ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-33

July 27, 2022

JUSTICE AND SOLICITOR GENERAL

Case File Number 011951

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Summary: An individual made an access request to Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for copies of written communications between Public Body employees about him regarding a talk given at a conference in Edmonton, and/or communications containing a particular attachment.

The Public Body located 261 pages of responsive records but withheld them in their entirety, citing section 4(1)(a).

The Applicant requested an inquiry into the Public Body's response. The Public Body refused to provide records for the inquiry, stating that the records were not in its custody or control.

The Adjudicator determined that the Public Body failed to meet its burden to show that the records in its possession were not in its custody or control, for the purposes of responding to an access request under the FOIP Act.

The Adjudicator ordered the Public Body to provide the Adjudicator with the records at issue and/or an affidavit of records for any records containing judicial information or court information, detailing how the information falls within those categories, in order for the Adjudicator to make a determination as to whether the responsive records fall within the scope of the FOIP Act.

The Adjudicator retained jurisdiction to make a determination regarding the application of the FOIP Act to the records.

Statutes Cited: AB: *Administrative Procedures and Jurisdiction Act,* R.S.A. 2000, c A-3, ss. 11, 12, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 4, 5, 56, 65, 68, 69, 71, 72, *Public Inquiries Act*, R.S.A. 2000, c. P-39, ss. 4, 5; **BC**: *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996 c. C-165, s. 3; **Ont**: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, s. 65

Authorities Cited: AB: Orders F2002-004, F2002-022, F2006-024 F2009-023, F2010-023, F2017-59, F2018-37, F2019-05, F2022-28, P2021-03; **Ont:** Orders MO-2408, PO-2739, PO-2836

Cases Cited: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252, *City of Ottawa*, 2010 ONSC 6835, *Ell v. Alberta*, 2003 SCC 35 (CanLII), *Ministry of the Attorney General v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172, *R v. Beauregard*, [1986] 2 S.C.R. 56, *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247, *Valente v. The Queen* [1985] 2 S.C.R. 673

I. BACKGROUND

[para 1] On November 1, 2018, the Applicant made an access request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for the following:

> I am seeking written communications of any type regarding [various names of Applicant], or regarding a talk given at the Bsides Edmonton conference, or containing an attachment named "Bsides YEG Presentation.pdf" that was sent or received by ministry staff between September 13th 2018 and present. Responsive accounts are likely to be those of [JP], but a complete search is requested of all Ministry of Justice accounts.

[para 2] The Public Body located 261 pages of responsive records but withheld them in their entirety, citing section 4(1)(a). Specifically, the Public Body informed the Applicant that the responsive records are "judicial administration records and/or records relating to support services provided to the judges of any of the courts, and as such they fall outside of the *FOIP Act*."

[para 3] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This was not successful and the Applicant requested an inquiry.

[para 4] By letter dated October 2, 2020, the Public Body informed the Registrar of Inquiries that it would not be providing a copy of the records it located as responsive to the Applicant's request, stating that it does not have custody or control of these records. As this differs from the response it had previously provided to the Applicant, the Public Body was asked to clarify its position; it was unable to do so by the deadline provided. The Notice of Inquiry was prepared to encompass both the issue of custody or control, as well as the application of section 4(1)(a), should the latter remain relevant.

[para 5] After issuing the Notice of Inquiry, I received a request from counsel for the Chief Justice of Alberta, Chief Justice of the Court of Queen's Bench of Alberta, and Chief Judge of the Provincial Court of Alberta, asking to make a submission to the inquiry. I agreed, and added the Chief Justices/Judge as an Affected Party.

II. RECORDS AT ISSUE

[para 6] The records at issue are comprised of the 261 pages initially identified by the Public Body as responsive to the Applicant's request.

III. ISSUES

[para 7] The issues as set out in the Notice of Inquiry, dated June 22, 2021, are as follows:

1. Are the records in the custody or under the control of the Public Body?

2. If the Public Body determines that it has custody or control of some or all of the responsive records, are the record(s) excluded from the application of the Act by section 4(1)(a)?

   If the Public Body determines that it has custody or control of some or all of the responsive records, it should provide a copy of those responsive records with its initial submission, per the instructions in this Notice.

IV. DISCUSSION OF ISSUES

1. Are the records in the custody or under the control of the Public Body?

Scheme under the FOIP Act

[para 8] This inquiry involves a determination with respect to the scope of the FOIP Act and how that scope relates to court or judicial information. I will briefly review the provisions of the FOIP Act relevant to making and responding to an access request made to a public body. I will also review the provisions that set out an applicant's right to request a review of a public body's decisions regarding access, and the Commissioner's authority in conducting a review or inquiry.

[para 9] The purposes of the FOIP Act are set out in section 2 of the Act. The provisions relevant to this inquiry state:

> *2 The purposes of this Act are*
>
> *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,*
>
> *(c) to allow individual, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body,*
>
> *(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

[para 10] An applicant's right of access is set out in section 6(1) of the Act:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

[para 11] Section 4(1) excludes certain classes of information from the scope of the Act. Section 4(1)(a) is relevant to this inquiry; it states:

> *4(1) 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) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 12] Sections 6(4), (7) and (9) exclude certain classes of records from the scope of Part 1 of the Act, meaning that an applicant does not have a right of access under the Act to these categories of records. The remainder of the Act applies to the information in the records (for example, the rules regarding the collection, use and disclosure of personal information, set out in Part 2 of the Act, apply to any personal information in these records). None of these provisions is relevant to this inquiry.

[para 13] Section 5 of the Act creates a paramountcy of the FOIP Act over other enactments:

> *5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*
>
> > *(a) another Act, or*
> >
> > *(b) a regulation under this Act*
>
> *expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.*

[para 14] Sections 7 to 9 set out how an applicant is to make an access request. Sections 10 to 15 set out obligations of public bodies in responding to a request (the duty to assist an applicant, timelines, what must be included in a response).

[para 15] Sections 16 to 29 of the Act set out exceptions to the right of access. Most of the exceptions are discretionary (meaning that a public body may apply them to refuse access) and a few are mandatory (meaning that a public body must apply them to refuse access). None of these provisions are relevant to this inquiry.

[para 16] Section 65 of the Act sets out an applicant's right to request a review by the Commissioner of decisions and actions of a public body as they relate to the public body's obligations set out in the Act. Section 65(1) is relevant to this inquiry and states:

65(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.

[para 17] Section 66 sets out how a request for review is to be made. Section 67 sets out obligations on the Commissioner upon the receipt of such a request. Section 68 permits the Commissioner to authorize a mediator to investigate and attempt to settle the matter.

[para 18] Section 69 requires the Commissioner to conduct an inquiry unless the conditions in section 70 are met such that an inquiry can be refused; it states:

69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

[para 19] Section 56 of the Act sets out the powers of the Commissioner in conducting an inquiry. It states:

56(1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquiries Act and the powers given by subsection (2) of this section.

(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

(4) If a public body is required to produce a record under subsection (1) or (2) and it is not practicable to make a copy of the record, the head of that public body may require the Commissioner to examine the original at its site.

(5) After completing a review or investigating a complaint, the Commissioner must return any record or any copy of any record produced.

[para 20] Section 71 of the FOIP Act sets out the burden of proof in inquiries regarding access decisions. It states:

71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

[para 21] At the completion of an inquiry, the Commissioner must make an order under section 72 of the Act, which states:

72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.

(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

- *(a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;*
- *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;*
- *(c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.*

(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

- *(a) require that a duty imposed by this Act or the regulations be performed;*
- *(b) confirm or reduce the extension of a time limit under section 14;*
- *(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*
- *(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;*
- *(e) require a public body to stop collecting, using or disclosing personal information in contravention of Part 2;*
- *(f) require the head of a public body to destroy personal information collected in contravention of this Act.*

(4) The Commissioner may specify any terms or conditions in an order made under this section.

(5) The Commissioner must give a copy of an order made under this section

- *(a) to the person who asked for the review,*
- *(b) to the head of the public body concerned,*
- *(c) to any other person given a copy of the request for the review, and*

(d) to the Minister.

(6) A copy of an order made by the Commissioner under this section may be filed with a clerk of the Court of Queen's Bench and, after filing, the order is enforceable as a judgement or order of that Court.

[para 22] The Williams Commission report entitled *Report of the Commission on Freedom of Information and Individual Privacy* (Toronto: Queen's Printer, 1980), which served as the basis for Ontario's *Freedom of Information and Protection of Privacy Act*, recommended that Act not apply to the judicial branch, stating (at page 239, Vol. 2):

> It is also our view that the freedom of information scheme should not be applied to the legislative and judicial branches of government. Both these institutions currently operate under conditions of openness and publicity which render the application of freedom of information laws to them unnecessary. In our court system, the conduct of trials and the hearing of appeals normally takes place in a forum which is open to the public. Decisions of the courts, and the reasons for them, are publicly available. In the legislature, debate is conducted in sessions to which the public is invited. A transcript of the legislative debates is published. Documents which are tabled in the assembly are made available to the public as well. None of the briefs presented to this Commission suggested that access to information in the context of judicial proceedings or the debates of the legislative assembly was a problem which should be addressed through the enactment of a freedom of information law. However, in exempting the legislative and judicial branches of government from our scheme, we would not thereby exempt the administrative and support services of these bodies, nor would we exempt from our proposals ministers of the Crown in their capacity as heads of government departments.

[para 23] This is reflected in Alberta's FOIP Act: the definition of "public body" does not include a court, and the FOIP Act excludes information in a court file, a record of a judge or master or justice of the peace, judicial administration records or a record relating to support services provided to judges from the scope of the Act under section 4(1)(a). The opening words of section 4 specifically states that this exclusion does not apply to court administration records; in other words, court administration records are subject to the FOIP Act, so long as they are in the custody or control of a public body.

[para 24] In a recent Order of this office, Order F2022-28, the adjudicator reviewed the history of access to information statutes, and the role of this office as set out in the FOIP Act with respect to the reviews of claims of privilege. In my view, this is relevant to this case. She said (at paras. 40-44, footnotes omitted):

> **Access to Information statutes generally**
>
> > Historically, freedom of information legislation was thought to be an important tool for citizens and members of the Legislature to participate meaningfully in democracy. For example, in *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403, La forest J. stated:
> >
> > The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly,

that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

> Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at p. 6.

Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-79:

> > There are not two stores of politically relevant information, a larger one *shared* by the professionals, the whole-time leaders and persuaders, and a much smaller one *shared* by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]

Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

Access to information and protection of privacy statutes, such as the FOIP Act, are intended to promote the accountability of governments, enable citizens and the Legislature to participate meaningfully in democracy, and enable citizens to access personal information about themselves in the custody or control of the state. In addition, access to information statutes contain mechanisms to address maladministration both in access decisions and in the handling of personal information.

What is a public body?

Under the FOIP Act, various public entities such as branches of the Government of Alberta, municipalities, educational bodies, and health bodies fall within the definition of "public body" set out in section 1(p). Essentially, public bodies are entities that derive their existences and authority from grants of power by the Legislature to carry out policies enacted by the Legislature. Moreover, they receive public money to carry out their statutory functions, including the administration of the FOIP Act. Collectively, public bodies, like the Commissioner, are emanations of the state constituting the "executive branch" of government.

What is the role of a public body in relation to records?

> Under the FOIP Act, a public body has custody or control over records; however, each individual public body does not "own" the records in its custody or control or have personal interests in them. A public body has duties to protect the personal information that records contain and to collect, use, or disclose personal information only in accordance with the FOIP Act. The records and information in the custody or control of public bodies are created or collected in the course of carrying out statutory duties for which the Legislature provides public funds. It is for this reason that the Legislature enacts freedom of information legislation regarding records to help ensure that public bodies are accountable for the manner in which they spend public money and carry out public duties.
>
> If the public body is a department of the Government of Alberta within the terms of section 2 of the *Government Organization Act*, the public body must also comply with the Records Management Regulation.

