

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 11-1994
June 16, 1994**

**INQUIRY RE: A Request for Access to Records of the Ministry of Health and
Dogwood Lodge**

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1. Description and Nature of the Review

As the Information and Privacy Commissioner, I conducted both a written and an oral inquiry under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry concerned a request to review the decision of the Ministry of Health and Ministry Responsible for Seniors (the Ministry) to deny the applicant, Mr. Michael Jacobson, Care Home Consultants, access to policy manuals in the custody of a contractor (Dogwood Lodge) with the Ministry.

The applicant wrote to Dogwood Lodge on January 25, 1994 requesting "access to [Dogwood Lodge's] policies, procedures, and related documentation." On January 28, 1994 the applicant wrote to the Ministry explaining that Dogwood Lodge had denied him access to the records and requested the Ministry to advise him on how to proceed. The Ministry was made aware of the request and the refusal by a facsimile message of January 27, 1994 from Dogwood Lodge. On March 2, 1994 Dogwood Lodge notified the applicant that as Dogwood Lodge was not a public body, the request was "misdirected." On March 18, 1994 the Ministry informed the applicant that the Ministry was "unable to provide you access to the manuals because Dogwood Lodge refuses to give us physical custody." On March 28, 1994, after correspondence with the Ministry and the Office of the Information and Privacy Commissioner, the applicant requested a review of the Ministry's denial of access.

Dogwood Lodge challenged my jurisdiction to conduct an inquiry on the basis that there was no proper request for information to a public body under subsection 5(1) of the Act, and there was no proper refusal to provide access by a public body.

I held a written inquiry on June 3, 1994 to decide if I had jurisdiction to conduct an inquiry under the Act.

I held an oral inquiry on June 7, 1994 to decide whether the concept of “under the control of a public body” (the Ministry) extends to the requested records in the custody of a contractor (Dogwood Lodge).

2. Documentation of the Review Process

The Office of the Information and Privacy Commissioner (the Office) provided the applicant, the Ministry, and Dogwood Lodge with notice of a written hearing which described the nature of the review of the jurisdictional issue. The parties were notified that if I decided the matter was settled by the resolution of this issue, the inquiry would be completed. However, if I decided that I had jurisdiction, the parties would be notified that the matter would proceed to an inquiry on the issue of control under the Act.

In order to prepare for the written inquiry, the Office released nineteen documents to the parties and Dogwood Lodge. This occurred with the full consent of the Ministry, the applicant, and Dogwood Lodge. The documents consisted of the correspondence among the parties and Dogwood Lodge leading up to and including the request for review.

Under subsections 56(3) and (4) of the Act, the Ministry, the applicant, and Dogwood Lodge were given the opportunity to make written representations and to view each other's initial submissions. All parties made final submissions. In reaching my decision on the jurisdictional issue, I carefully considered these submissions.

On June 3, 1994 I informed the parties and Dogwood Lodge that I had decided that I had jurisdiction and that I would give full reasons in writing after the oral inquiry on June 10, 1994. I have included reasons in this order.

The Office gave notice of the oral inquiry to the Ministry, the applicant, and Dogwood Lodge. The Office provided the Ministry, the applicant, and Dogwood Lodge with two statements of facts; the first, was a summary of the correspondence among the parties involved and, the second, was a description of the requested records (the policy manuals).

Under subsection 56(3) of the Act, the Office gave notice of the inquiry, and thus intervenor status, to the B.C. Freedom of Information and Privacy Association (FIPA), the B.C. Civil Liberties Association (BCCLA), the Community Care Coordinating Council (CCCC) [which represents the B.C. Association of Community Care, the Health Employers Association of B.C., the B.C. Association of Private Care, and the B.C. Health Association], the Ministry of Attorney General, the Ministry of Social Services, and the Ministry of Women's Equality. The Office provided Dogwood Lodge with notice under subsection 56(3) and, as a third party, it had the opportunity to make representations and to ask questions at the inquiry.

Written submissions received from FIPA, prepared by David Loukidelis, and from BCCLA, prepared by John Westwood, were provided to all parties prior to the oral hearing. The CCCC was represented at the inquiry by Janice Dillon, who is also counsel for Dogwood Lodge. The three intervenor Ministries and the Ministry of Health were represented at the inquiry by Catherine L. Hunt, counsel with the Legal Services Branch, Ministry of Attorney General.

