

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REPORT F-2008-002

Ministry of Justice and Attorney General

Summary:

A request for copies of any minutes of meetings from the Funeral and Cremation Services Council (Council) was submitted to the Superintendent of Funeral and Cremation Services (Superintendent) at the Consumer Protection Branch, an agency of the Department of Justice (Justice) now known as the Ministry of Justice and Attorney General. Justice responded that it did not have such a record in its possession. The issue under review was whether the responsive record, even if not in Justice's possession, was nonetheless in its control. The focus of the analysis was on section 5 of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that, of the factors recognized in other jurisdictions, none existed in this case to render the Council's records under the 'control' of Justice. The Commissioner further found that *The Funeral and Cremation Services Act* (FCSA) creates a system whereby the Council operates independently from Justice in its management of the licensees under the FCSA, and that the Superintendent acts largely as an oversight body. This involves the consideration of appeals from Council decisions and other matters that pertain to the administration of the FCSA. As such, it is not reasonable for any meeting minutes of the Council to be considered to be under the control of Justice.

Statutes Cited:

The Freedom of Information and Protection of Privacy Act, (S.S. 1990-91, c. F-22.01) ss. 2(1)(d), 5, and 7(2)(e); *The Freedom of Information and Protection of Privacy Act Regulations*, (c. F-22.01 Reg. 1); *The Funeral and Cremation Services Act*, (S.S. 1999, c. F-23.3) ss. 23, 24, 25, 34, 37, 38(1)(a), 38(2), 40, 48(2), 59(b)(ii), 61, 62, 63, 110, 111, and 112; *The Health Information Protection Act*, (S.S. 1999, c. H-0.021); *The Ombudsman and Children's Advocate Act*, (S.S. 1978, c. O-4) s. 22(1); *Access to Information Act*, (R.S., 1985, c. A-1); *Freedom of Information and Protection of Privacy Act*, (R.S.A. 2000, c. F-25); *Freedom of Information and Protection of Privacy Act*, (RSBC 1996, c. 165); *Freedom of Information and Protection of Privacy Act*, (R.S.O. 1990, c. F.31).

Authorities Cited: Saskatchewan Information and Privacy Commissioner (OIPC) Report 2004--006; Alberta Orders F2002-014 and F2002-006; British Columbia OIPC Order 04-19; Ontario Order P-1199 (1996); *Sawridge Band v. Canada (Minister of Indian Affairs and Northern Development)* [2007] F.C.J. No. 1717; *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)* [1989] 1 F.C. 143; *Canada Post Corp. v. Canada (Minister of Public Works)* [1995] F.C.J. No. 241; *Walmsley v. Ontario (Attorney General)* 34 O.R. (3d) 611; *David v. Ontario (Information and Privacy Commissioner)* [2006] O.J. No. 4351; *Canada (Attorney General) v. Canada (Information Commissioner)* [2004] F.C.J. No. 524.; *Canada (Attorney General) v. Canada (Information Commissioner)* [2000] F.C.J. No. 1648; *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* [1999] O.J. No. 4072.

Other Sources Cited: FCSCS Bylaws; *FCSCS Policy and Procedures of Council – Governance Policies*, 2006-07, date approved 07/11; *Roberts Rules of Order*; *FOIP Guidelines and Practices (2005)*, Alberta; *Black’s Law Dictionary*, 8th ed. (USA: Thomson West, 2004).

I BACKGROUND

[1] The Applicant made an informal request to the Funeral and Cremation Services Council (Council) for copies of minutes of Council and committee meetings. The Council refused to grant the request. On November 3, 2003, an access to information request pursuant to *The Freedom of Information and Protection of Privacy Act*¹ (FOIP) was submitted by the Applicant to the Superintendent of Funeral and Cremation Services (Superintendent) at the Consumer Protection Branch of the Department of Justice² (Justice). The request was for “copies of all minutes of the Funeral and Cremation Services Council of Saskatchewan since its inception together with copies of all the minutes of its committees, in particular any committees charged with responsibility for resource and compliance in relation to documentation utilized by licensees.”