Memorandums of Understanding

[para 25] The parties have referred to relevant sections from a memorandum of understanding between the Attorney General of Alberta and the Chief Justice of the Court of Queen's Bench (QB MOU) and a memorandum of understanding between the Attorney General of Alberta and the Chief Judge of the Provincial Court of Alberta (PC MOU). Both MOUs are substantially similar; for simplicity, I will cite relevant sections only from the QB MOU. These MOUs were provided with the Public Body's initial submission. Relevant provisions from the QB MOU are reproduced in the appendix to this Order.

[para 26] The Affected Party also provided copies of the Canadian Judicial Council *Blueprint for the Security of Court Information*. The extent to which Alberta has adopted the policies set out in the Blueprint is unclear; the Public Body did not refer to this document in its submissions. Some policies, such as the policy to have a Judicial IT Security Officer that is accountable only to the judiciary, seem to deviate from the current practice as described by the Public Body. The Public Body has stated that the Court Technology Services (CTS) has a dual role, reporting to the courts for certain functions and to the Public Body for other functions.

[para 27] I have reviewed the Blueprint; for the most part it is consistent with the language of the MOUs. Given the uncertainty regarding its application here, I am relying primarily on the language of the FOIP Act, MOUs, and case law in my decision.

Judicial Independence

[para 28] The Affected Party's submission focuses on the importance of judicial independence; the Public Body's submissions also address this issue. Both rely on the principle of judicial independence in support of their arguments that the records are in the custody and control of the courts and not the Public Body.

[para 29] The Affected Party argues (submission, at paras. 6-7):

> 6. The Information and Privacy Commissioner's Adjudicator does not have jurisdiction with respect to this access request; the *FOIP Act* does not apply.

7. A contrary decision would breach the constitutional independence of the judiciary.

[para 30] The Affected Party cites *Valente v. The Queen* [1985] 2 S.C.R. 673, at paragraph 18, which states:

> The scope of the status or relationship of judicial independence was defined in a very comprehensive manner by Sir Guy Green, Chief Justice of the State of Tasmania, in "The Rationale and Some Aspects of Judicial Independence" (1985), 59 A.L.J. 135, at p. 135 as follows:
>
> > I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.

[para 31] In that case, the Supreme Court of Canada considered what should be "the essential conditions of judicial independence for the purposes of section 11(d)" of the Canadian Charter of Rights and Freedoms.

[para 32] In addition to the excerpt cited by the Affected Party, the Court in *Valente* states (at para. 20):

> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

[para 33] The Court noted that there are differing opinions regarding what is "necessary or desireable, or feasible", especially regarding "the degree of administrative independence or autonomy it is thought the courts should have" (at para. 25).

[para 34] The Court states (at paras. 47-52):

> 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.
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> Howland C.J.O. drew a distinction, for 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. The position of the judiciary under the English and Canadian Constitutions is quite different from that

> under the American Constitution. In the United States the federal judiciary is a separate branch which includes judicial administration. While the report of Chief Justice Jules Deschenes, "Masters in their Own House", September, 1981, recommended the independent judicial administration of the courts, the Canadian Judicial Council, in September, [page709] 1982, only approved of the first two stages of consultation and decision sharing between the Executive and the Judiciary and was not prepared to approve at that time of the third stage of independent judicial administration.
>
> 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.

Judicial control over the matters referred to by Howland C.J.O. -- assignment of judges, sittings of the court, and court lists -- as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence. See Lederman, "The Independence of the Judiciary" in The Canadian Judiciary (1976, ed. A. M. Linden), pp. 9-10; Deschenes, Masters in their own house, pp. 81 and 124.

As the reasons of Howland C.J.O. indicate, however, the claim for greater administrative autonomy or independence for the courts goes considerably beyond these matters. The insistence is chiefly on a stronger or more independent role in the financial aspects of court administration -- budgetary preparation and presentation and allocation [page710] of expenditure -- and in the personnel aspects of administration -- the recruitment, classification, promotion, remuneration, and supervision of the necessary support staff. …

It is not entirely clear as to the extent to which the issue of institutional independence is actually raised by the various objections to the status of provincial court judges at the time Sharpe J. declined jurisdiction. As I understood the argument, the chief objection which could be said to relate to institutional independence was the extent to which the judges were treated as civil servants for purposes of pension and other financial benefits, such as group insurance and sick leave, and the control exercised by the Executive over such discretionary benefits or advantages as post-retirement reappointment, leave of absence with or without pay and the right to engage in extra-judicial employment. The contention was that the treatment of these matters and the executive control over them were calculated to make the Court appear as a branch of the Executive and the judges as civil servants. This impression, it was said, was reinforced by the manner in which the Court and its judges were associated with the Ministry of the Attorney General in printed material intended for public information. Dependence on the Executive for discretionary benefits or advantages was also said to affect the reality and the perception of the individual independence of the judges, an issue which must be considered separately from the question of institutional independence.

Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it, may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(d) of the Charter. The essentials of

> institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(d) must, I think, be those referred to by Howland C.J.O. They may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. To the extent that the distinction between administrative independence and adjudicative independence is intended to reflect that limitation, I can see no objection to it. It may be open to objection, however, in so far as the desirable or recommended degree of administrative autonomy or independence of the courts is concerned. In my opinion, the fact that certain financial benefits applicable to civil servants were also made applicable to provincial court judges, that the Provincial Court (Criminal Division) and its judges were shown in printed material as associated with the Ministry of the Attorney General and that the Executive exercised administrative control over certain discretionary benefits or advantages affecting the judges did not prevent the Provincial Court (Criminal Division) at the time Sharpe J. declined jurisdiction from being reasonably perceived as possessing the essential institutional independence required for purposes of s. 11(d).

[para 35] The Affected Party has also cited *R v. Beauregard*, [1986] 2 S.C.R. 56, which also addressed legislation affecting the remuneration of judges; specifically, the scheme for contributory pensions of judges. In that case, the Supreme Court of Canada found that the legislation did not contravene the principle of judicial independence.

[para 36] The Affected Party raised *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, which also considered "whether and how s. 11(d) of the Charter restricts the manner by and extent to which provincial governments and legislatures can reduce the salaries of provincial court judges" (at para. 111). The Court cited *Valente*, noting (at para. 115):

> The three core characteristics identified by Le Dain J. are security of tenure, financial security, and administrative independence.

[para 37] The Court discussed what is meant by administrative independence in greater detail. It states (at paras. 251):

> The administrative independence of the P.E.I. Provincial Court was the subject of question 3 of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island. The appellants also raised in question 5, the residual question, a concern about administrative independence which was not addressed by the specific parts of question 3. To frame the analysis which follows, I will begin by recalling the meaning given to administrative independence in Valente. The Court defined administrative independence in rather narrow terms, at p. 712, as "[t]he essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(d)". That essential minimum was defined (at p. 709) as control by the judiciary over
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> > assignment of judges, sittings of the court, and court lists -- as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions....
>
> These matters "bear directly and immediately on the exercise of the judicial function" (p. 712). Le Dain J. took pains to contrast the scope of s. 11(d) with claims for an increased measure of autonomy for the courts over financial and personnel aspects of administration. Although Le Dain

> J. may have been sympathetic to judicial control over these aspects of administration, he clearly held that they were not within the ambit of s. 11(d), because they were not essential for judicial independence, at pp. 711-12:
>
> > Although the increased measure of administrative autonomy or independence that is being recommended for the courts, or some degree of it, may well be highly desirable, it cannot in my opinion be regarded as essential for purposes of s. 11(d) of the Charter.
>
> It is against this background that I analyse these questions.

[para 38] The Court noted that *Valente* found that administrative independence does not necessitate that the judiciary have control over aspects of financial administration, as those matters "do not bear directly and immediately on the exercise of the judicial function" (at para. 253).

[para 39] The Court also discussed the necessity of the judiciary working with the Executive branch, citing *Valente* (at para. 256):

> However, I do wish to note that the separation of powers, which s. 11(d) protects, does not prevent the different branches of government from communicating with each other. This was acknowledged in the Court of Appeal's judgment in Valente, supra, at p. 433, in a passage which was cited with approval by Le Dain J. at p. 709:
>
> 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.

[para 40] The Court found that legislation granting the Lieutenant Governor in Council authority to make regulations respecting the duties and powers of the Chief Judge, and rules of court governing the operation and conduct of a court presided over by a judge or by a justice of the peace did not violate the principles of administrative independence. It found (at para. 260):

> However, s. 17 has to be read subject to s. 4(1), which confers broad administrative powers on the Chief Judge:
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> 4. (1) The Chief Judge has the power and duty to administer the provincial court, including the power and
> duty to
> > (a) designate a particular case or other matter or class of cases or matters in respect of which a particular judge shall act;
> > (b) designate a particular geographical area in respect of which a particular judge shall act;
> > (c) designate which court facilities shall be used by particular judges;
> > (d) assign duties to judges.
>
> The matters over which the Chief Judge is given power by s. 4(1) are almost identical to the list of matters which Le Dain J. held, in Valente, to constitute administrative independence: the assignment of judges, sittings of the court and court lists, the allocation of courtrooms, and the direction of administrative staff carrying out these functions. Section 4(1) therefore vests with the P.E.I. Provincial Court, in the person of the Chief Judge, control over decisions which touch on

its administrative independence. In light of the broad provisions of s. 4(1), I see no problem with s.17.

[para 41] The cases presented by the Affected Party and the Public Body refer primarily to the principle of judicial independence found in section 11(d) of the *Charter*, which states:

> *11 Any person charged with an offence has the right*
>
> > *(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;*

[para 42] By letter dated December 17, 2021, I asked the parties for additional information and arguments, as it was not clear how the case law presented supports the argument that the information in the responsive records relates to judicial independence, or that it would interfere with judicial independence to find that the Public Body has custody or control of those records. It is not clear how the cases cited by the Affected Party, which address primarily issues of remuneration and tenure, apply to the case at hand. I asked the parties to address these concerns. The Affected Party did not provide an additional submission to the inquiry, and the Public Body did not address these points in its response.

[para 43] It is not clear what the Affected Party means when it states that finding that the Commissioner has jurisdiction with respect to the Applicant's request would breach the constitutional independence of the judiciary.

[para 44] It may be that the Affected Party means to argue that as an Officer of the Legislature, the Commissioner's authority cannot extend to oversight of the courts. The Affected Party has pointed out that the courts do not fall within the definition of "public body" set out in section 1(p) of the Act.

[para 45] I agree that a court is not a public body under the FOIP Act by virtue of the definitions in the Act. Therefore, if the records are in the custody or control of a court and not the Public Body, the FOIP Act does not apply to the records, the Applicant does not have a right of access under the Act, and the Commissioner does not have authority to review any decision made by a court regarding access. This is true absent any constitutional considerations. This point was made by the Commissioner in Order F2002-004, discussed at paragraphs 112-114 below.

[para 46] Even so, a determination must still be made in this case regarding custody and control of the records. This is because the records are clearly in the possession of a public body and it must be determined whether that possession amounts to custody or control for the purposes of the FOIP Act. The Commissioner's authority under the FOIP Act involves making determinations regarding jurisdiction, including whether a public body has custody or control over records.

[para 47] The Affected Party's argument may be that the Commissioner lacks authority to require the Public Body to provide the responsive records for her (or my) review because to do so would breach the constitutional independence of the judiciary.

[para 48] This argument seems closely related to the issue of whether the Public Body has custody or control of the records. As I will discuss in greater detail later in this Order, the Public Body and Affected Party have both argued that the Public Body's possession of the records amounts to 'bare possession' but not 'custody' for the purposes of the FOIP Act. If the Public Body is found to have custody or control of the records, then the Commissioner has clear jurisdiction to review the Public Body's response to an access request for those records. The Commissioner also has authority to require the Public Body to provide those records for her review. It is unclear how the arguments relating to the constitutional independence of the judiciary would preclude or negate that jurisdiction, if the constitutional independence of the judiciary didn't prevent the Public Body from having custody or control of the records in the first place. Therefore, I understand the argument to be that the Public Body cannot have custody or control of the records because if it did, that would breach the constitutional independence of the judiciary. I will consider this argument in the discussion of custody or control.

[para 49] Similarly, the Affected Party's argument may be that the constitutional independence of the judiciary should inform the interpretation of section 4(1)(a). I will discuss this further in the relevant section of this Order.