The applicant appeared with his assistant Ms. Estelle Chimes. Both were sworn to give evidence at the oral inquiry. Ms. Vel Clark, Director, Information and Privacy Program, Ministry of Health and Ms. Evon Soong, Regional Director, Information and Privacy Program, Ministry of Health also were sworn to give evidence.

3. Jurisdictional Issue under Review at the Inquiry

The initial issue to be decided was as follows:

Is the request of the applicant of January 25, 1994, to Mr. Burton Holmes of Dogwood Lodge, a request for information within the meaning of subsection 5(1) of the Act?

The Ministry submits that the letter of January 25, 1994 from the applicant to Dogwood Lodge was not a request for information within the meaning of subsection 5(1) of the Act. However, the Ministry submits that a letter dated January 28, 1994, from the applicant to Ms. Laverne Bennett of the Ministry of Health constitutes a valid request under subsection 5(1).

The applicant argues that his original letter to the Minister of Health dated December 17, 1993, and responded to by the Minister on January 17, 1994, constitutes the written request. He submits that the letter of January 25, 1994 was a follow-up letter resulting from the Minister's reply.

Dogwood Lodge submits that I do not have jurisdiction to hold a review under section 52 of the Act. Dogwood Lodge states that two elements are required in order to trigger section 52:

1. there is a valid request to the head of the public body; and
2. there is a decision, act or failure to act of the head of the public body.

Dogwood Lodge submits that there has not been a request for access to information since the request to Dogwood Lodge on January 25, 1994 was an informal one within the meaning of subsection 2(2) of the Act, and further submits that Dogwood Lodge is not a public body, and that the request should have been made to the Minister of Health as the head of the public body. In addition, Dogwood Lodge submits that the

person requesting the information has the responsibility to make the request to the appropriate body. Therefore, a request was not made under subsection 5(1) of the Act.

Dogwood Lodge further submits that the decision to refuse access must be made by a public body. In this case the review was initiated because of the refusal of Dogwood Lodge to provide access. The Ministry did not request access to the information itself and did not give Dogwood Lodge third party notice under section 23. The request was made to Mr. Holmes of Dogwood Lodge (not the Ministry) and therefore the Ministry has not made a decision and is without authority to make a decision on behalf of Dogwood Lodge.

The requirements for applying to access a record are contained in subsection 5(1) of the Act which, states:

To obtain access to a record, an applicant must make a written request to the public body that the applicant believes has custody and control of the record.

Subsection 5(1) has two elements:

- a) a request must be in writing; and
- b) the request must be made to a public body that the applicant believes has the custody or control of the record.

I wish to adopt an approach to interpreting the Act that encourages citizens to use it. The spirit and the underlying purposes of the Act may be thwarted by a narrow interpretation. Information rights must be accessible to all citizens of this Province. As Commissioner, I must ensure that the door to the Act is held open and not closed prematurely on technical grounds.

I find support for this approach through a review of the legislative history of the Act. The government intended this legislation to be open to citizens and that it not be thwarted by public bodies administering the Act. During the second reading of Bill 50 in the legislature, Attorney General Colin Gabelmann stated:

What this bill seeks to do is empower citizens so that they can fully exercise their democratic rights. (B.C. Debates, June 18, 1994, p. 2737).

...what we're doing here is making clear to the head of a body in the government or to people covered by this legislation that they have a duty to actively assist an applicant in preparing the written request, so the applicant can't be thwarted by failing to have described accurately the record that is being sought and then having the Public Service say: "Oh, you didn't ask for that." The head has an obligation to help the applicant, to make it clear that what he or she is really asking for is in the written request. (B.C. Debates, June 22, 1994, p. 2872)

In reviewing the submissions for this inquiry, I am guided by the fact that the applicant made three attempts during December of 1993 and January of 1994 to communicate in writing his desire to access policy manuals from community care facilities. The first communication was with the Minister of Health on the general issue. This letter of December 17, 1993, in my opinion, does not constitute a request under the Act, since the applicant did not ask for specific records under the custody or control of the public body. He simply asked the Minister for general direction about the application of the Act to records held by continuing care facilities.