¹ *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

² As of December 2007, the Department of Justice has been continued as the Ministry of Justice and Attorney General.

[2] By letter dated December 1, 2003, Justice responded to the Applicant indicating that “It has not been the practice of the Council to provide the office of the Superintendent of Funeral and Cremation Services with copies of the minutes for either their Council or committee meetings”. Justice asserted that, since the responsive record does not exist within Justice, the access to information request was refused pursuant to section 7(2)(e) of FOIP.

[3] A Request for Review was received by this office on August 13, 2004. The accompanying correspondence stated that, in the Applicant’s opinion, simply because the responsive record does not exist within Justice does not mean that the documents do not exist. Further, the Applicant argued that “. . . as the general supervisor of the Council, it is within the power of the Superintendent to request copies of these documents ... [as] they are within the care of the Department of Funeral and Cremation Services/Consumer Protection Branch.”

II RECORD AT ISSUE

[4] The record at issue is comprised of any minutes of meetings of the Council and its committees. While it is common practice in a review for me to be provided with a copy of the requested record from the government institution, this was not required in this case given the analysis that follows.

III ISSUE

[5] **Is the responsive record within the control of Justice pursuant to section 5 of *The Freedom of Information and Protection of Privacy Act*?**

IV DISCUSSION OF THE ISSUE

Background

[6] Although an informal request for access to the responsive record was made by the Applicant to the Council, the formal request under FOIP was made to Justice, as the Council does not qualify as a government institution pursuant to the definition found in section 2(1)(d) of FOIP, whereas Justice does. That section reads as follows:

(d) “**government institution**” means, subject to subsection (2):

(i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or

(ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:

(A) by the Lieutenant Governor in Council;

(B) by a member of the Executive Council; or

(C) in the case of:

(I) a board, commission or other body, by a Crown corporation; or

(II) a Crown corporation, by another Crown corporation;

[7] For the purposes of subsection (ii) above, *The Freedom of Information and Protection of Privacy Regulations*³ sets out the prescribed government institutions in Part 1 of the Appendix. The Council is not included in this list.

³ *The Freedom of Information and Protection of Privacy Act Regulations*, c. F-22.01 Reg. 1.

[8] The provisions of FOIP relevant to the issue at hand are as follows:

Right of access

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are **in the possession or under the control** of a government institution.

(Emphasis added)

Response required

7(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:

...

(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

(e) stating that access is refused for the reason that the record does not exist;

[9] The relevant provisions of *The Funeral and Cremation Services Act*⁴ (FCSA) are as follows:

Council established

23(1) The Funeral and Cremation Services Council is established as a corporation.

(2) The council shall:

(a) carry out the powers and fulfil the responsibilities imposed on the council pursuant to this Act and the regulations; and

(b) manage and conduct the business of the council.

Council not agent of Crown

24 The council **is not an agent of the Crown**, and its powers granted by this Act are to be exercised in its own right only.

⁴ *The Funeral and Cremation Services Act*, S.S. 1999, C. F-23.3.

Superintendent appointed

110(1) The minister shall appoint a Superintendent of Funeral and Cremation Services, and may appoint any Deputy Superintendent of Funeral and Cremation Services that the minister considers necessary, **to supervise the administration of this Act.**

(2) The superintendent **may require any information or material from the council** or members of the council **respecting any activity of the council** or respecting the administration of this Act or the regulations.

(3) **Every decision of the council is subject to review by the superintendent** on the superintendent's own initiative or at the request of a person who, in the opinion of the superintendent, has an interest in the decision.

(4) On completion of a review mentioned in subsection (3), **the superintendent may direct the council to take any action** that the superintendent considers appropriate, and the council shall act in accordance with the superintendent's direction.