[para 50] The Affected Party's argument may be that the Commissioner does not have jurisdiction to conduct this inquiry at all. Given the determinations that must be made regarding custody or control of the records, it is unclear why the Commissioner would lack jurisdiction to conduct an inquiry to make those determinations. As the Affected Party's arguments are primarily based on the constitutional independence of the judiciary, it is possible that the Affected Party means that the Commissioner's authority under the Act to conduct an inquiry into this matter must be limited or 'read down' for constitutional reasons.

[para 51] This argument would appear to challenge the constitutional validity of the FOIP Act to the extent that it affects court records. Several court decisions, including decisions of the Alberta and Ontario courts, discuss the application of the FOIP Act (or Ontario's FOIP Act, as the case may be) to court records; none of these decisions have questioned the constitutional validity of the respective Acts, to the extent that the Acts touch upon or relate to court or judicial information. I will discuss these cases in greater detail later in this Order, as they relate to the discussion of custody or control and the application of section 4(1)(a).

[para 52] In any event, the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000 c. A-3 may preclude me from considering this argument. In Order P2021-03, the adjudicator refused to decide an argument raised by a party regarding the constitutional validity of the *Personal Information Protection Act* (PIPA). She said (at paras. 30-32):

> I have decided that I will not decide this issue. In my view, the Applicant has raised a constitutional issue, as the Applicant is essentially asking me to declare that PIPA, and the Legislature's action of amending PIPA, are of no force or effect.
>
> Section 11 of the *Administrative Procedures and Jurisdiction Act* authorizes decision makers set out in the Designation of Constitutional Decision Makers Regulation to decide constitutional questions. The Regulation does not designate the Information and Privacy Commissioner as a

decision maker who may decide constitutional matters regarding the *Personal Information Protection Act* (PIPA). As a result, there is no clear authority for me to pronounce on the issue raised by the Organization.

In addition, section 12 of the *Administrative Procedures and Jurisdiction Act* requires that the party challenging the constitutionality of a provision provide notice. Section 12 states, in part:

> *12(1) Except in circumstances where only the exclusion of evidence is sought under the Canadian Charter of Rights and Freedoms, a person who intends to raise a question of constitutional law at a proceeding before a designated decision maker that has jurisdiction to determine such a question*
>
> *(a) must provide written notice of the person's intention to do so at least 14 days before the date of the proceeding*
>
> *(i) to the Attorney General of Canada,*
> *(ii) to the Minister of Justice and Solicitor General of Alberta, and*
> *(iii) to the parties to the proceeding,*
> *And*
>
> *(b) must provide written notice of the person's intention to do so to the designated decision maker.*

I understand that at this time, no notice has been provided to all the parties set out in section 12 of the *Administrative Proceedings and Jurisdiction Act.*

[para 53] I agree with this analysis. Given this, and the significance of arguing that the FOIP Act is unconstitutional to the extent that it affects court records, I am not prepared to address this argument when it was not explicitly raised by any party.

[para 54] Given the necessary interrelationship between the courts and the Public Body, insofar as the Public Body is responsible for court administration, as well as providing resources to the courts to administer matters that fall within their authority, it seems inevitable that there will be access requests for information that touch upon this interaction between the courts and the Public Body. Given the Commissioner's authority to decide matters under the FOIP Act, including jurisdictional decisions, it is unclear how the Commissioner is to exercise that authority in this case if doing so were to offend the independence of the judiciary.

[para 55] To summarize, it is not entirely clear how the Affected Party's and Public Body's arguments regarding the constitutional independence of the judiciary are to be applied in this case. I understand that the courts are necessarily separate from the Public Body, and that the executive and legislative branches cannot take actions that would infringe upon the independence of the judiciary. The cases raised by the parties regarding judicial independence deal with matters that seem unrelated to the facts at hand. Possibly, the arguments would be more obviously relevant if the content of the records at issue were known to me. At this time, I have very little information regarding the contents of the records.

[para 56] In my December 2021 letter, I asked the Public Body how it was able to search for, locate, gather, and assess the records for disclosure under the Act, if those records were not in the Public Body's custody or control.

[para 57] The Public Body responded (rebuttal submission, at paras. 5-6):

> In conducting its search, the Public Body erred by failing to consider the threshold issue of the legal custody and control of potentially responsive records. The Public Body's response to the access request flowed from its incorrect assumption that the records were in its custody and control. This error resulted in the Public Body stating that there were 261 responsive records, and referring to section 4(1)(a) of the *FOIP Act* to exclude the records from disclosure (Public Body's Initial Submission, paragraph 8). The Public Body should have responded by stating that it did not have custody or control over any responsive records (Public Body's Initial Submission, paragraph 22).
>
> Neither the Public Body's error in conducting the search, nor the resulting response, can impair the Courts' custody and control over their own records, nor create jurisdiction in the Commissioner to review or access the Courts' records.

[para 58] I agree that if the Public Body made an error when processing the Applicant's request, that error cannot grant the Public Body custody or control that it did not already have. However, this apparent error leads to questions about how these records, or similar records, are treated and maintained within the Public Body. How these (or similar) records are maintained or integrated with Public Body records is one factor in determining whether the Public Body has custody or control, which I will discuss in greater detail later in this Order.

[para 59] In the next section of this Order, I will discuss the scope of the Applicant's request, and the Public Body's response.

Applicant's request

[para 60] As previously set out, the Applicant's access request is as follows:

> I am seeking written communications of any type regarding [various names of Applicant], or regarding a talk given at the Bsides Edmonton conference, or containing an attachment named "Bsides YEG Presentation.pdf" that was sent or received by ministry staff between September 13th 2018 and present. Responsive accounts are likely to be those of [JP], but a complete search is requested of all Ministry of Justice accounts.

[para 61] The Public Body states that the individual named by the Applicant in his request, JP, is the director of Court Technology Services.

[para 62] The Public Body informed the Applicant that it was withholding the 261 pages of responsive records under section 4(1)(a) of the Act. The Applicant sought a review of this response under section 65(1) of the Act, and the Commissioner authorized a Senior Information and Privacy Manager to investigate and attempt to settle the matter, under section 68 of the Act. Following this review, the Applicant requested an inquiry. In the letter concluding their review, the Manager states that they asked the Public Body to provide the responsive records for their review, but that

> [the Public Body] declined to do so arguing this office had no jurisdiction to review the records as they fall under section 4(1)(a) of the Act.

[para 63] Following the usual inquiry process, the Registrar of Inquiries asked the Public Body to provide the responsive records for the inquiry (letter dated August 20, 2020).

[para 64] The Public Body responded to the Registrar, stating that it would not be providing the requested records to this Office for the inquiry as it does not have custody or control over any responsive records (letter dated October 2, 2020). The Public Body cited the Commissioner's authority to compel records under sections 56(2), (3), and (4) and argued:

> It is clear from the wording of sections 56(3) and 56(4) that the obligation to produce records under section 56(2) applies to public bodies. The Courts are not public bodies under the *FOIP Act*, and therefore cannot be required to produce records to the Commissioner. Nor can the Courts' records be obtained through a request to a public body, as it could not have been the intention of the legislation to undermine the explicit exemption for the Courts set out in section 1 by allowing their records to be compelled indirectly where they cannot be compelled directly.

[para 65] Following this, I asked the Public Body to clarify its position, as its October 2020 letter is not consistent with the Public Body's earlier response to the Applicant, or its apparent position during the Manager's earlier review. The Public Body did not respond, and was reminded on June 9, 2021. The Public Body requested until July 5, 2021 to provide its response, as it intended to consult with the courts and prepare a submission. Rather than the Public Body providing submissions before the inquiry was underway, I notified the parties that I would issue the Notice of Inquiry and the Public Body could clarify its position in its initial submission.

[para 66] There is no indication that the Public Body informed the Applicant prior to this inquiry that despite its initial response, the Public Body does not have any records responsive to his request in its custody or control. It is not until its rebuttal submission that the Public Body explicitly stated that it ought to have informed the Applicant that it did not have responsive records, though this position may also be inferred by the arguments in its initial submission.

[para 67] Nevertheless, I understand that regardless of the Public Body's earlier position, it is now arguing that it does not have custody or control over the responsive records for the purpose of the FOIP Act.

[para 68] The Public Body provided the following background to the Applicant's request: it states that the Applicant gave a presentation at a cyber-security conference in September 2018, on IT security. The Applicant provided detailed information about vulnerabilities he discovered in Government of Alberta servers. This included three Court servers, though the Applicant states he had no way of knowing that at the time. A government employee who attended the presentation reported the vulnerabilities to the Office of the Corporate Chief Information Officer. Information regarding the court servers was provided to the Court Technology Services (CTS). The Public Body states that CTS provides IT services to the courts, including maintaining servers containing court information and judicial information. The Applicant's access request specifically referred to records of JP, who is (or was at the relevant time) the director of CTS.

[para 69] The Public Body states that some of the responsive records include information from non-judicial staff, which do not report to the courts (initial submission, at para. 16):

> The Courts sometimes request support services from non-judicial staff (i.e., staff in the Public Body that do not report directly to them). For the present request, approximately 28 pages of potentially responsive records consist of emails where at least one copy was held by non-judicial staff of the Public Body, either as a sender or one of the recipients of the email.

[para 70] In his submission, the Applicant clarified what records he expected to receive in response to his request. His summary is as follows:

- I am not seeking information about any vulnerabilities, vulnerable servers, or technical remediation activities.
- I am seeking records related to Court Technology Services and their possible retaliation against me for a talk I presented in September 2018.
- The Court Technology Services operate as a part of the Ministry but are controlled by the Courts, but this appears to be contrary to the Memorandum of Understanding cited by both parties.
- The Memorandum of Understanding is either not being followed or is immensely ambiguous regarding Court Technology Services organizational placement and it's exposure to FOIP requests

[para 71] The Applicant states that following his presentation, he was terminated from his employment from an organization that is associated with government at arms-length. He states that he was able to confirm that this termination related to his presentation. He believes it is possible that there was pressure from government to terminate his employment; he is therefore seeking records relating to his presentation.

[para 72] The Applicant also provided background to his access request, which is consistent with the background provided by the Public Body. He states that prior to his presentation, and in response to a presentation that had been made by the Chief Information Security Officer (CISO) of Service Alberta, the Applicant found systems owned by Service Alberta with obvious security vulnerabilities. The Applicant states that while he discussed his plans to include this information in his presentation with the CISO, he was unable to determine at that time which government departments were affected.

[para 73] The Applicant has raised concerns about Public Body's characterization of his request as being for "access to records relating to the security of servers containing court and judicial information." He states that he is not seeking information about the Public Body's or Affected Party's systems or security. He states that he is seeking discussions about any actions taken by CTS against the Applicant, specifically whether discussions were had with his former employer.

[para 74] While I understand that the Applicant is not seeking information about technical aspects of how the security issues were addressed, his access request could be interpreted as encompassing such information. Therefore, the responsive records may include information about the steps taken by CTS to address the security issues identified by the Applicant.

[para 75] Following the clarification provided by the Applicant in his submission, I asked the parties to explain whether any of the responsive records fit the categories described by the Applicant as records he is seeking. If so, the parties were asked to provide greater detail as to how those records are not in the custody and control of the Public Body.

[para 76] The Public Body said it could not provide any detail regarding the records, as it does not have custody or control of them. The Affected Party did not provide an additional response. Therefore, I do not know if the records relate to the Applicant only insofar as his presentation brought the vulnerabilities to light, or if they discuss the Applicant in greater detail, as he suspects. The extent to which the 261 pages of records relates to the information the Applicant described in his submission is unclear.

[para 77] As noted, the Applicant states that he had no way of knowing specifically which Government of Alberta departments (or other bodies) were affected by the security issues he highlighted in his presentation. He expressed the possibility that some of the records he requested relate to Public Body servers, separate from the court servers. In my December 17, 2021 letter to the parties, I asked the Public Body to address this possibility; it did not expressly respond to that question. The Public Body's submissions indicate that all responsive records relate to the courts; however, it would have been helpful if the Public Body had confirmed that none relate to the security of the Public Body's servers separate from court servers. Without such confirmation, I cannot definitively rule out that possibility, although I also do not have evidence to support it.