The applicant wrote to Dogwood Lodge on January 25, 1994 initially requesting the manuals and followed that with a letter three days later to the Ministry seeking advice on how to proceed. The Ministry received a facsimile message from Dogwood Lodge stating it was not going to provide access to the applicant. Both the applicant and Dogwood Lodge informed the Ministry of the request.

I do find that a written request for the records was made. Reviewing the correspondence as a whole, the applicant had attempted to notify “the public body” that he “believed” had custody and control of the records. The letter from the applicant of January 25, 1994 to Dogwood Lodge, together with the letter of January 28, 1994 to the Ministry, identify the records requested. Throughout the correspondence, the Ministry acted to assist both the applicant and Dogwood Lodge to handle this request.

I am satisfied that there is a written request that meets the requirements of subsection 5(1) of the Act. For the purposes of this hearing, I find that the letter of January 25, 1994 together with the letter to the Ministry of Health of January 28, 1994 constitute the request to a public body for access to records.

The Ministry has the responsibility to respond to a request for access to records made by a citizen either about or to a service provider contracting with the Ministry. In this case the Ministry acted appropriately in handling the request and responding to questions from either the applicant or the contracted agency.

The Ministry acknowledged the receipt of the request, extended the time for responding to the applicant by thirty days (under section 10 of the Act), and received a copy of Dogwood Lodge’s letter to the applicant refusing him access. On March 18, 1994 the Ministry wrote to the applicant denying him access to the records. This letter states that “as the Commissioner’s office requires a response from the [Ministry] for their review process, please consider this letter official notification that we are forced to deny you access to the policy manuals at [Dogwood Lodge].” For the purposes of section 52 of the Act, I find this letter constitutes a decision by the public body.

The earlier correspondence from my office, in response to a letter from the applicant, incorrectly identified his request for review of Dogwood Lodge’s decision to deny access. This earlier request was to review the thirty day extension.

On March 28, 1994 the applicant wrote to my office requesting a review of the Ministry's refusal of March 18, 1994. For the purposes of section 52 of the Act, I consider this letter the request for review.

4. Issue under Review at the Oral Inquiry

The issue to be decided is whether the concept of "under the control of a public body" (the Ministry) extends to the requested records in the custody of a contractor (Dogwood Lodge).

The Applicant's Case

The applicant essentially argued that the records in question, that is the policy and procedure manuals, should be accessible to him under section 4 of the Act because Dogwood Lodge is a contractor to the Ministry of Health.

Exhibit 1, a letter from the Minister of Health to the applicant dated January 17, 1994, advised him that "publicly funded continuing care facilities operating under contract to the Ministry of Health and Ministry Responsible for Seniors are now covered by the" Act.

The applicant established in his Exhibit 2 that the Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (the Manual) sets out seven "indicators that a public body has control of a record." (Manual, Section C.3.2, p. 5) He claimed that at least three of the indicators were applicable to the current inquiry:

- the content of the record relates to the public body's mandate and functions;
- the contract permits the public body to inspect, review or copy records produced, received or acquired by the contractor as a result of the contract; and
- the public body has the authority to regulate the record's use and disposition.

The applicant's authority for the second indicator was the *Continuing Care Act*, section 5 and the *Community Care Facilities Act*, section 11. For the third point, he cited the *Continuing Care Act*, section 2.

The applicant noted further that section 70 of the Act deals with "Policy manuals available without request."

- 70.(1) The head of a public body must make available to the public, without a request for access under this Act,
- (a) manuals, instructions or guidelines issued to the officers or employees of the public body, or
 - (b) substantive rules or policy statements adopted by the public body, for the purpose of interpreting an enactment or of administering a program or activity that affects the public or a specific group of the public.

The applicant argued that this exclusion of policy manuals from the Act means that they “are open to public scrutiny and cannot be considered as being harmful to the business interests of a third party [under section 21 of the Act].”

The applicant's argument is that the Dogwood Lodge policy manuals were created and are maintained by the expenditure of public funds and are in fact the property of the public since they were paid for by the global funding provided to continuing care facilities. The applicant's Exhibit 4 sought to establish that provincial grant funding accounts for about seventy percent of the budget of all continuing care facilities; resident contributions are in the neighbourhood of thirty percent.

The applicant also stressed that the Ministry's Continuing Care Division issued to all contractors the Service Provider Policy Handbook (1991), which requires, with respect to “Policies and Procedures,” that “[w]ritten policies and procedures shall be developed in sufficient detail to guide staff.” (Exhibit 6) Subsequent chapters outline all of the required standards.