Annual report

34 In each fiscal year of the council and according to requirements established by the superintendent, **the council shall prepare and submit to the superintendent an annual report ...**

(Emphasis added)

[10] The Applicant argued as follows:

The Minutes of these meetings are in existence, and as the general supervisor of the Council, it is within the power of the Superintendent to request copies of these documents. According to Section 110 of *The Funeral and Cremation Services Act*, the Superintendent may require from the council or members of the council any information or material respecting any activity of the council, or respecting the administration of the Act and regulations. Additionally, every decision of the council is subject to review by the superintendent on his own initiative, or at the request of a person who has an interest in the decision.

It is our submission that because there are Minutes of the Council meetings in existence, and because these minutes have been requested and **the Superintendent is able to access these documents at his request, that they are within the care of the Department of Funeral and Cremation Services/Consumer Protection Branch** and should be provided, as requested.⁵

(Emphasis added)

⁵ As can be seen in section 5 of FOIP, as quoted in [7] above, the wording used in FOIP is "in the possession or under the control of a government institution", rather than the term used in the Applicant's submissions: "within the care".

[11] The Applicant also contended that although the responsive record is not classified as ‘public record’, the Council should be accountable to the members of its industry, and this can occur through supervision by the Superintendent. To obtain and review Council and committee meeting minutes is, in the Applicant’s opinion, a reasonable and prudent measure for the Superintendent to take, and indeed, to not do so would represent inadequate supervision of the Council.

[12] In response, Justice referenced the wording of section 110 of the FCSA and submitted that requesting Council’s meeting minutes in order to respond to an access to information request could not be described as supervising the administration of the FCSA.

[13] The website of the Council⁶ was reviewed and the following information is pertinent to this analysis:

- The Council is made up of four members appointed by the Lieutenant Governor in Council and six members elected by licensees⁷ (as per section 25 of the FCSA).
- The Council’s mandate is to ensure consumer confidence in the funeral and cremation service industry by setting standards of practice and procedures for funeral homes and crematoria.
- The Council’s activities include educating, licensing and regulating its licensees. This is done through oversight of licensees’ conduct and investigation of public complaints.
- All funeral, cremation and transfer service businesses are required to be licensed by the Council, to comply with the FCSA, and to meet professional standards.
- Under the FCSA, the Council is given bylaw making authority to set standards of practice (section 37 of the FCSA).
- License fees are payable to the Council pursuant to bylaw 2100.

⁶ www.fcscs.ca.

⁷ Licensees are funeral home managers/owners/salespersons, funeral directors, and embalmers.

[14] The following bylaws⁸ of the Council are relevant to the issue at hand:

4060 All meeting [sic] of the Council shall be conducted in accordance with Roberts Rules of Order.⁹

4070 Council meetings may be called by the Chairperson of the Council or, on the written request of any three (3) members of the Council, the Registrar shall summon a meeting of the Council.

[15] The Council has established operational guidelines through the *Policy and Procedures of Council – Governance Policies*¹⁰ (Governance Policies), and the following provisions are relevant:

Policy CG-1 Governance Principles

6. Council is accountable to the public via the Superintendent of Funeral and Cremation Services...

12. Council management of Governance Policies:

a. The Legislative Committee is responsible for an annual review of all governance policies, which will cover all routine changes to policy. These changes will **require ratification by Council and the Superintendent** of Funeral and Cremation Services before they come into force.

Policy CG-8 Code of Conduct for Council Members

13. That part of a meeting where financial information, negotiation strategies, or personnel matters are discussed shall be kept confidential. **The proceedings of any meeting of the Council or any part of a meeting of the Council or any committee that is conducted in camera or is defined as Closed, including the minutes or any records, shall be kept in confidence by all attendees.**

(Emphasis added)

⁸ FCSCS Bylaws, available at: http://www.fcscs.ca/pdf/BYLAWS_2008.pdf.

⁹ The *Roberts Rules of Order* relative to the keeping of minutes were reviewed from the website: <http://www.rulesonline.com/>. There does not appear to be any mention about whether minutes of meetings are required or what is to be done with such minutes. The content of minutes is, however, addressed.