[para 78] The Affected Party states that "[t]he access request at issue in this Inquiry involves communications about vulnerabilities in the security of three Court servers. On behalf of the Courts, the security issues were remedied by Court Technology Services ("CTS"). When working on judicial administration matters, CTS staff report functionally to the Chief Justices/Judge, not the Minister" (at para. 32).

[para 79] This description indicates that the records may relate to the identified vulnerabilities of the servers, and their remedies. However, this description is about the access request, and not the content of the responsive records. It does not provide any substantive indication regarding the actual information in the records, and how that information relates to the Applicant, to judicial administration information, etc.

[para 80] The Public Body has described the access request as seeking "communications sent or received by judicial staff (i.e., Court Technology Services), relating to the judicial administration of the Courts (i.e., supervision and control of court and judicial information). All such records are in the custody and control of the Courts, and not the Public Body" (initial submission, at para. 13). Similar to above, this description tells me how the Public Body interpreted the Applicant's request.

[para 81] The Public Body has provided a brief description of the records: it states that the records relate to "supervision and control of court and judicial information." This description does not provide specific information about the content of the records that would allow me to make my own determination based on facts before me. I know that the records contain

communications but I do not know if they include emails, memos, or another format; I do not know to whom the communications are directed and from whom; I do not know whether all of the 261 pages are comprised of communications. Further, whether the content of the records relates to the judicial administration of the courts seems to be a determination that must be made on the facts of this particular case.

[para 82] The Public Body has argued that the Commissioner does not have the authority to require the Public Body to provide the responsive records for this inquiry. The Public Body argued that the Commissioner's authority under sections 56(3) and (4) relates only to public bodies, and the courts are not public bodies.

[para 83] Section 56 is set out at paragraph 19 of this Order. The language of section 56(2), which gives the Commissioner authority to compel records, does not limit this authority to public bodies. It also expressly extends this authority to information not subject to the FOIP Act. Sections 56(3) and (4) do expressly apply to public bodies; these provisions set out a public body's obligations when responding to a requirement from the Commissioner to produce records. As the FOIP Act applies to public bodies, it makes sense that these obligations refer specifically to public bodies.

[para 84] Section 56(1) also grants the Commissioner the power, privileges and immunities of a commissioner under the *Public Inquiries Act*, R.S.A. 2000, c. P-39, in addition to the powers granted in section 56(2) of the FOIP Act. The *Public Inquiries Act* includes the following authorities:

> *4 The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquiry.*
>
> *5 The commissioner or commissioners have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, an the same privileges and immunities as a judge of the Court of Queen's Bench.*

[para 85] The application of these authorities under the *Public Inquiries Act* are not limited to public bodies under the FOIP Act. It doesn't necessarily follow that there are *no* limits to these authorities. However, it is reasonable to interpret these provisions in such a way that permits the Commissioner to exercise the authority therein in a manner that enables her to make determinations regarding her jurisdiction.

[para 86] In this case, the Public Body has possession of the records at issue, and it is not clear from the access request or the general references made about the records whether they fall within the Commissioner's jurisdiction. Therefore, a finding of fact and/or law must be made, and section 69(1) grants the authority to make that finding to the Commissioner. Were the Commissioner's powers limited to records that are, from the outset, clearly subject to the Act, the Commissioner would be fettered in making a determination regarding her jurisdiction in circumstances in which it is not obvious and/or where it was challenged by a party.

Section 4(1)(a)

[para 87] Section 4(1) states that the FOIP Act applies to all records in the custody or control of a public body, but excludes certain classes of information from the scope of the Act. Section 4(1)(a), reproduced at paragraph 11 of this Order, excludes information in a court file, records of judges, justices and masters, judicial administration records, and records relating to support services provided to judges.

[para 88] Also relevant is the definition of "judicial administration record" found in section 4(3) of the FOIP Act:

> *4(3) In this section, "judicial administration record" means a record containing information relating to a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta or to a master of the Court of Queen's Bench of Alberta or a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, and includes*
>
> > *(a) the scheduling of judges and trials,*
> >
> > *(b) the content of judicial training programs,*
> >
> > *(c) statistics of judicial activity prepared by or for a judge, and*
> >
> > *(d) any record of the Judicial Council established under Part 6 of the Judicature Act.*

[para 89] Section 4(1)(a) excludes information in a court file etc. even if that information is in the custody or control of a public body. The scope of section 4(1)(a) expressly does not include court administration records. This means that where court administration records are in the custody or control of a public body, they are subject to the Act.

[para 90] The language of section 4(1)(a) indicates that the Legislature contemplated that the type of information set out in this provision could be in the custody or control of a public body.

[para 91] The application of the FOIP Act to court records was discussed by the Court of Queen's Bench in *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (*Krushell*). In that case, the Court considered whether information from court dockets was excluded from the FOIP Act under section 4(1)(a). The applicant in that case had made an access request to Alberta Justice (as it was then called) for trial and docket sheets for all court houses in Alberta. Alberta Justice refused access on the basis that the information was exempt from the Act under section 4(1)(a). In Order F2002-022, the Commissioner found that information on trial and docket sheets was better characterized as "court administration records" than "information in a court file." This finding was overturned by the Court in *Krushell*.

[para 92] In discussing the purpose of section 4(1)(a), the Court in *Krushell* said (at para. 48):

> Perhaps more usefully, one might consider the possible reasons for excluding court records from disclosure as an aid to determining which purpose s. 4(1)(a) was created to address. One such reason may indeed be that an ongoing alternate system for access to information is available. However, another may be the desire to protect the privacy of persons who are charged but have not yet and may never be convicted of a criminal offence. While such interests might be protected through the subsequent operation of s. 17 it is also likely that the privacy concerns surrounding the unconvicted accused are without exception, and so should be excluded in the first instance from the operation of the Act rather than triggering the expense of having Alberta Justice having to subsequently locate and edit such documents under the s. 17 provisions.

[para 93] Neither Order F2002-022 nor the Court in *Krushell* indicate that there is an issue with Alberta Justice having custody or control over the court records at issue. At paragraph 5 of *Krushell*, the Court accepts that Alberta Justice had custody or control of the records.

[para 94] Of course, it does not necessarily follow that whenever this type of information is in possession of the Public Body it is thereby within its custody or control, simply because the Legislature contemplated that it could be.

[para 95] BC's FOIP Act contains a provision substantially similar to section 4(1)(a) (section 3(1)(a) in BC's Act). There are few Orders from the BC Information and Privacy Commissioner's office relating to this provision, or court records more generally.

[para 96] In contrast, the Ontario Information and Privacy Commissioner has issued several Orders that discuss custody or control of court information. However, Ontario's FOIP Act does not contain a provision similar to Alberta's section 4(1)(a). Instead, sections 65(3), (3.1), (4), (5) and (5.1) of Ontario's Act exclude only specific types of information relating to the courts or judiciary:

> 65(3) This Act does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with the proceeding. R.S.O. 1990, c. F.31, s. 65 (3).
>
> (3.1) This Act does not apply to personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity. 2019, c. 7, Sched. 60, s. 9.
>
> (4) This Act does not apply to anything contained in a judge's performance evaluation under section 51.11 of the *Courts of Justice Act* or to any information collected in connection with the evaluation. 1994, c. 12, s. 49.
>
> (5) This Act does not apply to a record of the Ontario Judicial Council, whether in the possession of the Judicial Council or of the Attorney General, if any of the following conditions apply:
>
> 1. The Judicial Council or its subcommittee has ordered that the record or information in the record not be disclosed or made public.
> 2. The Judicial Council has otherwise determined that the record is confidential.
> 3. The record was prepared in connection with a meeting or hearing of the Judicial Council that was not open to the public. 1994, c. 12, s. 49.
>
> (5.1) This Act does not apply to a record of a committee investigating a complaint against an associate judge under section 86.2 of the *Courts of Justice Act*, whether in the possession of the

committee, the Chief Justice of the Superior Court of Justice, the Attorney General or any other person, if any of the following conditions apply:

1. The committee has ordered that the record or information in the record not be disclosed or made public.
2. The record was prepared in connection with the committee's investigation of the complaint and the complaint was not dealt with in a manner that was open to the public. 1996, c. 25, s. 6; 2002, c. 18, Sched. K, s. 11; 2021, c. 4, Sched. 3, s. 22.

[para 97] These provisions, taken together, are narrower than the exclusion in section 4(1)(a) of Alberta's Act. This means that court or judicial information in the custody or control of a public body in Ontario, other than the type of information found in sections 65(3) – (5.1), is subject to Ontario's FOIP Act. The only way to exclude such information is to find that it is not in the custody or control of the public body. I will discuss this case law in greater detail later in this Order.

Custody or control

[para 98] Under the FOIP Act, applicants have a right of access to records in the custody or control of a public body. The Act does not define custody or control. Early cases from this office equated custody with possession, as described in Order F2006-024 (at para. 18):

> In Order 2000-003, the Commissioner held that that physical possession of a record was sufficient to establish custody of that record. Furthermore, the Commissioner held that a legal right to control the record, over and above simple possession, is not relevant to a determination regarding custody. A legal right of control would be a criterion for control and not custody. The Commissioner held that the capacity or authority under which a person has possession of a record are also criteria for control and not custody.

[para 99] In Order F2009-023, the adjudicator adopted the analysis from Ontario orders which found that 'bare possession' of records is not sufficient to find that they are in a public body's custody. Instead, a public body must have "some right to deal with the records and some responsibility for their care and protection" (see Ontario Order PO-2836). This latter interpretation is the current approach taken by this office in determining whether a public body has custody of records, as discussed below.

[para 100] In Order F2010-023, the adjudicator explained how 'custody with some right to possess the records' is distinct from control of the records, which has been described as the right to possess the record and regulate its use. She said (at para. 43):

> In section 6 of the FOIP Act, the word "custody" implies that a public body has some right or obligation to hold the information in its possession. "Control," in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession.

[para 101] A public body may have both custody and control of records, but it needn't have; either custody *or* control is sufficient for the purpose of the FOIP Act.

[para 102] Past Orders have set out factors to help determine whether a public body has custody or control of requested records, including Order F2018-37, which states (at paras. 19-21):

> The phrase "custody or control" refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. "Custody or control" also imparts the notion that a public body has duties and powers in relation to a record, such as the duty to preserve or maintain records, or the authority to destroy them.
>
> Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors to determine whether a public body had custody or control over records:
>
> - Was the record created by an officer or employee of the public body?
> - What use did the creator intend to make of the record?
> - Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
> - If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
> - Does the public body have a right to possession of the record?
> - Does the content of the record relate to the public body's mandate and functions?
> - Does the public body have the authority to regulate the record's use?
> - To what extent has the record been relied upon by the public body?
> - How closely is the record integrated with other records held by the public body?
> - Does the public body have the authority to dispose of the record?
>
> Not every factor is determinative, or relevant, to the issues of custody or control in a given case. …

[para 103] These factors were used *in University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247 (*University of Alberta*), cited by the Public Body. They have also been used and discussed in Orders from the Ontario Information and Privacy Commissioner's office and judicial reviews of those decisions.

[para 104] *City of Ottawa*, 2010 ONSC 6835, is a decision of the Ontario Superior Court resulting from a judicial review of Order MO-2408 of the Ontario office. In that case, an employee of the City had used his City work email account to send and receive emails relating to his volunteer role with another organization. An access request was made for those emails. The

adjudicator in Order MO-2408 found that the emails were in the custody or control of the City because the City had physical custody of emails on its server and also had control to regulate its email system. The Court overturned that decision.

[para 105] The Court reviewed the ten factors considered by the Ontario adjudicator in determining whether the City had control over the personal emails. These factors are the same as the ten factors used in past Orders of this office in determining control over records, listed above. The Court considered these factors in the context of the purpose of the access-to-information provisions in the Act, which is to facilitate democracy. It concluded that the City did not have custody such that the personal emails could be the subject of an access request. Applying the factors, the Court noted that while the City employee created some of the records, the records were not created in the course of his work duties. Other records were sent to the employee by an individual unrelated to the City. These records were not intended to be used for City business, and were not related to City business. The City *did* possess the records by virtue of the employee's use of the City email system but it did not have a *right* to possess the records. The City had some ability to regulate the record because it regulates its email system and the record was on the system. The City did not have the ability to regulate the record itself, outside of that email system.

