



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

ORDER P-378

Appeals P-9200378, P-9200384, P-9200387 and P-9200413

Ministry of Community and Social Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

INTERIM ORDER

BACKGROUND:

The Ministry of Community and Social Services (the Ministry) received four requests for access to records relating to certain named wards during their stay at Grandview Training School for Girls (Grandview). Three of the requests were made by the named wards themselves under section 48(1) of the Freedom of Information and Protection of Privacy Act (the Act), and the fourth request was made by a non-ward who sought access to personal information about both himself and a named ward.

The Ministry denied access to the first three requesters under section 14(1)(b) of the Act.

As far as the fourth request was concerned, the Ministry informed the requester that any records containing his personal information were destroyed in accordance with the institution's retention schedules. This decision was not appealed. Access to records containing the personal information of the named ward was denied pursuant to sections 45(1)(e) and (f) of the Young Offenders Act (the YOA). The Ministry went on to state that section 45(6) of the YOA extends the scope of sections 45(1)(e) and (f) to records relating to the offence of delinquency under the Juvenile Delinquents Act (the JDA).

Each of four requesters appealed the Ministry's decision to deny access.

In accordance with normal procedure, the Ministry was asked to forward a copy of the records at issue in these appeals to the Information and Privacy Commissioner's Office. In response, the Ministry broadened its basis for denying access to the first three requests to also include sections 45(1)(e) and (f) and 45(6) of the YOA. The Ministry also refused to provide the Commissioner's Office with a copy of the records for all four appeals, claiming that to do so would offend the disclosure provisions of the YOA.

Mediation was not possible in the circumstances, and notice that an inquiry was being conducted to review the Ministry's decision not to provide a copy of the records to the Commissioner's Office was sent to the Ministry and the four appellants. Because of the nature of the issue, the Attorney General of Ontario (the Attorney General) and the Attorney General of Canada were also advised, and provided with an opportunity to submit representations. Representations were received from all four appellants, the Ministry, and the Attorney General. No representations were received from the Attorney General of Canada.

The representations received from some of the appellants raised an additional issue. Three of the appellants submitted that the records were not subject to section 45(6) of the YOA. One of the appellants also stated that the records "came under the exclusive jurisdiction of the Province of Ontario by virtue of s. 21 of the Juvenile Delinquents Act". In this appellant's view, the

records relating to her stay at Grandview were created pursuant to the Training Schools Act and were, therefore, subject to the Act, and can be provided to the Commissioner's Office for the purpose of processing the appeals.

Further representations in response to this new issue were solicited and received from the parties who had responded to the original notice.

This Interim Order will deal with the preliminary issue of whether I have authority to order production of the records to me, for consideration in these appeals. In order to address this issue, I must consider a number of matters relating to the relationship between the Act and the YOA and/or the JDA.

ISSUES:

- A. Whether the Act is constitutionally inoperative in respect of records withheld in accordance with the federal YOA.
- B. If the answer to Issue A is yes, whether I have the jurisdiction to make a determination as to whether the Act applies to the requested records.
- C. If the answer to Issue B is yes, whether disclosure by the institution of the requested records to me, in the course of my inquiry under the Act is prohibited under the YOA.
- D. If the answer to Issue C is yes, how do I satisfy myself that the records are not covered by the Act as alleged by the Ministry.

SUBMISSIONS/CONCLUSIONS

ISSUE A: Whether the Act is constitutionally inoperative in respect of records withheld in accordance with the federal YOA.

The YOA contains a number of provisions relating to the keeping and disclosure of records. The relevant provisions for the purposes of these appeals are the following.

Section 43 of the YOA deals with "GOVERNMENT RECORDS - Private Records", and provides in part:

43(1) A department or agency of any government in Canada may keep records containing information obtained by the department or agency

- (a) for the purposes of an investigation of an offence alleged to have been committed by a young person;

- (b) for use in proceedings against a young person under this Act;
 - (c) for the purpose of administering a disposition;
 - (d) for the purpose of considering whether, instead of commencing or continuing judicial proceedings under this Act against a young person, to use alternative measures to deal with the young person;
- or
- (e) as a result of the use of alternative measures to deal with a young person.

Section 44.1 limits access to any record kept pursuant to section 43 to a specific list of persons, including the young person to whom the record relates and counsel acting on behalf of the young person.

Section 45(1) states, in part, that a record kept pursuant to section 43 may not be made available for inspection under section 44.1:

...

- (e) where the young person is found guilty of the offence and it is a summary conviction offence, on the expiration of five years after the young person is found guilty; and
- (f) where the young person is found guilty of the offence and it is an indictable offence, on the expiration of five years after all dispositions made in respect of that offence and all dispositions made in respect of any other indictable offence of which the young person may have been found guilty after he was found guilty of that offence but prior to the expiration of the five year period have been completed.

Section 45(6) states that section 45 applies "with such modifications as the circumstances require, in respect of records relating to the offence of delinquency under the JDA, as it read immediately prior to April 2, 1984", the date when the JDA was repealed and the YOA came into force.

Sections 45.1(1) and 45.2 set out the means by which access to records not made available for inspection under 45(1) may be obtained. These sections read as follows:

45.1(1) A youth court judge may, on application by any person, order that any record to which subsection 45(1) applies, or any part thereof, be made available for inspection to that person or a copy of the record or part thereof be given to that person, if a youth court judge is satisfied that

- (a) that person has a valid and substantial interest in the record or part thereof;
- (b) it is necessary for the record, part thereof or copy thereof to be made available in the interest of the proper administration of justice; and
- (c) disclosure of the record or part thereof or information is not prohibited under any other Act of Parliament or the legislature of a province.