¹⁰ *FCSCS Policy and Procedures of Council – Governance Policies*, 2006-07, date approved 07/11, available at: <http://www.fcscs.ca/pdf/Governance.pdf>. It is noted that between the time of the review of this matter and the writing of this Report the Council has changed the name of this document to *FCSCS Council Governance – Governance Policies*; however, the content referenced in this Report has not been altered.

[16] In addition, some other provisions of the FCSA relate to the responsibilities of the Superintendent; they are summarized as follows:

- Receive copies of bylaws made by Council and file same with the Department of Justice [sections 38(1)(a), (2)].
- If in the public interest, amend, repeal or enact a Council bylaw [section 40].
- Make an order suspending the license of a licensee whose conduct is the subject of an investigation by the Council's investigation committee [section 48(2)].
- Receive a report from the Council's investigation or discipline committees regarding a licensee's possible criminal offence [section 59(b)(ii)].
- Receive an appeal, hold a hearing, receive copies of the record and make a decision (including written reasons), regarding a decision made by Council about a licensee's conduct [sections 61, 62, and 63].
- Inquire into or investigate any matter respecting the administration of the FCSA [section 111].
- Inspect the records, enter into premises, obtain copies of records, or require the production of records of an owner licensee [sections 111 and 112].

Section 7 response: “the record does not exist”

[17] The Applicant claimed both that the responsive record exists in the hands of Council and that the record is “in the care of” Justice by virtue of the Superintendent's ability to compel it. In its section 7 response to the Applicant, Justice cited section (2)(e), stating that because it did not possess the record, “access is refused for the reason that the record does not exist”. It should be clarified that this response does not imply that the record in question does not exist at all. Justice never claimed as much, nor would it be possible for a public body¹¹ to make such a sweeping statement about the general existence of a record.

¹¹ In this Report, as is common practice, the terms ‘public body’ and ‘government institution’ are used interchangeably.

- [18] How then, should the term “exist” in section 7(2)(e) be understood? A section 7(2)(e) response must be interpreted in light of section 5 which states that “every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are **in the possession or under the control** of a government institution” (emphasis added). The term “exist” in section 7(2)(e) then, is a function of being possessed or controlled by the public body to which the access request is being made.
- [19] The Applicant in this case never disputed, and the evidence would seem to confirm, that Justice did not possess the record at issue. However, the Applicant argued that Justice had ‘control’ over the record by virtue of the Superintendent’s powers to compel. Justice did not address this argument in its submission. As a result, the analysis in this case focuses on section 5. If Justice is found to have control over the responsive record, its section 7(2)(e) response would be inaccurate. If no control is found, then the response that the record does not exist is proper - although for the sake of clarity¹² in this case, Justice should have also referenced section 5 in its response to the Applicant.
- [20] Even if a public body does not possess or control the record in question, merely citing section 7(2)(e) may not be adequate. If the head considers that another public body has a “greater interest” in the record, the head may transfer the applicant’s request in accordance with sections 7(1)(b) and 11(1)(a) (Please note that the discretion to transfer an application, and if necessary, the relevant record, may also apply even if the initial public body to whom the access request was made controls or possesses the record.). Also, the duty to assist suggests that if a public body neither possesses nor controls a responsive record, nor can identify another public body with a “greater interest”, but can nonetheless suggest another public body that may possess or control the record in question, the head should advise the applicant accordingly. In this case, whether or not Justice believed that the Council had a greater interest in the record according to section 7(1)(b), there was no opportunity to transfer since, as noted earlier, the Council is not a

¹² A Saskatchewan government institution has an implicit duty to assist an applicant by responding openly, accurately and completely. I have discussed this in Reports F-2008--001, F-2006--004, LA-2004--001, and H-2008--001, among others.

public body under FOIP. Also, Justice had no reason to direct the Applicant to another public body under the implied duty to assist.