[para 106] The Court also noted that it is not uncommon for employees to have or bring personal paper documents to their workplace. It stated that electronic documents are not different in this regard. It said (at paras. 37-38):

> It can be confidently predicted that any government employee who works in an office setting will have stored, somewhere in that office, documents that have nothing whatsoever to do with his or her job, but which are purely personal in nature. Such documents can range from the most intimately personal documents (such as medical records) to the most mundane (such as a list of household chores). It cannot be suggested that employees of an institution governed by freedom of information legislation are themselves subject to that legislation in respect of any piece of personal material they happen to have in their offices at any given time. That is clearly not contemplated as being within the intent and purpose of the legislation.
>
> The question then is whether information stored electronically should be treated any differently. I do not see any rational basis for making such a distinction.

[para 107] The Ontario Court discussed the fact that electronic records (unlike paper or tangible records) were subject to the City's "Responsible Computing Policy", which stated that the City had the right to access its IT assets and information, and to monitor their use. The Court found that this management of IT services did not amount to custody or control of the personal emails of the City employee, located on the City's servers. The Court noted (at para. 42):

> Employers from time to time may also need to access a filing cabinet containing an employee's personal files. That does not make the personal files of the employee subject to disclosure to the general public on the basis that the employer has some measure of control over them. The nature of electronically stored files makes the need for monitoring more pressing and the actual monitoring more frequent, but it does not change the nature of the documents, nor the nature of the City's conduct in relation to them. It does not, in my view, constitute custody by the City, within the meaning of the Act.

[para 108] This Ontario decision is cited by the Alberta Court of Queen's Bench in *University of Alberta*, cited above, a decision resulting from a judicial review of Order F2009-023. The Order related to whether the University had custody or control of emails sent or received by a professor in connection with his voluntary participation in a grant process for a federal program. In its review of Order F2009-023, the Court found that the professor's emails were akin to the City employee's personal emails in *City of Ottawa*, and that the University did not have custody or control over them. It noted that the University's ability to monitor emails on its server and its Condition of Use policy did not indicate it had custody or control. The Court also noted that the University's duty to maintain the security of its email system did not mean it has custody or control over all emails contained in that system.

[para 109] This analysis has also been applied in situations involving complaints about a public body's collection, use or disclosure of personal information contained in an employee's personal records maintained on the public body's electronic systems. Order F2019-05 states (at paras. 43-44):

> As these Courts have stated, the ability to regulate personal documents stems from the public body's ability to regulate its systems and use of its systems. The ability to regulate is not tied to the document itself.
>
> Whether electronic or tangible, when an employee voluntarily stores personal information at the workplace and that information:
>
> - is for the personal use of the employee
> - is unrelated to the employee's work duties, and
> - is unrelated to the functions of the public body (i.e. is not personal information of the employee collected for human resources purposes)
>
> then the public body will generally not be found to have collected it within the terms of Part 2 of the Act.

[para 110] I agree with the above analyses: the fact that the records at issue are on the Public Body's electronic systems, or are maintained at the Public Body's physical location, is not determinative of whether the Public Body has custody or control of the records. As discussed in the case law above, 'bare possession' of records is not sufficient to find that a public body has custody of those records. A public body must also have some right to possess the records, in order to have custody of the records.

[para 111] The above cases regarding custody of records are different from the case at hand; in the cases above, the information at issue arose from public body employees using the public body's computer and electronic systems for purposes other than their work duties. In this case, the CTS staff were performing their work duties. That said, the circumstances are similar insofar as CTS staff, as I understand the parties to argue, can have distinct roles. One role is in relation to their duties to provide services that fall under the Public Body's mandate. The other role is in relation to services that fall under the responsibility of the courts. The Public Body argues that

insofar as CTS staff perform services for the courts, the courts have custody and control over records relating to those services.

[para 112] The only Alberta decision that discusses court records or judicial information in terms of custody or control, rather than section 4(1)(a), is Order F2002-004. This Order was cited by the Public Body in support of its position that it does not have custody or control over records relating to employees providing services to the courts. In that case, a former employee of Alberta Justice, who reported to the Chief Justice of the Court of Appeal of Alberta, made an access request for records of employee complaints made about him. Alberta Justice responded to the request, stating that no responsive records were located. The Commissioner summarized Alberta Justice's submission as follows (at paras. 21-24):

> It is my view that, under the usual employment circumstances, the Public Body would have control over employment-related records of the Registrar and other employees of the Court, since those records would relate to the Public Body's mandate as employer. Those records would include any complaints made by an employee about the conduct of another employee.
>
> The Public Body says that employee grievances, which involve a formal process, will find their way from the Court to the Public Body. The Public Body gave evidence that it has employee grievance files in its records system.
>
> The Public Body also gave evidence that it has some employee complaint files in its records system. However, the Public Body says that not all employee complaints are recorded, nor is there is a requirement that all employee complaints be recorded.
>
> Furthermore, the Public Body maintains that not all employee complaints will necessarily find their way from the Court to the Public Body. The Public Body says that there is nothing to stop someone from going to a judge, such as the Chief Justice, to complain. If a complaint were raised with the Chief Justice or a judge of the Court, the Public Body may have no record of that complaint.

[para 113] He found (at paras. 28-30):

> Furthermore, the Public Body says that it has no way of demanding records from the Court. It does not go to the Court to search, or request the Court to search. If a record does not find its way to the Public Body, the Public Body says it does not have any way to compel the record from the Court, nor would it check the Court for records. The Public Body maintains that it cannot control the relationship with the Court.
>
> I asked the Public Body how it can be sure it gets everything from the Court that it is supposed to get. The Public Body says that there are mechanisms in place for the records that must go to it to do so: for example, personnel evaluations. The Public Body says it must rely on the Court to provide it with records, and it makes the assumption that it has everything it needs from the Court, in its own files.
>
> In these unusual circumstances, I find that the Public Body does not have control over any responsive records that may exist in the Court. Whether the Public Body should have such control so as to be able to compel the Court to produce responsive records, if any, is another

> matter. I note here only the apparent gap that exists between the Public Body's mandate as employer and its ability to compel responsive records, if any, from the Court.

[para 114] The Commissioner's finding indicates that had records relating to employee complaints been found in the possession of Alberta Justice, then Alberta Justice would have had the requisite custody or control over them for the purpose of the FOIP Act. The Commissioner's finding that Alberta Justice was not required to provide responsive records to the applicant that were in the custody of the Courts was premised on the fact that Alberta Justice did not have possession of the records and had no avenue by which to obtain them from the courts (if any responsive records existed).

[para 115] The facts of the present case are different, insofar as the Public Body located responsive records in its possession.

[para 116] With respect to the Ontario cases, I have noted that Ontario's Act does not contain a provision as broad as the exclusion in section 4(1)(a). Alberta's exclusion provision achieves the result that the Act does not apply to court or judicial information regardless which body has custody or control (i.e. whether the information is in the custody or control of a public body or the courts). In contrast, in Ontario, whether the Act applies to court or judicial information depends on which body has custody or control of the records (unless the information falls within the narrower exclusions in section 65(3) – (5.1) of that Act).

[para 117] Given that in the present case the Public Body and Affected Party focussed on which body has custody or control of the records identified as responsive, it is helpful to review the line of cases from Ontario, despite the differences in the respective Acts.

[para 118] In Ontario Order PO-2739, an access request was made to the Ministry of the Attorney General for records that had been created by Ministry staff at the request of the Chief Justice of the Ontario Court of Justice. The reports were annual and monthly reports entitled "Offence Type Statistics by Location". The Ministry had disclosed some responsive records to the applicant but withheld others on the basis that the disclosure would compromise the independence of the judiciary.

[para 119] During the inquiry, the Assistant Commissioner invited submissions from the Office of the Chief Justice of Ontario but that Office declined to participate in the inquiry. The Assistant Commissioner reviewed the list of factors used to determine whether the Ministry had custody or control of the responsive records; these factors are the same as the factors cited in *City of Ottawa* and *University of Alberta*, discussed above.

[para 120] The Assistant Commissioner reviewed past Orders of that office regarding court information, summarizing the precedents as follows:

> **25** 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.

26 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.

27 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.*

28 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.]

29 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.

30 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.

31 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.

[para 121] The Assistant Commissioner found that the information in the reports did not constitute judicial information, as it was "gathered, produced and used for purposes other than judicial purposes" (at para. 65). The Assistant Commissioner noted that the statistical information had been maintained by the Ministry prior to the Chief Justice having requested the reports. The Assistant Commissioner also found that the reports did not constitute a 'court record' as it did not relate to a specific proceeding or to the adjudicative function of the courts. The Assistant Commissioner also found that the Ministry used the reports for its own purposes. Lastly, the Assistant Commissioner did not accept that the information in the reports relates to or impacts judicial independence, judicial functions, or the adjudicative role of the courts (at para. 87).

[para 122] The Ministry sought judicial review of this Order. In its decision, the Ontario Divisional Court (*Ministry of the Attorney General v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172) (*Ministry of the Attorney General*) found that the Ministry had custody but not control over the reports. It concluded (at para. 6):

> 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.

[para 123] The Court cites the principles of judicial independence discussed in *Valente*, *Ell v. Alberta*, 2003 SCC 35 (CanLII), and *Provincial Court Judges Reference*, noting that judicial independence consists of three core components: security of tenure, financial security and administrative independence. The Court determined that the third component was relevant to the case before it. It stated (at paras. 28-29):

> [28] … 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, [1985] S.C.J. No. 77, 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, [1989] S.C.J. No. 99, at paras. 70-71);
> - the appointment of the trier of fact in a court martial (R. v. Généreux, [1992] 1 S.C.R. 259, [1992] S.C.J. No. 10, 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, 269-70); [page598]

- 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, [1997] S.C.J. No. 82, at para. 74).

…

> [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.
>
> [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". [page599]

[para 124] The Court concluded:

> [36] …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.

[para 125] Applying this analysis to the facts before it, the Court concluded that by virtue of section 92(14) of the Constitution, it is the Ministry and not the courts that "collects, prepares and maintains data related to the administration of justice" (at para. 39). That said, if the data is collected (and/or compiled) at the request of the Chief Justice, the reports resulting from the collection remain under the control of the judiciary.

[para 126] In the particular circumstances of that case, the Ministry also used the reports for its own purposes, which fell within its core mandates. The Court considered the factors cited in past Orders of both the Ontario office and this office, and concluded that the Ministry had more than bare possession of the reports such that the reports were in the custody of the Ministry for the purposes of the Act.

[para 127] In coming to this conclusion, the Court cautioned that mere possession of the records by Ministry staff for the reason that they are responsible for compiling the reports is not sufficient to find that the Ministry had custody of the records. This is consistent with cases discussed above with respect to custody and control under Alberta's FOIP Act. The Court further cautions that there may be circumstances in which the judiciary may share 'judicial information' with the Ministry that nevertheless continues to be constitutionally protected from disclosure. The Court indicates that such a finding is dependent on the facts of each case. In the case before

it, the Court determined that the extent to which the Ministry used the reports, and the nature of the information in the reports, did not support a finding that the information in the reports is constitutionally protected. It concluded (at para. 49):

> [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.

[para 128] While the Public Body's and Affected Party's arguments are closer to the analyses found in the Ontario case law rather than Alberta's precedents, neither party addressed the Ontario cases in their submissions. Therefore, I do not have arguments from the parties as to how the principles applied in these cases relate to the records at issue. Without specific information about the content of the records at issue, it is difficult to determine whether, or the extent to which, the analysis in the Ontario cases applies here.

Application to this inquiry

[para 129] In its submissions, the Public Body addressed most of the factors for determining whether a public body has custody or control of records, set out above.

[para 130] The first factor is whether the records were created by an officer or employee of the Public Body. The Public Body has referred to CTS as judicial staff. However, the Public Body has acknowledged that CTS staff are Public Body employees. It states that CTS has a dual reporting role. CTS reports to the courts when performing "judicial administration" tasks. Presumably, CTS reports to the Minister (or Public Body), as well as the courts, depending on the function being performed.

