciary is guaranteed in part by the unwritten constitution that Canada inherited from the United Kingdom, cited in the preamble to the *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3. Judicial independence is further guaranteed in ss. 96 to 100 of the Constitution Act, 1867. The right to be tried by an independent tribunal when charged with an offence is enshrined in s. 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K,), 1982, c. 11 (the "*Charter*"), and the right to an independent decision-maker is an integral part of the "principles of fundamental justice" that are such an important component of the section 7 *Charter* protection: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 105-107 ["*Provincial Court Judges Reference*"]; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at paras. 30-31; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 38.

[26] The concept of judicial independence relates to he nature of the relationship between a court and others. This relationship must be marked by a form of intellectual and institutional separation that allows a judicial decision-maker to "render decisions based solely on the requirements of the law and justice", free from the pressure or influence "of any other entity in the performance of his or her judicial functions": *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, at paras. 35 and 37.

[27] The independence of the judiciary includes both an individual and an institutional dimension. The former relates to the independence of a particular judge; the latter to the independence of the court of which the judge is a member. In each of its dimensions, judicial independence is intended to prevent undue interference in the decision-making process, which must be based only on the requirements of law and justice: *Ell v. Alberta*, [2003] 1 S.C.R. 857, at para. 28; *Provincial Court Judges' Assn, of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, at para. 5 ["*Provincial Court Judges' Assn.*"]; *Mackin*, *supra*, at para. 39.

[28] Judicial independence consists of three core components: security of tenure, financial security, and administrative independence. It is the third component that is relevant in this case. Judicial administrative independence requires judicial control with respect to matters of administration bearing directly and immediately on the exercise of the judicial function: *R. v. Valente*, [1985] 2 S.C.R. 673, at paras. 27, 40, 47; *Provincial Court Judges Reference*, *supra*, at para. 115; *Ell v. Alberta*, *supra*, at para. 28; *Provincial Court Judges' Assn.*, *supra*, at para. 7.

[29] Examples of matters of administration bearing directly and immediately on the exercise of the judicial function are:

- the assignment of judges (*Valente*, *supra*, at para. 49), including
    - the composition of appellate panels (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at paras. 70-71);
    - the appointment of the trier of fact in a court martial (*R. v. Généreux*, [1992] 1 S.C.R. 259, at paras. 44, 100);
    - the determination of a judge's place of residence following his or her initial appointment (*Provincial Court Judges Reference*, *supra*, at para. 266);
    - the sittings of the court (including determinations about the opening/closure of the court) (*Valente*, *supra*, at para. 49; *Provincial Court Judges Reference*, *supra*, at paras. 267, 269-270);
- the preparation of court lists (*Valente*, *supra*, at para. 49);
- the allocation of court rooms (*Valente*, *supra*, at para. 49);
- the direction of court staff engaged in carrying out these functions (*Valente*, *supra*, at para. 49); and
- the pace of adjudicating a given case (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 74).

[30] The Chief Justice of the Court plays a central role in matters of administration bearing directly and immediately on the exercise of the judicial function. *The Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 36(1), provides that the "Chief Justice of the Ontario Court of Justice shall direct and supervise the sittings of the Ontario Court of Justice and the assignment of its judicial duties". Section 75 of the same Act states that the powers and duties of the Chief Justice in this regard include determining the sittings of the court, assigning judges to the sittings, assigning cases and other judicial duties to individual judges, determining where and when individual judges will sit,

determining the workload of individual judges, and preparing trial lists and assigning courtrooms "to the extent necessary to control the determination of who is assigned to hear particular cases."

[31] Where the Chief Justice or a judge of a court is exercising responsibilities relating to administrative matters that bear directly on the exercise of the judicial function, the principle of judicial independence requires judicial control. Similarly, any information or documentation created by and for the judiciary to carry out these judicial administrative functions is also constitutionally protected. In order to ensure judicial independence, the judiciary, by necessity, must have supervisory control over access to, and disclosure of, this information.