Characterization as to Possession or Control

[21] In *Canada Post Corp. v. Canada (Minister of Public Works)*¹³, the minority opinion¹⁴ included the following helpful comments regarding the difference between possession and control:

28... in their normal and proper sense, the two words “control” and “possession” do not signify the same concept. “Control” connotes authority whereas “possession” merely indicates custody. It is true that they are used interchangeably in some contexts, but that occurs because normally one is an attribute of the other. Possession is usually a consequence of control. To say ... that a person who has possession of a thing has some control over it simply means that a person has one of the basic attributes of control. There is no such thing as a proportion of control. While I am prepared to agree with the motions judge that the dictionary definition alone cannot solve the problem, it is necessary to recognize that, in common but proper language, “control” and “possession” do not have the same meaning and cannot be taken one for the other.¹⁵

[22] Although I have not previously considered in a report under FOIP the specific issue of when a responsive record, if not in the possession of the government institution, is nonetheless within its control, in Report F-2004--006 I did comment on the difference between the two terms:

... possession and control are different things. Otherwise, there would be no need to have both words. It is therefore conceivable that a government institution might have possession but not control of a record or that it might have control of a record but not possession.¹⁶

[23] Further, in Investigation Report H-2007--001 it was determined that the government institution retains authority to manage personal information even when it is delivered to an outside entity for mailing preparation, and as such is no longer in the possession of the government institution.

¹³ *Canada Post Corp. v. Canada (Minister of Public Works)* [1995] F.C.J. No. 241.

¹⁴ Although this quote has been taken from the minority judgment, this issue was not the basis for the divided judgments, and indeed also holds true for the majority judgment.

¹⁵ Supra note 13 at [28].

¹⁶ Saskatchewan OIPC Report F-2004--006 at [58], available online at <http://www.oipc.sk.ca/reviews.htm>.

[24] It is noted that the applicable wording under consideration there, from *The Health Information Protection Act*¹⁷ (HIPA), differs from that used in FOIP; however, I commented as follows:

In my last Annual Report, I explained that the word “custody” in HIPA is to be understood as “physical possession”. FOIP, however, uses the term “possession” in the place of “custody”. I find that these two terms are interchangeable as they have the same connotation.¹⁸

[25] In order for a record to be subject to an access to information request, the public body need only have possession or control, not both. This is demonstrated through the legislature’s choice to join the two terms with ‘or’, rather than ‘and’.

[26] Based on the foregoing, possession and control is not the same thing, and only one is required in order for the record to fall within the scope of FOIP. In this case, it being common ground that the record is not within Justice’s possession, the issue left to be decided is whether the record is nonetheless within Justice’s control.

Analysis of Control

[27] Based on my examination of various decisions of Information and Privacy Commissioners in Alberta, British Columbia and Ontario, I have identified the following list of five factors in assessing whether control exists:¹⁹

1. How is the author of the record connected to the public body?
2. What are the circumstances surrounding the creation, use and retention of the record?
3. Given the public body’s mandate and functions, how closely is the record integrated with other records held by the public body?

¹⁷ *The Health Information Protection Act*, S.S. 1999, C. H-0.021.

¹⁸ Saskatchewan OIPC Investigation Report H-2007--001 at [29].

¹⁹ The Information and Privacy Commissioners in Alberta, Ontario and British Columbia have each used similar factors to a greater or lesser extent in various decisions, some of which are referenced in this Report. I have taken those factors and modified them as the context of this matter requires.

4. Is there any agreement that limits the use or disclosure of the record?
5. Does the right to compel records from the Council give the Superintendent control over such records?

[28] I will now address each in turn.

[29] **How is the author of the record connected to the public body?** Section 24 of the FCSA specifically states that “[t]he council is not an agent of the Crown . . .” Although this is not necessarily determinative of the question, it is instructive.