[para 131] The Public Body states that "[i]t was therefore the Courts, rather than the Public Body, that responded to the security threat to the Court servers. The Courts responded to the security threat through their judicial staff" (initial submission, at para. 10). The Public Body states that judicial staff are appointed under the *Public Service Act* and administratively fall under the Public Body but functionally report to the courts. It states:

> Judicial staff includes judicial assistants, court legal officers, and other staff whose function relates to judicial functions of the Courts (QB MOU, s 3.23; PC MOU, s 3.22). Court Technology Services staff have a dual reporting role. When working on judicial administration matters, as in the case at hand, they are judicial staff who report to the Courts, rather than to the Public Body.

[para 132] "Judicial staff" is defined in the QB MOU as "employees whose function relates to the Judicial Administration of the Court. It specifically excludes Court Administration Staff." If the CTS have a dual role, it is unclear whether they can properly be considered "judicial staff", especially if part of their role is court administration. That is not to say that CTS cannot report to the courts with respect to certain roles. However, if CTS have dual reporting role, then whether they report to the courts or the Public Body on a particular matter will be context-dependant, and will require an assessment on a case-by-case basis.

[para 133] The Public Body has also acknowledged that the records also involve non-judicial staff. It states that some of the records were sent to or by non-judicial staff with the Public Body, including emails "sent by judicial staff seeking advice from non-judicial staff, with the remainder supplying that advice" (initial submission, at para. 19). Therefore, regardless of whether CTS staff are properly characterized as "judicial staff", at least some records were created by non-judicial and non-CTS employees of the Public Body.

[para 134] The next several factors in determining whether a public body has custody or control of records seem to depend largely on whether the records relate to judicial administration or court administration:

- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body's mandate and functions?
- Does the public body have the authority to regulate the record's use?
- To what extent has the record been relied upon by the public body?

[para 135] The Public Body's arguments on these points depend on the role of CTS (and other Public Body employees), as well as the characterization of "judicial administration information" and "judicial information". These ideas are intermingled such that it is impractical to address each of the bullets above separately.

[para 136] The Public Body states that the CTS was "acting at the direction of the Courts, not the Public Body, when sending and receiving the requested records". It states that the purpose of the records was to analyze and respond to the security threat to servers containing judicial information. It argues that the responsive records are comprised of 'judicial information' insofar as they are "any record relating to support services provided to a Judicial Officer, but does not include Court Information or a Court Administration Record." The Public Body states that the courts are responsible for developing or approving policies for managing, auditing and accessing judicial information (per section 8.1.2 QB MOU) (initial submission, at para. 14).

[para 137] As noted above, the Public Body states that while non-CTS staff created at least some records, because the records "relate to the supervision and control of court and judicial information (i.e., the security of court servers), [which is] the responsibility of the Courts (QB MOU, s 5.1.1.7; PC MOU, s 5.1.1.8), the records themselves are also judicial information as defined by the MOUs (QB MOU, ss 3.19(g) & 3.21(e); PC MOU ss 3.18(g) & (3.20(e))" (initial submission, at para. 14).

[para 138] The Public Body also states that the records "are held by employees of the Public Body for the limited purpose of providing assistance to the Courts on a judicial administration matter" (initial submission, at para. 19). The Public Body's submissions on this point rest on the

characterization of the information in the responsive records as "judicial information" or "judicial administration" information.

[para 139] In the QB MOU, "judicial administration", "judicial administration record", and "judicial information" are defined as follows:

> 3.18. "**Judicial Administration**" means the management and direction of matters related to judicial functions in the Court and includes, the scheduling and adjudication of proceedings in the Court, and all other matters undertaken by the judiciary as assigned by law or set out in this Memorandum of Understanding. Judicial Administration specifically excludes Court Administration.
>
> 3.19. "**Judicial Administration Record"** means administrative information relating to a Judicial Officer, regardless of the medium in which it is created or stored, including:
>
> a. the scheduling of Judicial Officers and trials;
> b. professional development information;
> c. personnel and financial information;
> d. staff meeting materials other than those that are Court Administration Records;
> e. complaints or other sensitive information directed to or concerning a Judicial Officer;
> f. aggregated, non-identifying statistical information concerning a Judicial Officer; and
> g. any record relating to support services provided to a Judicial Officer, but does not include Court Information or a Court Administration Record.
>
> 3.21. **"Judicial Information"** means information created, stored, accessed, produced or used by or for a Judicial Officer regardless of the medium in which it is created, stored, and wherever it is collected, received, maintained or otherwise handled, including:
>
> a. pre- and post-hearing work, research memos, hearing and other notes;
> b. rulings, endorsements, orders, judgments or reasons for judgment, that are in draft form;
> c. individual calendar notations;
> d. Personally Identifiable Information;
> e. Judicial Administration Records;
> f. information and procedures concerning internal operations;
> g. statistical information concerning a Judicial Officer's individual Court related activity or workload;
> h. information from judicial meetings, including agendas, supporting documentation, minutes, notes, information about attendees, transcripts and recording and reports of the meeting;
> i. correspondence or communications to or from a user dealing with the above categories;
> j. metadata associated with any of the above information; but does not include Court Information or Court Administration Records.

[para 140] Most of the categories above do not seem applicable here – such as records relating to scheduling, professional development, personnel and financial information etc. It seems clear that CTS isn't involved in the scheduling or adjudication of court proceedings. However, the category includes records relating to support services, which could conceivably cover some or all of the records at issue.

[para 141] Under the FOIP Act, for records relating to support services to be excluded from the scope of the FOIP Act under section 4(1)(a), the services must be provided to a judge. In the QB MOU, the support services may be provided to a judicial officer, which includes Justices and Masters of the Court. For the purpose of this inquiry, nothing turns on this minor difference.

[para 142] Past Orders have addressed what is meant by "support services" in this context. In Order F2002-004, former Commissioner Work said (at paras. 37-38):

> Section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] refers to the support services provided to the judges. It does not refer to the persons employed to provide those support services. Indeed, the evidence is that the Court does not employ the persons who provide the support services. The Public Body is responsible for employing those persons. So section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] is not concerned with employment and records relating to employment of the persons who provide the support services.
>
> Records of employee complaints concerning the conduct of the Registrar would relate to the employment of the persons who provide the support services. Therefore, if those records were in the custody or under the control of the Public Body, the records would not be excluded from the application of the Act by section 4(1)(a) [number unchanged by R.S.A. 2000, c. F-25] because those records do not relate to support services provided to the judges of the Court. The Act would apply to those records.

[para 143] In Order F2017-59 the adjudicator considered the application of section 4(1)(a) to records relating to a complaint made to the court by an applicant about services provided by court clerks. She found (at para. 32):

> That being said, the records in this inquiry were about the Applicant's complaints about how the clerks and Case Management Officer performed their roles in relation to a matter the Applicant had before the Courts. Whether a complaint itself, the investigation of a complaint, and the result of a complaint are records relating to support services provided to the judges of any courts referred to in section 4(1)(a) of the Act will depend on the nature of the complaint. I do not believe every complaint submitted to the Courts and every investigation and finding done by or on behalf of the Registrar will fit the terms of section 4(1)(a) of the Act. However, in this case, the complaint was about the services provided by the clerks and Case Management Officer and those individuals were providing their services in support of the judges of the Courts mentioned in section 4(1)(a) of the Act. The words used in the relevant portion of section 4(1)(a) use the wording "related to" which is, I believe, broad enough to cover the records at issue.

[para 144] As stated in Order F2017-59, whether records relate to support services provided to a judge (or a master) will depend on the particular circumstances of each case.

[para 145] Regarding the records held by non-judicial staff who do not report to the courts, the Public Body further argues (initial submission, at para. 20):

> The Courts rely on the protections for judicial information expressed in the MOUs when seeking advice on judicial administration matters from nonjudicial staff. Finding that the resulting records were under the custody or control of the Public Body would limit the ability of the Courts to seek such advice and infringe their constitutionally protected administrative independence.

[para 146] I asked the parties to explain the manner in which non-judicial staff provide services to the court if they do not report to the court. I also asked the parties to explain how related records would be within the control of the courts. The Public Body' response seems to be that the courts have the right to regulate the use of the records (rebuttal submission, at para. 11).

[para 147] It is not clear from the Public Body's submissions if the advice sought from non-judicial staff was sought by a member of the court or by CTS staff. Without any information as to the content of the records, it is difficult to determine the role of the various employees in creating the records.

[para 148] The Applicant argues that because the Minister is responsible for resourcing information systems and information support services, including repair and replacement of hardware and software (section 5.3.1.5 of the QB MOU), that the Public Body has responsibility for any repairs to the server. I understand the Applicant to be arguing that if the Public Body has responsibility for repairs to the servers, then communications involving CTS about those repairs are in the custody and control of the Public Body.

[para 149] This is not necessarily the case. The cited section of the MOU could also mean that the Minister is responsible for financial resources or providing the equipment necessary for the courts to implement the information system they deem appropriate. I cannot say which interpretation is correct from the submissions before me.

[para 150] The Applicant also argues that section 8.1.2 of the QB MOU places responsibility for creating policies for information security and access to court and judicial information on the Chief Justice, while the Public Body has responsibility to ensure its implementation conforms to those policies. Therefore, he argues that the Public Body has at least some level of management and oversight.

[para 151] It seems possible that the records contain emails between the courts and CTS regarding the vulnerabilities – how they happened, whether the court's policies had been followed, etc. Possibly records consisting of such communications show how CTS addressed the security issues identified by the Applicant, and possibly such records are properly characterized as records relating to a support service provided to a judge (or master). It is difficult to conclude whether such communications would be within the court's purview by way of creating policies, or whether such communications would be within the purview of the Public Body by way of implementation. It seems likely that it would depend upon the specific content of the records, of which I have no knowledge.

[para 152] I note as well that the Public Body has said that 261 pages of records were located; this could indicate that the records relate to more than one discussion or specific topic.

[para 153] The Public Body has argued that the determination regarding custody and control of records relates to which body *has* custody or control of the records, and not which body *ought to* have custody or control. The Public Body also argues that whether the records are more properly characterized as court administration records rather than judicial information, is relevant only if the Public Body has control of the records (rebuttal submission, at para. 12). In principle I

agree. However, unlike the circumstances in Order F2002-004 (discussed at paras. 112-114 above) because it is clear that the Public Body has possession of the records, it must be determined whether this possession amounts to custody or control for the purposes of the FOIP Act. The MOUs and the FOIP Act both contemplate that the Public Body would have custody or control over court administration records (see sections 3.8 and 3.9 of the QB MOU). The question before me is not which body ought to have custody or control of the records. Rather, the question is which body does have custody or control for the purposes of the FOIP Act, which is a determination based on the particular facts of the case and content of the records. Without the records or any substantive description of the records, I have few facts before me to make the determination.

[para 154] The Public Body states that the records "were generated in response to a security threat, identified by the Applicant, to court servers" (rebuttal submission, at para. 9). The Affected Party has said that the access request "involves communications about vulnerabilities in the security of three Court servers. On behalf of the Courts, the security issues were remedied by Court Technology Services ("CTS")" (submission, at para. 32). They argue that the records are therefore in the control of the courts, as judicial administration matters. The Public Body also states that the requested records relate to judicial administration of the Courts, insofar as they relate to the supervision and control of court and judicial information.

[para 155] This is not obviously the case. I understand the Public Body and Affected Party intend for the statements made in their submissions to be descriptions adequate to meet the exclusion provision (and/or as demonstrating an absence of custody or control in the Public Body). However, the statements are not sufficiently detailed for me to reach that conclusion. It is possible that some or all of the records may "relate to" judicial administration or "involve" communications about court server security, yet not themselves contain judicial administration information or be records relating to support services provided to judges. To give a possible example, the parties' submissions do not exclude the possibility that some of the records are about consequences to the Applicant arising from the presentation he gave (information of the sort he seems to be seeking). Such records would not necessarily constitute judicial administration records or records relating to support services provided to judges; nor would they necessarily even constitute "court administration records".