The Ministry Role in Court Administration

[32] Section 92(14) of the *Constitution Act, 1867* authorizes the provinces to legislate in relation to the "administration of justice in the province". Pursuant to the *Ministry of the Attorney General Act*, *supra*, s. 5(c), the Attorney General has the duty to "superintend all matters connected with the administration of justice in Ontario". The *Courts of Justice Act*, *supra*, s. 72, provides that the Attorney General "shall superintend all matters connected with the administration of the courts", other than, *inter alia*, "matters that are assigned by law to the judiciary".

[33] The legislative powers exercised by the province under s. 92 are subject to constitutional requirements, and, in particular, are limited by the principles of judicial independence. Accordingly, the provincial Legislature's authority over the administration of justice in Ontario, and the Attorney General's statutory duties regarding the administration of justice, must be exercised consistently with the principles of judicial administrative independence: *Provincial Judges Reference*, *supra*, at para. 108.

[34] As a result of this constitutional and legislative framework, and the respective roles and responsibilities of the judiciary and the Attorney General, "the heads of the judiciary have to work closely with representatives of the Executive" in matters of court administration: *R. v. Valente*, *supra*, at para. 47. There exists a close working relationship between the Court and the Ministry in this regard.

Does the Ministry have "control" over the Reports?

[35] In a previous decision by the Information and Privacy Commissioner involving the determination of whether "court records" were within the "custody" or "control" of the Ministry, Adjudicator Cropley commented upon the special relationship that exists between the Ministry and the judiciary as follows:

> In acknowledging that the responsibility over records in a court file is divided between the Ministry and the judiciary, the Ministry maintains that such records are central to the adjudicative process of the courts and are, therefore, intimately related

> to the judicial function of the courts. Further, the Ministry submits that while recognizing the administrative role the Ministry plays in maintenance of these records, the common law has expressly recognized the right of the courts to supervise and protect their own records (see: *Re London Free Press Printing Co. Ltd. and Attorney General of Ontario* (1988), 66 O.R. (2d) 693 (H.C.)).
>
> In this regard, the Ministry recognizes that it has possession of such records in that they are housed in Ministry premises and are cared for by Ministry staff, and that, as administrator of the courts, it has a limited right to possess these records, in that responsibility for administrative decisions regarding the establishment of procedures for accessing the records may lie with the Ministry. The Ministry submits, however, that it possesses the records as a "custodian" only and any authority it has over the records' use is subject to supervision by the courts.
>
> I have found that the courts are not institutions under the Act. Moreover, I recognize that the independence of the judiciary is well established in the common law and reflected in the CJA. In my view, the objectives of the Act as set out in section 1 are, to a certain degree, met by the "public" nature of court proceedings and the ability of the judiciary to control the dissemination of sensitive information. In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those records which are directly related to this function. (IPC Order P-994, [1995] O.I.P.C. No. 342, at paras. 31-33).

[36] As noted, the above decision deals with records in court files. However, the reasoning is also applicable to the Reports at issue. Given the Ministry's and the Court's shared mandate over Court administration, the Act must be interpreted in a way that allows the judiciary to use Ministry resources for generating reports that bear directly and immediately on the exercise of the judicial function without having those reports be thereupon considered to be in the "custody" or "control" of the Ministry.

[37] The Court relies on Ministry staff to collect, store and manipulate data for it. The question of whether the database from which the Reports were compiled is in the "custody" or "control" of the Ministry was not before the Commissioner and is not before us. What is clear is that the Ministry does not admit to having "custody" or "control" of that database, and that the evidentiary record before the Commissioner and before us is not sufficient to decide that question. Unlike in the Ontario Court of Appeal decision in *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)* (2009), 93 O.R. (3d) 563, the issue here is the generated Reports, not the database used or even access to the specific data, as in that decision.

[38] What is known about the Reports is that they were generated at the request of and in accordance with the instructions of the Chief Justice. While the precise purpose behind requesting the Reports is not clear, it cannot be consistent with the principle of judicial independence that Reports generated for the Court in these circumstances are subject to the provisions of the Act unless

the Chief Justice explains why he or she requested the Reports, and can establish how the Reports bear upon the exercise of the judicial function. The Courts are not institutions that are subject to the provisions of the Act and, therefore, the Chief Justice should not be put in the position of having to explain to the Commissioner why he or she requested the Reports.