[30] *Walmsley v. Ontario (Attorney General)*²⁰ has often been cited²¹ when considering whether there is an agency²² relationship in the context of access to information. In that case, the public body set up an independent body, the Judicial Appointments Advisory Committee (Committee), to provide arms-length recommendations regarding judicial appointments. The Committee members were not appointed by order-in-council and were not on salary. They were only paid a per diem by the Ministry. There was no contract governing the relationship between the public body and the Committee. Although the Court stated there was some semblance of an agency relationship, it concluded that an agency relationship did not exist: “The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they could create, use or maintain or what use to make of the documents they did possess.”²³

[31] The case at hand has some striking similarities to the facts in *Walmsley*. There is nothing in the FCSA, in the bylaws or the Council’s Governance Policies that dictates what records the Council must create. In particular, the creation of meeting minutes is not

²⁰ *Walmsley v. Ontario (Attorney General)* 34 O.R. (3d) 611.

²¹ See *David v. Ontario (Information and Privacy Commissioner)* [2006] O.J. No. 4351; *Canada (Attorney General) v. Canada (Information Commissioner)* [2004] F.C.J. No. 524.; *Canada (Attorney General) v. Canada (Information Commissioner)* [2000] F.C.J. No. 1648; and *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* [1999] O.J. No. 4072.

²² *Black’s Law Dictionary*, 8th Ed. (USA: Thomson West, 2004), defines agency as “a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.”

²³ *Supra* note 20 at 8.

contemplated. There is also nothing in the FCSA or the Council's bylaws or Governance Policies that suggests any of the Council members are employees or officers of Justice, or that they are paid by Justice. There is no supervision of the individual Council members by Justice, including no specific roles or duties placed on the Council members by Justice. The fact that a portion of the Council is appointed by order in council is the closest connection there is between the Council and Justice.

[32] As was the case in *Walmsley*, the Council appears to have been created to operate at arms-length from the Ministry. The Council has certain powers conferred on it by the statute to oversee and manage its licensees, to hear complaints, issue licenses, etc.²⁴ Justice, through the Superintendent, has the authority to hear complaints about decisions of Council, to authorize variations in what the statute requires of the licensees, and a general supervisory responsibility, as can be seen in section 110(1), which requires the Superintendent to "supervise the administration of this Act". This role is more akin to that of an oversight body, rather than to an employer or principal, as would be the case with an agency relationship.

[33] Indeed, because of the ability under the FCSA to file an appeal to the Superintendent against a decision of Council, there must be independence between the two entities. To determine that the Superintendent has ultimate responsibility and control over Council and its records, would be contrary to the nature of an appeal body.

[34] **What are the circumstances surrounding the creation, use and retention of the record?** Although it is not entirely clear what use the Council might make of any meeting minutes created, it is generally the case with minutes that they would be used as a record of the Council's proceedings and decisions made by Council. Typically, minutes are carried forward and approved at each subsequent meeting. Although in some cases minutes provide a detailed summary of who said what, according to the *Roberts Rules of Order*²⁵, this is not the intent of minutes. Rather, the focus should be on decisions and resolutions made. There is nothing in the FCSA that requires the keeping of minutes of

²⁴ See section 37 of the FCSA.

²⁵ Supra note 9.

Council meetings, or specifies the purpose for which they might be used. Without evidence to the contrary, it can be concluded that any minutes that may be created are used for internal purposes only, and that in the case of a decision being made on a complaint or a licensee's failure to comply with the FCSA, other records would be created in order for the Council to meet its obligations under the statute.

[35] The Alberta publication *FOIP Guidelines and Practices (2005)* provides the following guidance in *Chapter 1: Purposes and Scope of the FOIP Act*:²⁶

A record is under the control of a public body when the public body has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition.²⁷

[36] In Alberta Order F2002-014, it was determined that the right to demand possession of the record, or to authorize or forbid access to the record, are indices of control of the record.²⁸

[37] As already discussed, the creation of minutes is not contemplated in the FCSA or the bylaws. Although the FCSA gives the Superintendent the general authority to request records from the Council for the purposes of reviewing a decision made by Council or to ensure compliance with the FCSA, this does not then result in all such records being under the control of the Superintendent. Further, the FCSA does not address any matters such as retention or disposal of Council records.