The same Continuing Care Division's Quality Assurance Branch has developed Standards for Residential Care Services: Facilities (May 1992) (Exhibit 7), also which evaluate compliance with the Service Provider Policy Handbook. This Quality Assurance Branch has six consultants who are expected to review all continuing care facilities in the province. (I was informed there are a total of 120 facilities).

Finally, the *Continuing Care Act*, in subsections 2(4) and (5), specifies that the Minister may issue standards, guidelines, or directives to all operators. Non-compliance may lead to termination of the agreement.

The Ministry of Health's Case

The Ministry sought a determination that the head of the public body has “control” of the requested records pursuant to subsection 4(1) of the Act.

The Ministry argued that its control for the purposes of the Act derived from its contractual relationship with the third party to this review, Dogwood Lodge, which has physical custody of the requested records. The contract specifies that Dogwood Lodge “agrees to comply with the *Continuing Care Act* ... and any other applicable legislation.” Further terms of the contract specify that the Minister may issue standards, guidelines, or directives to Dogwood according to the Service Provider Handbook (1984). (Ministry's Submission, tabs 1, 2, 5, 6, and Exhibit 7)

The Ministry claimed that Dogwood Lodge had agreed that it is a contractor with the Ministry and that, as such, certain documents within its custody are under the control of the Ministry. The issue is which records are under the Ministry's control. The

Ministry cited two of the same “indicators of control” advanced by the applicant (from the Manual) and added two more:

- the record was created by an officer, employee or member of the public body; and
- the record is specified in a contract as being under the control of a public body; (Manual, C.3.2, p. 5; and Exhibit 2)

The Ministry argued, as did the applicant, that these indicators of control are similar to those set out by Commissioner Linden in Ontario Interim Order 120 (Re Ministry of Government Services, Nov. 22, 1989, pp. 11-12).

In the Ministry's view, even if Dogwood's policies, manuals, and procedures were created before the date of its agreements with the Ministry, they are still required by the Standards for Residential Care Services: Facilities (May 1992) (Exhibit 7) and are therefore under the control of the Ministry for purposes of the Act.

At the most general level of the purposes of the Act, the Ministry advanced the view that Ministries or contractors should not be permitted to avoid certain obligations for openness and accountability that derive from public funding. Thus the Ministry advanced a broad construction of the term “control” in section 4 of the Act in order to promote the general goals of the legislation.

The Ministry concluded that Dogwood Lodge's “records that relate to their contracted service (continuing care services) should fall within the scope of the Act. The requested policies and procedures records clearly relate to the contracted services and are required by both the agreements and *Continuing Care Act*.”

The Case of the Third Party and of the Intervenor, the Community Care Coordinating Council

The third party's position is that the policy and procedure manuals of the Dogwood Lodge Society are not under the “control” of the Ministry so as to be subject to disclosure under subsection 4(1) of the Act.

Dogwood Lodge’s argument is that all of the ten issues addressed in Commissioner Linden's Order 120 need to be looked at together in order to determine control. In Ontario Order 119, a particular combination of factors led the Commissioner to conclude that the Ministry did not exercise control.

Moreover, although Dogwood Lodge's agreements require it to have policies and procedures in place, which the Ministry can monitor, this is not sufficient to establish “control.” In addition, quality assurance is conducted by the City of Vancouver not the province. (The Ministry's response is that the city is acting under the control of the province.) Nor is the Ministry's right of access alone an indicator of control.

The Board of Trustees of the Dogwood Lodge Society controls the management and operations of Dogwood Lodge, not the Ministry of Health.

Counsel for Dogwood Lodge acknowledged during the oral hearing that Dogwood Lodge is subject to the Act on the basis of its contract with the public body, but that only means that “most probably some of its records ... fall under the control of the Ministry of Health,” but not the requested records at issue.