[para 156] Moreover, even if all of the records consist of information about steps that were taken to address the vulnerabilities in the courts' systems that the Applicant had identified, it would still not be clear to me without greater detail regarding the contents of the records whether all such records were in the control of the courts or were in the custody or control of the Public Body. This could depend on which staff were involved, to whom they were reporting at the relevant time, with whom they were communicating, whether the communications or actions taken by the employees involved obligations falling under the Public Body's purview, etc. It is also possible that, given the dual role of CTS, there was a dual purpose for some records such that the analysis in *Ministry of Attorney General* is relevant (discussed at paragraphs 122-127 above).

[para 157] In its rebuttal submission, the Public Body states (at paras. 9-10):

> 9. The purpose of the *U of A* factors is to determine which body's mandate and functions the records relate to. The records in question were generated in response to a security threat, identified by the Applicant, to court servers. Both the Public Body and the Chief Justices/Judge have confirmed that the requested records relate to supervision and control of court and judicial information, a function within the responsibility of the Courts that was carried out by the Courts (Initial Submission of the Chief Justices/Judge, paragraph 32; Public Body's Initial Submission, paragraph 13).
>
> 10. The *U of A v IPC* factors require only a determination of what a body's mandate and functions are; they do not invite a review of what those mandates and functions could or should be, or how they should be exercised. It is not necessary for determination of the issue in this inquiry to consider whether the Courts must (as a constitutional requirement) or should (as a matter of policy) have supervision and control over court and judicial information. While the answer to both questions is 'yes', it is sufficient for this analysis to observe that the Courts do have such authority, which they exercise, and which was exercised in response to the security threat identified by the Applicant.

[para 158] I understand the Public Body to mean that the courts may have control of the responsive records regardless of whether control is constitutionally necessary. I agree that it would be overly restrictive to state that the courts can have control over records only if the principle of judicial independence requires it.

[para 159] However, I still must make a determination regarding whether the records relate to judicial functions that fall within the authority of the courts such that the courts have control of the responsive records.

[para 160] There are two additional factors relating to a determination of whether a public body has custody or control of records, which were not addressed by the Public Body:

- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

[para 161] In this case, I have some indication, though not conclusive evidence, regarding how the records at issue are integrated with the Public Body's records. As discussed above, the Public Body's FOIP area was able to access the records when responding to the Applicant's request. This indicates that the records were somehow integrated with other records held by the Public Body. Of course, this may not be the case, but I do not have any arguments from the parties to indicate otherwise.

[para 162] I also do not know whether the Public Body has any authority to dispose of the records. This is closely related to the factor above, insofar as it would seem prudent for the Public Body to have policies to ensure that judicial records are maintain separately from the Public Body's records and that they are regulated in accordance with the courts' processes and not the Public Body's. For example, the Public Body would presumably want to ensure that it did not dispose of judicial administration information in accordance with its records retention and disposition schedule, rather than the courts' policies.

[para 163] It is unclear how the Public Body initially located the responsive records. The Public Body's submissions indicate that the records include communications to and from CTS regarding the security issue. It is not clear whether the Public Body searched the email accounts of CTS employees to locate responsive records, and if so, whether there were any concerns raised about such a search if CTS employees report to the Courts and not the Public Body for at least part of their duties. It is a common practice for employees who may have responsive records to be asked to search for those records; it is unclear whether such a process took place in this case and if so, whether the CTS employees alerted the Public Body's FOIP area to concerns about the Public Body searching through judicial records. It is possible there is a reasonable explanation, but none has been provided to me.

[para 164] It is also not clear what steps the Public Body has taken to identify judicial information that is under the custody or control of the courts and to maintain it separately from the Public Body's own records (including court administration records, which seem to be within the custody and control of the Public Body, per the MOUs).

[para 165] The fact that the Public Body's FOIP area apparently had ready access to the records such that they were initially located and identified as responsive to the Applicant's request – in error or otherwise – raises questions about the significance of these records to the constitutional independence of the judiciary. For example, if the content of the records is such that providing them to the Commissioner for the purpose of this inquiry could breach the constitutional independence of the judiciary, then it seems that the FOIP area's ready access would create a similar problem. Further, if a finding that the Public Body has custody or control of these records could breach the constitutional independence of the judiciary, then it would seem prudent to ensure that access to these records by Public Body employees is restricted. As above, there may be a reasonable response to these concerns, but none has been offered to me.

[para 166] Again, the fact that the Public Body may have made such an error in processing the Applicant's request is not conclusive of the matter. However, it raises obvious questions about the content of the records and how it relates to judicial independence, that have not been adequately addressed by the parties.

Conclusion

[para 167] It may be that the records, or some of them, contain information that is in the control of the courts. I can likewise imagine that the records, or some of them, contain information that falls within the Public Body's mandate, such that it has custody or control over the records. I am unable to make a determination on this point on the basis of the submissions before me. Therefore, were I to uphold the Public Body's claim that it does not have custody or control of the responsive records, I would be doing so on the basis of mere speculation. That is not the standard I am required to apply.

[para 168] I appreciate the arguments made by the Public Body and Affected Party; that both the Public Body and Affected Party agree that the responsive records are not in the custody or control of the Public Body is not to be discounted. However, the submissions raise valid questions as to how the records the Applicant is seeking fall within the sole control of the courts.

Having carefully considered the Public Body and Affected Party submissions, I cannot answer those questions. In other words, I cannot point to evidence or arguments that show, on a balance of probabilities, why the records, or some of them, would not be in the custody or control of the Public Body.

[para 169] The Applicant has exercised his right under the Act to request a review of the Public Body's response. As the matter was not settled between the parties at the mediation stage, the Commissioner is tasked with conducting an inquiry and making all findings of fact and law arising in the course of the inquiry. This is not a situation in which it is clear on the face of the Applicant's request that responsive records would not be in the custody or control of the Public Body. Therefore, as indicated by the precedents discussed above, a determination about custody or control depends upon the particular facts of this case. The arguments in the submissions before me thus far are too general to make my own findings regarding custody or control. Without the records or any substantive description of the content of the records, I cannot fulfill my obligation to determine whether the Applicant has no right of access to the records as argued by the Public Body and Affected Party.

[para 170] For the same reasons, I am unable to come to any conclusion regarding the application of section 4(1)(a) to the records at issue.

[para 171] I am also not satisfied that the Commissioner, or I as her delegate, do not have authority to properly decide this jurisdictional question.

[para 172] I have a duty under section 72 of the FOIP Act to issue an order concluding this inquiry. In a recent Order of this office, Order F2022-28, the adjudicator found that a public body failed to provide sufficient evidence to satisfy her that it properly claimed privilege over records at issue. In that case, the adjudicator made the following observations (at paras. 47-53):

> I have a duty under section 72 of the FOIP Act to issue an order in relation to the records the Public Body has withheld from the Applicant on the basis of section 27(1)(a). I must carry out this duty even though the Public Body may seek judicial review of my decision and seek costs against the Commissioner. The evidence of the Public Body fails to provide a basis for its application of section 27(1)(a) to the records and I must order the Public Body to give the Applicant access to the records.
>
> Given the termination of the Applicant's employment and the commencement of legal proceedings, I anticipate that at least some of the records, if not many of them, contain privileged communications. On the descriptions provided by the Public Body, I am unable to determine which records are privileged or to which privilege they may be subject. Ordering disclosure because the Public Body has not met its case might harm the Public Body's position in litigation, which would not necessarily serve the public interest. On the other hand, it may be that the Public Body prefers to have the issue of the application of section 27(1)(a) adjudicated by the Court of Queen's Bench, in which case, an order under section 72 will be necessary.
>
> A difficulty with the approach above, is the fact, discussed above, that the Public Body asserts that much of the information in the records was sent by, or sent to, the Applicant. If so, then litigation privilege and solicitor-client privilege cannot apply to that information. I find that such

information remains within my jurisdiction to demand under section 56, as the only privilege that could apply is settlement privilege, which is a privilege of the law of evidence.

I note, too, that judicial review results in the expenditure of judicial resources and also requires the expenditure of public resources provided by the Legislature to both the Public Body and the Commissioner to carry out their statutory duties, such as administering the FOIP Act.

I have decided to order the Public Body to give the Applicant access to the records to which it applied section 27(1)(a) as this will enable it to seek judicial review; however, I will also give it the option of providing better submissions to make its case and to provide the records sent to or by the Applicant for my review.

I draw support for the requirement that the Public Body provide better evidence and submissions, and provide records that appear not to be privileged from *Edmonton Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 207 (CanLII). In that case, Renke J. confirmed that the Commissioner has the authority to question claims of privilege where, as here, the standards in *Canadian Natural Resources Limited v ShawCor Ltd*., 2014 ABCA 289 (CanLII) are not met. He said:

> Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?
>
> In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the ***CNRL v ShawCor*** standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

As noted above, I find that the reference to the Applicant as being the author or recipient of many of the records is evidence that solicitor-client privilege or litigation privilege does not apply to them. In such circumstances, the foregoing case contemplates that the Commissioner may require further information.

[para 173] The adjudicator accepted that some records may be privileged as claimed by the public body, but was unable to ascertain this fact, or determine for which records privilege was properly claimed. This situation here is similar, insofar as I found that the information in the records, or some of it, may fall within the scope of the Courts' authority such that the Public Body may not have custody or control of the records for the purpose of responding to an access request under the FOIP Act. However, this is not clearly the case. Even if it is the case, it is not clear that this is true for all of the 261 pages of records initially identified by the Public Body as responsive.

[para 174] The difference between the situation in Order F2022-28 and the present case, is that the Public Body had also claimed that section 4(1)(a) applied to the information in the records, and as discussed below, I have not made a determination on that issue. Therefore, it would be premature to order the Public Body to provide the Applicant access to the records at issue, for the reason that it failed to substantiate its claim that it does not have custody or control. This is especially the case as section 4(1)(a) is a jurisdictional exclusion, meaning that if the provision applies, the Commissioner (or I as her delegate) does not have authority to order the Public Body to provide the records to the Applicant. Therefore, a determination regarding the application of section 4(1)(a) must still be made on the facts of this case.

[para 175] Despite the differences between this case and the circumstances in Order F2022-28, I see the wisdom of the approach taken in Order F2022-28 cited above, and have decided to take a similar approach. I will ask the Public Body to provide me with the records at issue to enable me to make a determination regarding the whether the records fall within the scope of the FOIP Act and/or to provide me with an affidavit of records for any records containing judicial information or court information, detailing how the information falls within those categories. I will retain jurisdiction to review the records and/or affidavit, to determine if the FOIP Act applies.

[para 176] In his initial submission, the Applicant clarified his request; his original access request seems broader than how he characterized it in his initial submission. It is not clear whether the responsive records contain the information the Applicant now states he is seeking. I asked the Public Body to clarify whether any of the responsive records fit the categories described by the Applicant as records he is seeking. It did not respond to this request.

[para 177] Given this, before providing the records and/or affidavit to me for review, the Public Body is to clarify the scope of the Applicant's request and determine if any of the 261 pages of records are no longer responsive to the request, given the clarified scope. The Public Body should provide a new response to the Applicant if the clarified scope amends the records at issue.

2. If the Public Body determines that it has custody or control of some or all of the responsive records, are the record(s) excluded from the application of the Act by section 4(1)(a)?

[para 178] The Public Body previously informed the Applicant that the responsive records were excluded from the scope of the FOIP Act under section 4(1)(a). Absent the records or any specific information about the records, I cannot make a determination regarding whether section 4(1)(a) would apply to any or all of the responsive records. As above, I will retain jurisdiction to review the records and/or affidavit, to determine if the FOIP Act applies.

V. ORDER

[para 179] I make this Order under section 72 of the Act.

[para 180] I find that the Public Body failed to substantiate its position that it does not have custody or control of the responsive records.

[para 181] I order the Public Body to clarify the scope of the Applicant's access request. The Public Body should provide a new response to the Applicant, copied to me, setting out whether and how the clarified scope amends the records at issue.

[para 182] I order the Public Body to provide me with the records at issue and/or to provide me with an affidavit of records for any records containing judicial information or court information, detailing how the information falls within those categories. I will retain jurisdiction

to determine whether the Public Body has custody or control of all or some of the records, and the application of section 4(1)(a) to any records that are within its custody or control.