²⁶ Section 6(1) from the Alberta *Freedom of Information and Protection of Privacy Act* is quite similar to Saskatchewan's FOIP: s. 6(1) "An applicant has a general right of access to any record in the custody or under the control of a public body."

²⁷ *FOIP Guidelines and Practices (2005)*, Alberta at 7, available online at <http://foip.alberta.ca/resources/guidelinespractices/pdf/chapter1.pdf>. Very similar, if not identical, wording is used in other publications from Alberta. As such, this appears to be an interpretation consistently used in Alberta.

²⁸ Alberta Order F2002-014 at [12], available online at <http://www.oipc.ab.ca/orders/orders.cfm>.

[38] **Given the public body’s mandate and functions, how closely is the record integrated with other records held by the public body?** In Order F2002-006²⁹, the Alberta Office of the Information and Privacy Commissioner determined that where a public body requested the creation of the particular record and relied on that record in carrying out its mandate, that even if it no longer had possession of the record, it nonetheless had the right to possess the record and thus had control over the record.

[39] Order 04-19 from the British Columbia Office of the Information and Privacy Commissioner resulted in similar findings. The legislation under consideration was section 3(1) of British Columbia’s *Freedom of Information and Protection of Privacy Act*³⁰, which states: “This Act applies to all records in the custody or under the control of a public body.” In that case, the determination was made that consideration should be given to the mandate and functions of the public body when determining control:

[47] A statutory provision that imposes express obligations on a public body with respect to a particular record or type of record is obviously relevant to determining control ... [alternatively] control may be established by reference to express or implied functions of a public body that necessarily entail obtaining or compiling records.³¹

[40] The Office of Ontario Information and Privacy Commissioner³² concluded in Order P-1199 (1996)³³ that a funding arrangement between the public body and the other entity gave the public body control over records of the other entity that relate to funding, but not to other records. Therefore, it is possible for a public body to have control over some records but not all.

²⁹ Alberta Order F2002-006.

³⁰ *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165.

³¹ British Columbia OIPC Order 04-19 at [47], available online at http://www.oipc.bc.ca/orders_reports.htm.

³² In Ontario, section 10(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F.31 states as follows: “Every person has a right of access to a record or a part of a record in the custody or under the control of an institution”.

³³ Ontario Order P-1199 (1996), available online at <http://www.ipc.on.ca/english/advanced-search/>.

- [41] The FCSA requires the Council's Annual Report, as well as a copy of all bylaws enacted by the Council, to be filed with the Superintendent.³⁴ There are no other instances in the FCSA which refer to what specific records the Superintendent may acquire from the Council. In addition, there is no obvious connection between meeting minutes and these other records that would or should be in the possession of Justice.
- [42] There is also nothing dictating what should be contained in meeting minutes. As such, it is difficult to determine whether meeting minutes relate to the Superintendent's mandate. However, it is noted that the Superintendent's mandate appears to be one of overseeing the FCSA. Although there is some oversight of the Council, it is concluded this only occurs through the responsibility to oversee the statute. Given the fact that the Superintendent has not historically possessed or reviewed any Council meeting minutes, there is no reasonable basis to find that the Superintendent routinely needs or accesses such minutes to meet his supervisory responsibilities. One would expect that if the Superintendent is reviewing a decision made by Council, meeting minutes, if any exist, might be relevant and would at that time be requested by the Superintendent. But until such a specific instance requires such materials, no such reliance or connection to the Superintendent's activities would exist. Further, it is quite reasonable to expect that the Council might be keeping additional, and more detailed, records when making a decision that is reviewable by the Superintendent – such as the validity of a licensee's license.
- [43] **Is there any agreement that limits the use or disclosure of the record?** The Federal Court, when hearing appeals of decisions of the Information Commissioner of Canada, in *Sawridge Band v. Canada (Minister of Indian Affairs and Northern Development)*³⁵ and in *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*³⁶, decided in both instances that because the Indian Band had a statutory obligation to supply the specific records to the Ministry, the Ministry had control, regardless of whether the records were indeed supplied and thus in the Ministry's possession.³⁷

³⁴ See sections 34, 38 and 40 of the FCSA.