Burton J.D. Holmes, the administrator of Dogwood Lodge, submitted an affidavit to this inquiry, which made a number of relevant points, including the following: “The policies and procedures of the Dogwood Lodge were not created pursuant to the contract with the Ministry of Health.... All policies and procedures pre-date the implementation of a Regional Quality Assurance Program in July, 1993.... The policies and procedures are maintained and used solely by Dogwood Lodge for the purpose of providing a high quality of residential care.” (Affidavit of Mr. Holmes, items 11, 12)

The Regional Quality Assurance Program accepts Dogwood's accreditation with the Canadian Council on Health Facilities Accreditation as evidence that the relevant requirements for quality assurance have been met. Although the Regional Quality Assurance Consultant may have access to the policy manuals, his or her main goal is to ensure that policies exist on specific issues. (Affidavit of Mr. Holmes, item 7, 10)

Mr. Holmes further claimed that the applicant intends to make “the policies and procedures of the Dogwood Lodge available to other facilities at a reasonable cost. This cost was not to be on a non-profit basis but would represent a profit to Mr. Jacobson.” (Affidavit, item 18) Dogwood itself does not market its policy and procedure manuals to the public.

The Community Care Coordinating Council (CCCC) was an intervenor in this inquiry. It is a representative of various facets of the continuing care sector within the health care industry. Its main affidavit testimony concerned the costs of developing a policy manual and the fact that “the majority of policies and procedures are internal and unique to a particular facility or agency.” (Affidavit of Ed Helfrich, Chairman, CCCC, items 6, 8) Oral testimony at the inquiry suggested that it would be difficult simply to transplant the application of a manual from one physical setting to another but that portions of any manual might give explicit guidance to those preparing a manual on a particular topic for another facility. The applicant indicated his interest in facilitating such assistance.

The Intervention of the B.C. Freedom of Information and Privacy Association

FIPA's main interest in this inquiry was the criteria to be applied in deciding whether the records in dispute are under the “control” of a public body. It initially reviewed the various sections of the *Community Care Facility Act* (subsection 11(1)), the *Adult Care Regulation* (sections 4, 9(1)), and the *Continuing Care Act* (subsections 2,

2(2), and 5(2)) that, among other things, require a contractor to maintain policies and procedures and have them available for inspection. FIPA also agreed that in Ontario Order 120 the list of factors and the Manual's list of indicators of control are relevant for purposes of this inquiry.

FIPA advanced the view that in general and in the present case, “the absence of explicit contractual provisions regarding control over records for the Act should be accorded little, if any, weight.” In its view, the implied contractual term in subsection 5(2) of the *Continuing Care Act*, giving an inspector the right of access to records related to the provision of continuing care, is a relevant consideration on the issue of control for the purposes of the Act.

FIPA concluded “that the manual is within the control of the Ministry for the purposes of the Act.”

5. Discussion:

Burden of Proof

Section 57 of the Act sets out which party has the burden of proof in an inquiry. Subsection 57(1) provides:

At an inquiry into 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.

In this case, the Ministry refused access to the applicant on the grounds that Dogwood Lodge refused to give it custody of the records. On the face of it, the Ministry has the burden of proof, since it made a decision to refuse access.

However, the issue in dispute at this inquiry is whether or not the Ministry has control of these policy manuals. The Ministry argued that this issue is not amenable to the strict application of subsection 57(1). It took the position that it does have control of these records and has consistently demonstrated its desire to disclose them to the applicant.

Dogwood Lodge, the third party, is of the view that the applicant has no right of access to these records because the Ministry does not have control. Subsection 57(3)(b) of the Act provides:

- (3) At an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
 - (b) in any other case [not a case of personal information], it is up to the third party to prove that the applicant has no right of access to the record or part.

This section does not apply, because the Ministry did not make a decision to give the applicant access to these records. While it has done its best to assist, and has indicated that it wishes to provide access to the applicant, it did make a decision to refuse access in its letter of March 18, 1994.

The Records at Issue

The issue of custody and control of policy manuals has been dealt with above as an abstract issue. What does one learn by examining the actual five volumes and literally thousands of pages contained in Dogwood's four separate "Manuals," each of which has a different label?

First, the Dogwood manuals do not look like the kinds of government manuals noted above, which are printed with a cover and some kind of binding and obviously produced in multiple copies. Nor are the Dogwood manuals anything like a mass-produced computer software manual or one to tell you how to install, operate, and maintain a stereo system. They are in fact more like the kinds of detailed manuals that automobile manufacturers provide to auto maintenance centers for servicing customers' vehicles. But the resemblance stops there.