[para 183] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Amanda Swanek
Adjudicator

Appendix

Relevant provisions of the Memorandum of Understanding between the Attorney General of Alberta and the Chief Justice of the Court of Queen's Bench of Alberta (QB MOU)

2. PURPOSE

2.1. The purpose of this Memorandum of Understanding is to set out the principles that will guide the relationship between the Court of Queen's Bench and the Ministry of Justice and Solicitor General of Alberta.

2.2. This Memorandum of Understanding does not create, purport to create, or detract from any law or legal rights or responsibilities that exist or may exist in the future between the Attorney General and the Chief Justice.

2.3. This Memorandum of Understanding is not intended as a justiciable document.

3. DEFINITIONS

3.1. "**Attorney General"** means the Attorney General of Alberta.

3.2. **"Assistant Deputy Minister (CS)"** means the Assistant Deputy Minister of the Corporate Services Division in the Department of Justice and Solicitor General of Alberta.

3.3. "**Assistant Deputy Minister (RCAS)**" means the Assistant Deputy Minister of the Resolution and Court Administration Services Division ("RCAS") in the Department of Justice and Solicitor General of Alberta.

3.4. "**Business Intelligence**" means the collection, storage, disclosure or use of data, to study or influence the productivity or effectiveness of a process and includes strategic planning, analytics, performance measurement, and performance planning.

3.5. **"Case"** means any matter initiated in the Court.

3.6. "**Chief Justice**" means the Chief Justice of The Court of Queen's Bench of Alberta.

3.7. "**Court**" means The Court of Queen's Bench of Alberta and includes the Justices, Masters and Judicial Staff.

3.8. "**Court Administration**" means the management and direction of matters necessary or the operation of the Courts, Resolution Services, or other matters assigned to the Attorney General by law. Court Administration specifically excludes Judicial Administration.

3.9. "**Court Administration Record**" includes administrative policies and procedures of RCAS and, regardless of the medium in which it is created or stored, information specifically gathered or created for the purposes of managing those policies and procedures, including personnel and financial information that is in the custody or control of RCAS. It does not include a Court Record or Judicial Administration Record.

3.10. "**Court Administration Staff**" means all employees appointed under the Public Service Act, RSA 2000, c. P-42, who provide services to the Court, but does not include Judicial Staff.

3.11. "**Court Budget**" means the operating budget that is allocated to the Court of Queen's Bench by the Department annually.

3.12. "**Court Information**" means the Court Record, docket system and any other document or information, regardless of the medium in which it is created or stored, that is collected, received, maintained or otherwise handled by the Court in connection with a Case, but does not include a Court Administration Record or Judicial Information.

3.13. "**Court Record**" means the part of the Court Information which contains the permanent record of a matter initiated in the Court and which, barring specific exclusions by statute or court order, is available to the public.

3.14. "**Department**" means the Department of Justice and Solicitor General of Alberta.

3.15. "**Deputy Minister**" means the Deputy Minister of Justice and Deputy Attorney General of Alberta.

3.16. "**Empowering Legislation**" means, as applicable, the *Court of Queen's Bench Act*, RSA 2000, c C-31, the *Judicature Act* RSA 2000, c J-2 or any other act or regulation of the Legislative Assembly of Alberta or Parliament of Canada that enables the Court to exercise its powers or grants jurisdiction to the Court.

3.17. "**Information System**" means applications, information technology services and assets, or other information handling components.

3.18. "**Judicial Administration**" means the management and direction of matters related to judicial functions in the Court and includes, the scheduling and adjudication of proceedings in the Court, and all other matters undertaken by the judiciary as assigned by law or set out in this Memorandum of Understanding. Judicial Administration specifically excludes Court Administration.

3.19. "**Judicial Administration Record"** means administrative information relating to a Judicial Officer, regardless of the medium in which it is created or stored, including:

a. the scheduling of Judicial Officers and trials;
b. professional development information;
c. personnel and financial information;
d. staff meeting materials other than those that are Court Administration Records;
e. complaints or other sensitive information directed to or concerning a Judicial Officer;
f. aggregated, non-identifying statistical information concerning a Judicial Officer; and
g. any record relating to support services provided to a Judicial Officer, but does not include Court Information or a Court Administration Record.

3.20. "**Judicial Independence**" includes the judicial independence of an individual Justice or Master and/or the administrative and institutional independence of the Court.

3.21. **"Judicial Information"** means information created, stored, accessed, produced or used by or for a Judicial Officer regardless of the medium in which it is created, stored, and wherever it is collected, received, maintained or otherwise handled, including:

a. pre- and post-hearing work, research memos, hearing and other notes;

b. rulings, endorsements, orders, judgments or reasons for judgment, that are in draft form;
c. individual calendar notations;
d. Personally Identifiable Information;
e. Judicial Administration Records;
f. information and procedures concerning internal operations;
g. statistical information concerning a Judicial Officer's individual Court related activity or workload;
h. information from judicial meetings, including agendas, supporting documentation, minutes, notes, information about attendees, transcripts and recording and reports of the meeting;
i. correspondence or communications to or from a user dealing with the above categories;
j. metadata associated with any of the above information; but does not include Court Information or Court Administration Records.

3.22. "**Judicial Officer**" means the Justices and Masters of the Court.

3.23. "**Judicial Staff**" means all employees appointed under the Public Service Act, RSA 2000, c. P-42, whose function relates to Judicial Administration of the Court. It specifically excludes Court Administration Staff.

3.24. "**Office of the Chief Justice**" means the Associate Chief Justice; the Executive Director and General Counsel; Executive Counsel and Directors; the Executive Legal Officer and Director of Communications; and the Director of Judicial Scheduling and Court Coordination.

3.25. "**Personally Identifiable Information (PII)**" means any information that can be used to identify the PII Principal to whom such information relates, or is or might be directly or indirectly linked to a PII Principal.

3.26. "**PII Principal**" means a natural person to whom the Personally Identifiable Information relates.

3.27. "**Resolution Services**" includes mediation, education and information programs and initiatives available through RCAS to assist Albertans with their legal issues and disputes.

5. ADMINISTRATION OF THE COURTS OF ALBERTA

5.1. The Role of the Chief Justice

5.1.1. The Chief Justice has sole responsibility to manage and direct Judicial Administration in the Court, including the following specific areas:

5.1.1.1. the management of Justices and Masters;

5.1.1.2. the scheduling and assignment of Justices and Masters, as well as managing court sittings and courtrooms;

5.1.1.3. management of Judicial Staff, in accordance with the provisions of the *Public Service Act*, the *Financial Administration Act,* RSA 2000, c. F-12, and any other law and public service

policy respecting the employment of persons in the public service of Alberta or relating to the expenditure of public funds;

5.1.1.4. the direction of Court Administration Staff when carrying out functions related to Judicial Administration.

5.1.1.5. the direction of Sheriffs when carrying out functions related to Judicial Administration;

5.1.1.6. the development of a proposed budget for the Court and the administration of, and reporting on the approved Court Budget, including the approval of expenditures by the Court, a Justice, a Master or a member of the Judicial Staff.

5.1.1.7. the supervision and control of Court Information and Judicial Information;

5.1.1.8. the supervision of, and modifications to, court scheduling systems;

5.1.1.9. the supervision over the use of Court facilities, specifically courtrooms, and other facilities when those uses relate to Judicial Administration or have the potential to affect the dignity, decorum and reputation of the Court;

5.1.1.10. the issuance of practice directives and other notices governing matters of practice and procedure, decorum, and matters relating to Judicial Administration;

5.1.1.11. the design and implementation of public and media relations strategies, including public education initiatives that relate to Judicial Administration;

5.1.1.12. the design implementation, and reporting to the public of Business Intelligence relating to Judicial Administration;

5.1.1.13. other matters assigned to the judiciary by law.

5.3. **The Role of the Attorney General**

5.3.1. The Attorney General has sole responsibility to manage and direct Court Administration in the Court, including the following specific areas:

5.3.1.1. the provision and administration of Court registries;

5.3.1.2. the provision and administration of Resolution Services;

5.3.1.3. the provision of financial, audit and other administrative and corporate support services to the Office of the Chief Justice, in accordance with government policy;

5.3.1.4. the provision of human resource services, including benefits administration, advice and consultation regarding classification, recruitment and employee relations matters for Judicial Staff;

5.3.1.5. the provision of resources for Information Systems and information support services, including repair and replacement of hardware and software when appropriate, in consultation with the Chief Justice;

5.3.1.6. the provision of resources for judicial libraries and research services in consultation with the Chief Justice;

5.3.1.7. the provision of security services, threat assessment services and emergency planning and services in collaboration with the Court on matters regarding the administration of justice;

5.3.1.8. supervision, direction, hiring, management, reclassification, and termination of Court Administration Staff and Sheriffs in accordance with the Judicial Security Officer Memorandum of Understanding

5.3.1.9. Subject to subsection 8.1.2 of this Memorandum of Understanding, the management and storage, including the archiving of Court Information and those Judicial Administration Records that the Chief Justice requests the Attorney General to manage, store and/or archive;

5.3.1.10. the design and implementation of public and media relations strategies relating to Court Administration;

5.3.1.11. the provision of statistical information and services;

5.3.1.12. the design, implementation, and reporting to the public of Business Intelligence relating to Court Administration; and

5.3.1.13. other matters assigned to the Attorney General by law.

6. COLLABORATION AND CONSULTATION

6.1. **General Acknowledgement**

6.1.1. Given the division of roles and responsibilities described in section 5 of this Memorandum of Understanding, the Chief Justice and the Attorney General agree that collaboration and consultation on matters of Judicial Administration and Court Administration are necessary to develop and maintain an innovative, responsive and accessible justice system.

6.1.2. The Chief Justice acknowledges that the Attorney General, Deputy Minister and/or Assistant Deputy Minister (RCAS) will be consulted in a timely, transparent, and accountable way on any programs and initiatives developed by the Office of the Chief Justice that may affect, or on any issues that may impact Court Administration, subject to any confidentiality and privilege obligations to which the Chief Justice may be subject.

6.1.3. The Attorney General acknowledges that the Office of the Chief Justice will be consulted in a timely, transparent, and accountable way on any programs or initiatives developed by the Attorney General that may affect, or on any issues that may impact Judicial Administration and on any legislation proposed by the Attorney General that impacts the Court’s procedure and workload, subject to Cabinet Confidentiality.

7. SECURITY OF INFORMATION SYSTEMS

7.1. The Attorney General and the Chief Justice acknowledge that the judiciary is responsible for policy for the security of Court Information and Judicial Information and acknowledge the need to maintain Information Systems with comprehensive security and privacy specifications for Court Information and Judicial Information, which, in respect of Judicial Information, are in compliance with the principles outlined in the Canadian Judicial Council's Blueprint for the Security of Judicial Information as published from time to time.

7.2. The Attorney General and the Chief Justice acknowledge that Judicial Information and Court Information must be safeguarded regardless of the organization that administers the

Information System containing the Judicial Information and the Court Information, including Corporate Services Division, RCAS, or a commercial entity.

8. ACCESS TO COURT INFORMATION AND JUDICIAL INFORMATION

8.1. **Access to and Use of Information**

8.1.1. As outlined in Part 5 of this Memorandum of Understanding, there is a shared responsibility for Court Information.

8.1.2. The Chief Justice is responsible for developing or approving policies for managing, auditing, and accessing Court Information and Judicial Information and the Assistant Deputy Minister (RCAS) and the Assistant Deputy Minister (CS) are responsible for ensuring that their respective divisions' practices and procedures conform to the policies developed or approved by the Chief Justice.

8.1.3. Access to Court Administration Records is governed principally by the *Freedom of Information and Protection of Privacy Act,* RSA 2000, c. F-25.

8.2. **Combining of Information**

8.2.1. When Court Information or Judicial Information form part of Court Administration Records, the Attorney General must obtain authorization from the Chief Justice for the use or disclosure of that information.

8.2.2. At the request of the Attorney General, the Chief Justice may prepare a schedule of certain types or categories of Court Information and Judicial Information granting permission for specified use or disclosure as a matter of course or on terms and conditions set by the Chief Justice.