³⁵ *Sawridge Band v. Canada (Minister of Indian Affairs and Northern Development)* [2007] F.C.J. No. 1717.

³⁶ *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)* [1989] 1 F.C. 143.

³⁷ The federal *Access to Information Act*, R.S., 1985, c.A-1 provides for a right of access to “any record under the control of a government institution” in section 4.

- [44] As discussed already, there is no mention made of Council meeting minutes in the FCSA or the bylaws, and there exists no separate contract or other agreement between the Council and the Superintendent. Within the Governance Policies there is the general reference to the confidentiality of Council proceedings, including minutes and other records, but there is no specific reference to records in relation to Justice or the Superintendent.
- [45] **Does the right to compel records from the Council give the Superintendent control over such records?** Section 110(2) of the FCSA gives the Superintendent the general authority to require the production of documents or any information “respecting any activity of the council or respecting the administration of this Act or the regulations”. Although this authority is broadly written, it is my belief that it is closely tied to the other subsections in section 110, which sets out the authority to review any decision made by Council and on completion of such a review to direct Council to take any action the Superintendent deems appropriate. Other provisions in the FCSA also address this, and a provision conferring such a right to compel documents would be needed in order to give meaning and effect to this responsibility of the Superintendent.
- [46] Further, the mere authority to compel documents, when not exercised, does not in my opinion give control over any and all such documents that are compellable. Nor should the right to compel be used by applicants simply as a method of gaining access to a record not ordinarily under the possession or control of a public body. In this case, the Superintendent would only utilize section 110(2) in limited and specific circumstances. This would typically occur when necessary for carrying out a specified responsibility: hearing an appeal under section 61 of the FCSA, reviewing some other decision of Council under section 110(3), or another supervisory activity under the FCSA. In such a situation, the Superintendent would require the production of relevant and necessary documents and would then have such documents in his possession, as well as under his control.

[47] Sections 111 and 112 of the FCSA bestow upon the Superintendent the authority to inspect the records, enter into premises, obtain copies of records, or require the production of records of an owner licensee. Again, this general right to compel records could not reasonably then also result in the Superintendent being said to have control over all such records in the possession of the many owner licensees in Saskatchewan. Such an interpretation would be untenable.

[48] The Superintendent's role and authority to compel the production of records is much like that of an oversight body or an ombudsman. Under *The Ombudsman and Children's Advocate Act*³⁸, a similar authority as given the Superintendent exists:

Ombudsman may require information and examine persons

22(1) Subject to section 23, the Ombudsman may require any person who in his opinion is able to give any information relating to any matter being investigated by him:

(a) to furnish information to him; and

(b) to **produce any document, paper or thing** that, in his opinion, relates to the matter being investigated and that may be in the possession or under the control of that person; whether or not that person is an officer, employee or member of the department or agency of the government and whether or not the document, paper or thing is in the custody or under the control of a department or agency of the government.

[49] To conclude that the Ombudsman has control over all of the records in all ministries of the government would be unreasonable. Likewise, it is concluded that the Superintendent does not have control over all records that may be in the possession of the Council.

Finding

[50] I find that the responsive record is not within the possession or control of Justice.

³⁸ *The Ombudsman and Children's Advocate Act*, S.S. 1978, c. O-4.

V RECOMMENDATION

[51] I recommend that Justice take no further action with respect to the subject request for access.

[52] Dated at Regina, in the Province of Saskatchewan, this 9th day of October, 2008.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for
Saskatchewan