The Dogwood Lodge manuals are loose-leaf binders filled with hundred of separate sections in a very intricate organizational pattern. Each section and subsection of what is mostly typescript was prepared at different times and, in many instances, is marked as having been revised at a subsequent date, or marked in handwritten notes as awaiting updating or additional information. The contents are obviously under continuing revision.

The Dogwood Lodge manuals strike me as very individualized, to the point of having separate sections on occasion for the separate Dogwood Lodges in Vancouver and Burnaby. Thus there are usage and maintenance rules for individual pieces of equipment, such as a brand name stove, that Dogwood happens to have purchased for one location. There are statements of philosophy, objectives, and goals, long-term or annual, for each segment of the operation, such as food services. The Manuals include organization charts for separate sections of the lodge, job descriptions, duties by position, specialized services that are offered, rules on medication, and schedules of availability of a chaplain at each lodge.

Even though any continuing care facility may need to have such manuals, it seems evident that the Dogwood manuals are the product of significant effort on the Lodge's part and that they contain information that is either solely prepared by or interpreted uniquely by Dogwood Lodge and may well be used to differentiate Dogwood from what are essentially competitors.

Thus I am left to ponder the issue of whether the Ministry's right of access to and inspection of these manuals can be transformed into custody and control and the right to

disclose the manuals to third parties, especially since the service agreement between the Ministry and the Lodge is silent on these specific matters (a topic that should be clarified in future contracts of this type).

The Dogwood Lodge manuals are not identical to the manuals described in section 70 of the Act. The Act is referring to standard government-issue manuals released to their own employees or officers rather than specialized manuals of the type prepared by the contractor in this particular case. (see Manual, Chapter C.2, p. 11)

The Issue of Control

As a preliminary matter, it is important to define the meaning of “control.” Does it mean only the right to have access to a document? Or does it mean the right to have a say in the contents, use, or disposition of the document? In my view, where a public body does not have the right to have custody of a record, “control” means the latter. It must derive from a contractual or specific statutory right to review records of a contractor which relate to the services being provided, as well as a right to have a say in the content, use, or disposition of the document.

Turning to the contractual and statutory framework of the present inquiry, I find as follows:

- The contracts between the Ministry of Health and Dogwood Lodge have no provision which authorizes the Ministry to request copies of records that relate to the performance of services under the contracts (as in my Order 7, dated April, 11 1994), except that Dogwood agrees to comply with the *Continuing Care Act* and any other applicable legislation.
- The *Continuing Care Act* allows the Ministry to enter into agreements with operators to provide continuing care. Where an operator fails or refuses to comply with applicable standards, guidelines or directives, a terms of its contract or a provision of the Act, the Minister may terminate the contract.
- Subsection 5(1)(a) of the *Continuing Care Act* (relied on by the Ministry) gives a Ministry inspector the authority to inspect “all records related to the provision of continuing care of *current or former clients* of the operator.” Subsection 5(1)(b) provides access to financial records related to the provision of continuing care. It is not clear if this section gives authority for a Ministry inspector to have access to records such as these policy manuals.
- The *Community Care Facility Act* gives a licensing board or its representative the power to issue licenses to community care facilities. Under section 11, the board or its representative may “call for and inspect the financial and other records of the community care facility.”

- The Adult Care Regulations, issued under the *Community Care Facility Act*, set standards for community care facilities licensed under the Act. Section 9 requires the facility (called the “licensee”) to “ensure that there are written policies to guide staff actions in all matters relating to the care of the residents.”
- Nowhere is there any power given to the Ministry or its representative to require a continuing care facility to amend its policy manual to comply with a standard. For example, under the *Continuing Care Act*, one action may be termination of the contract. Under the *Community Care Facility Act*, the action can be revocation of a license.
- The *Community Care Facility Act* gives the Ministry (indirectly) the power to look at policy manuals. This power is given in relation to a licensing authority. This does not give the Ministry “control” in the direct sense, because it is limited to the matters covered in this Act.

Based on the above, I accept that the Ministry has the statutory power to require the creation and preparation of the Dogwood manuals and, in certain circumstances, the right to access and inspect them to ensure that appropriate standards are maintained but, in my view, that is quite distinct, in the present case, from custody or control of the manuals.

The present contractual agreements between Dogwood and the Ministry do not settle the matter of custody or control. If the Ministry wishes such custody or control, especially over individualized manuals of the type at issue in this inquiry, then I would respectfully suggest that it amend its contracts.