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

[40] The question then becomes whether the Reports, including the severed portions, were placed "in the custody" of the Ministry such that they should be disclosed to the CBC, as ordered by the Commissioner.

Are the Reports in the "custody" of the Ministry?

[41] In Order P-239, [1991] O.I.P.C. No. 33, released on September 5, 1991, the Commissioner discussed the issue of "custody" when dealing with records of the Ombudsman (which is not an "institution" under the Act) that were in the possession of the Ministry of Government Services (which is an "institution" under the Act). At pages 3 to 5 of the Quicklaw version of that Order, the Commissioner writes:

> Although the Ombudsman's office is not listed among those entities which are to be considered "institutions" for the purposes of the Act, there is nothing in the Act which expressly excludes from its application records which originated in the Ombudsman's office.
>
> Section 10(1) of the Act provides as follows:
>
> > Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22. [Emphasis added.]
>
> It is my opinion that to remove information originating from non-institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the Act. Therefore, it is my view that the Act can apply to information which originated in the Ombudsman's office which is in the custody or under the control

of an institution. I must now determine whether the records are in the custody or control of the institution.

In Order 120, dated November 22, 1989, former Commissioner Sidney B. Linden set out a number of factors that would assist in determining whether an institution has custody or control of a record. Although this is not an exhaustive list, these factors include:

1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. 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?

4. If the institution does not 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 employee?

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

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

7. Does the institution have the authority to regulate the record's use?

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

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

10. Does the institution have the authority to dispose of the record?

Some of the factors listed in Order 120 are evidence of custody, some are evidence of control and some factors are evidence of both. In my opinion, there is an intended distinction between the concepts of custody and control. An institution that has control of a record may not have the record in its custody, alternatively, an institution

with custody of a record may have very limited rights of control. In order to fall under the jurisdiction of the Act an institution need only have custody or control of a record. In the circumstances of this appeal I will be considering the issue of whether the institution has custody of the records.

The office of the Ombudsman has submitted that as the institution does not have the power to govern the use of the records, the records are not in the custody or under the control of the institution to the extent required to render them accessible under the Act. In my view, the fact that there may be limits on the institution's ability to govern the use of the records is relevant to the issue of whether the institution has control of the records, but does not preclude an institution from having custody.

In Order 120 supra, Commissioner Linden stated that:

> In my view, although mere possession of a record by an institution may not constitute custody or control in all circumstances, physical possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession.

It is position of the office of the Ombudsman that although the institution has possession of the records, it is bare possession which does not amount to custody for the purposes of the Act. I agree that bare possession does not amount to custody for the purposes of the Act. In my view, there must be some right to deal with the records and some responsibility for their care and protection.

In the circumstances of this appeal, I note:

1. the records were created by the office of the Ombudsman for use by that office;

2. the institution currently has a copy of the records in its possession;

3. a copy of the records has been in the possession of the institution for over nine years;

4. the institution is responsible for the care and protection of its copy of the records;

5. the records relate to the institution's mandate and function;

> 6. the institution responded to the request and participated in mediation implying that it had the right to deal with the records; and,
>
> 7. the limitations placed on the institution by the Ombudsman do not limit the institution's custody of the records, rather they limit the institution's control of the records.
>
> Having reviewed all of these circumstances, I am of the view that the institution has more than bare possession of Records 1 and 3. I am satisfied that, for the purposes of the Act, the institution has custody of the records.

[42] The reasoning in Order P-239 is helpful when it comes to an analysis of whether the Ministry has "custody" of the Reports in question. However, in applying this reasoning it must also be remembered that, unlike in the case of the Ombudsman's office records, this is a case where the principle of preserving judicial independence must be kept in mind at every stage of the analysis.