I also have no specific guidance to offer, absent empirical knowledge of what other records Dogwood Lodge maintains, on where to draw the line between records of a continuing care facility that the Ministry in fact controls from other records that it has no right to see or can simply inspect. I would prefer to see such matters settled in negotiations between continuing care facilities and the Ministry.

On this analysis and the discussion which follows, the Ministry does not have “control” over Dogwood’s policy manuals.

Indicators from the Manual

The parties and Dogwood Lodge reviewed the indicators in the Manual, Section C.3.2, p. 5. I have taken these indicators and applied them to the Dogwood Lodge manuals as follows:

- The record was not created by an officer, or member of the Ministry, but by employees and a consultant of a contractor.
- The record was not created by an outside consultant for the Ministry.

- The record is not specified in a contract as being under the control of the Ministry.
- The content of the record, at least in part, may relate to the Ministry's mandate and functions.
- The Ministry does not have the authority to regulate the record's use and disposition. The contract and the statutory framework require only the existence of policy and procedure manuals.
- The Ministry has not relied on the record to a substantial extent.
- The contract does not permit the Ministry to copy these manuals.

Ontario Interim Order 120

As noted above, Commissioner Linden addressed various factors that may assist in determining whether an institution has “custody” and/or “control” of particular records (Ontario Interim Order 120, pp. 11-12). I have taken his ten factors and answered them with respect to the Dogwood manuals at issue in this inquiry:

1. The manuals were not created by an officer or member of the Ministry, but by employees and a consultant of a contractor.
2. Dogwood Lodge intended to use the manuals for internal operational and management purposes.
3. The Ministry does not have possession of the manuals; they have not been voluntarily provided by Dogwood Lodge or pursuant to a mandatory statutory or employment requirement.
4. The manuals are not being held by an officer or employee of the Ministry for the purposes of his or her duties as an officer or employee.
5. The Ministry does not have a right to possession of the manuals.
6. The content of the manuals may relate, at least in part, to the Ministry's mandate and functions.
7. The Ministry does not have the authority to regulate the manuals' use.
8. The Ministry has not relied on the manuals, except to the extent that their existence is required by law.
9. The manuals are not integrated with other records held by the institution.
10. The Ministry does not have the authority to dispose of the manuals.

Ontario Order 119

I have considered Ontario Order 119 (Re: Ministry of Skills Development, November 16, 1989) also decided by Commissioner Linden. The circumstances of the Order 119 are similar to those in this review. The “Futures” program was not administered directly by the public body, the record requested did not reside at the public body, and the public body had the authority to access the records to perform an audit. The inspection and audit rights were for the purposes of ensuring program quality and accountability for funds. The public body did not have control over the maintenance of the records. Commissioner Linden found that the public body did not

have custody or control of the records. I find the above factors apply to the manuals at Dogwood Lodge. The manuals do not reside at the Ministry. The Ministry's powers to audit and examine the manuals do not go beyond the power to view them. The Board of Trustees or management of Dogwood Lodge authorizes the policies and the maintenance of the manuals.

Order 7

Counsel for Dogwood Lodge argued that this case was similar to the case considered in my Order 7, dated April 11, 1994. In my opinion a principle underlying Order 7 applies in this case. The contract in Order 7 authorized the province to ask for copies of documents relating to the performance of services under the contract. I am unable to find any similar contractual language in the agreement between Dogwood Lodge and the Ministry. I am unable to find any specific statutory language authorizing the province to copy or take into its possession the policy manuals.

In Order 7 I did not require the release of an insurance contract because the contract with the Ministry only required the contracting service to furnish proof that the clinic was insured. In this case, the contract and the Standards issued under the contract and the *Continuing Care Act* do not require Dogwood Lodge to provide the Ministry with actual copies of the manuals. I agree with the submission by counsel for Dogwood Lodge that the requirement to have and maintain the manuals, even with the Ministry's authority to ascertain that the policies exist, does not amount to control.

6. Order

Under subsection 58(2)(c) of the Act, I conclude that the Ministry of Health and Ministry Responsible for Seniors does not have control or custody of the records at issue in this inquiry and therefore is required to refuse access.

David H. Flaherty
Commissioner

June 16, 1994