[43] The Ministry has possession of the Reports in one capacity since its support staff are responsible for compiling the Reports at the direction of the Chief Justice. Such "bare possession" cannot amount to "custody" for the purposes of the Act. The Ministry's duty with respect to the administration of justice and courts administration must be exercised within the context of the constitutionally mandated requirement to preserve the independence of the judiciary, including its administrative independence. As already discussed, this need extends beyond exercising judicial supervision over court records and documents to protecting the judiciary's right to supervise the use of Reports such as the ones at issue. Thus, to the extent that the Ministry has a right to possess the Reports because it compiled them at the request of the judiciary, we agree with the reasoning of Adjudicator Cropley in Order P-994, *supra*, at page 7, namely that "its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to 'custody' for the purposes of the Act."

[44] However, the Ministry also subsequently gained possession of the Reports in another, quite different, capacity. The Office of the Chief Justice agreed to the Reports being made available to senior Ministry court staff and senior Crown Attorneys for the purpose of their planning and decision-making relating to support of court operations, at the discretion of the Chief Justice of the Court. It is the position of the Ministry that this, too, is merely a "bare possession" that does not amount to "custody" for the purposes of the Act.

[45] The Ministry response to the Commissioner regarding these Reports includes the following additional details of its possession, integration, and regulation of their use:

> 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 Operations and to the 7 Managers of Business Support
>
> The data in the report is a record of court activity including incoming workload, court appearances, inventory of pending matters before the court and judicial disposition of cases. It is used primarily by the judiciary for its own purposes and minimally by court staff for court administration purposes (Public Record of the Proceedings, pages 718-19).

[46] We acknowledge that there may well be circumstances where the judiciary may choose to share or disseminate "judicial information" with the Ministry that continues to be constitutionally protected from disclosure pursuant to the Act. Judicial independence and the shared responsibility for courts administration may dictate such a result in the appropriate case.

[47] However, this is not such a case due to the nature of the information at stake and the extent to which the judicial information has been shared with, and subsequently used by, the Ministry. Possession of the severed portions of the Reports was voluntarily provided to the Ministry with no distinct or special limitation from the Office of the Chief Justice. Its content relates to the Ministry's mandate and functions, and has been obviously relied upon by the institution. The severed portions of the Reports have also been integrated with other Ministry records, and it certainly appears that their use has been regulated by the Ministry. Having regard to the Ministry's ability to deal with the judicial information, and the responsibility for the care and protection it has been allowed, there have not been sufficient limits placed on the Ministry to preclude it from having custody.

[48] In our view, the fact that the Ministry subsequently acquired an ability to use the judicial information from the Reports for purposes relating to its core, central and basic functions relevant to the Ministry's mandate, results in these Reports being placed "in the custody" of the Ministry for the purposes of the Act. We note the integration of information from the Reports into the Ministry's intranet site for its core functions, not only in Court Services but also in its Criminal Law divisions.

[49] Given such an integration and use by the institution, the record in this application for judicial review does not support the conclusion that disclosure of the severed portions to the CBC would

compromise the independence of the judiciary. Further, having reviewed the Reports, we are not persuaded that the severed portions contain information that, if released, would negatively impact on the independence of the judiciary, including its administrative independence.

Conclusion

[50] Having reviewed all of the circumstances here, particularly the nature of the severed portions of the Reports at stake and the extent to which that judicial information has been shared with the Ministry by the judiciary, we are of the view that the Ministry has more than bare possession of the Reports. We are therefore satisfied, with respect to this very discrete issue involving the judicial information contained in the severed portions of the Reports, that for the purposes of s. 10(1) of the Act, this judicial information is "in the custody" of the Ministry.

[51] Since we have determined that the severed portions of the Reports are "in the custody" of the Ministry, even if they are not "under its control", the Order correctly determined that they must be disclosed to CBC. This application for judicial review is therefore dismissed.

[52] If the parties cannot agree on costs of the application, we will entertain brief written submissions within 30 days of the release of this decision.

SWINTON J.
SACHS J.
NADEAU J.

Released: February 23, 2011

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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, SACHS and NADEAU JJ.

B E T W E E N:

MINISTRY OF THE ATTORNEY GENERAL

Applicant

- and -

INFORMATION AND PRIVACY COMMISSIONER and CANADIAN BROADCASTING CORPORATION, Requester

Respondents

REASONS FOR JUDGMENT

BY THE COURT

Released: February 23, 2011