45.2 Where records originally kept pursuant to section 40, 42 or 43 are under the custody or control of the National Archivist of Canada or the archivist for any province, that person may disclose any information contained in the records to any other person if

- (a) the Attorney General or his agent is satisfied that the disclosure is desirable in the public interest for research or statistical purposes; and
- (b) the person to whom the information is disclosed undertakes not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates.

Finally, sections 46(1) and (4) provide:

- (1) Except as authorized or required by this Act, no record kept pursuant to sections 40 to 43 may be made available for inspection, and no copy, print or negative thereof or information contained therein may be given, to any person where to do so would serve to identify the young person to whom it relates as a young person dealt with under this Act.
- (4) Any person who fails to comply with this section or subsection 45(2)
 - (a) is guilty of an indictable offence and liable to imprisonment for two years; or
 - (b) is guilty of an offence punishable on summary conviction.

Two of the appellants submit that there is no conflict between the Act and the YOA. In their view, section 14(2)(b) of the Act provides the Ministry with a means of addressing the situation where disclosure would contravene an Act of Parliament. Section 14(2)(b) reads as follows:

A head may refuse to disclose a record,

that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament

In these appellants' view, the Act applies to all records held by a body designated as an "institution" under the Act, and the source of the record "... was not a factor relevant to the reach of the FIPPA. At the end of the day, a disclosure prohibition in the YOA may preclude a disclosure to the FIPPA applicant (eg. s. 46(1) of the YOA)."

One of the other appellants submits that "... the purpose and underlying principle of the YOA is to provide anonymity for a youth or a person who in their youth has committed an offence and whose judgement at the time of the offence was immature", and that the YOA should not apply in circumstances where "a mature person voluntarily surrenders the protection of anonymity granted under the YOA ...".

In its original response to the requests made by the three appellants for their own personal information, the Ministry took the position that the requested records fell within the scope of the Act, but denied access on the basis that "disclosure could reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result" (section 14(1)(b) of the Act). However, in its representations, the Ministry changed its position, claiming that the records in all four requests fell within the scope of the YOA, and were therefore outside the jurisdiction of the Act by virtue of the doctrine of federal legislative paramourncy. The Ministry also submits that, because of the operation of section 45(6) of the YOA, records relating to the offence of delinquency under the JDA also fall under the scope of the YOA, and therefore all records relating to the offence of delinquency are also removed from the jurisdiction of the Act.

The Attorney General submits that the Act is constitutionally inoperative in respect of records which are withheld under the YOA, because compliance with the requirements of the Act would require a breach of the YOA. According to the Attorney General, the doctrine of federal legislative paramourncy, as set out in the Supreme Court of Canada decisions in Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161 and Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, requires that the YOA prevail over the Act.

I considered the question of federal legislative paramourncy in Order P-344, dated August 21, 1992. In that order I outlined what I understand to be the constitutional doctrine of federal legislative paramourncy as follows: where valid federal legislation is inconsistent with or conflicts with valid provincial legislation, the federal legislation prevails to the extent of the inconsistency or conflict. For the doctrine to apply, the courts have held that the inconsistency or

conflict must amount to an "express contradiction". I also noted in Order P-344 that case law appears to establish that "express contradiction" includes both an express conflict in the wording of a federal and provincial statute, as well as a conflict in the operation of the two legislative schemes in a way which interferes with the functioning of the federal scheme.

Having considered the various representations and reviewed the relevant provisions of both the Act and the YOA, I find that there is an express contradiction between the disclosure provisions of the two statutes.

Specifically, section 45(1) of the YOA states that, in certain circumstances, a record kept pursuant to section 43 of that statute may not be made available for inspection under section 44.1, except where the record is in the custody or control of the National Archivist or an archivist for any province, or by way of an application to a youth court judge. Before a youth court judge can make the record available for inspection, he or she must be satisfied that: (a) the applicant has a valid and substantial interest in the record; (b) it is necessary for the record to be made available in the interest of the proper administration of justice; and (c) disclosure of the record is not prohibited under any other federal or provincial statute (section 45.1). Before a provincial archivist can disclose any information contained in a YOA record, the Attorney General must be satisfied that disclosure is desirable in the public interest for research and statistical purposes, and the person who received access must undertake not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates (section 45.2).

There would appear to me to be an express contradiction between these provisions of the YOA and the access provisions of the Act. Section 10(1) of the Act states that "[e]very person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22." These exemptions are intended to protect certain defined interests, and section 67 of the Act states that the Act "... prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise."

I also find that there is an express contradiction between the two statutes as it relates to my right to require production of records for consideration during the course of an appeal.

Specifically, section 46(1) of the YOA requires that, except as "authorized or required" by the YOA, a record kept pursuant to section 43 of the YOA may not be made available and no information contained in the record may be given to any person where to do so would serve to identify the young person to whom it relates as a young person dealt with under the YOA. Any person failing to comply with section 46 is guilty of an offence. Further, section 44.1 of the YOA provides a specific and limited list of persons who may be provided with access to a record kept pursuant to section 43, and this list does not include the Information and Privacy Commissioner.

These provisions clearly conflict with section 52(4) of the Act, which provides the Information and Privacy Commissioner or his delegate with the authority to require records to be produced for examination "despite any other Act or privilege".

In my view, there is an express contradiction between the disclosure scheme contained in the YOA and the disclosure scheme in the Act and, in accordance with the doctrine of federal legislative paramountcy, I find that the YOA prevails in respect to records kept by a provincial institution pursuant to section 43 of the YOA. Because section 45(6) of the YOA, provides that records relating to the offence of delinquency under the JDA fall under the YOA, I also find that the records relating to the offence of delinquency under the JDA fall outside the scope of the Act.

ISSUE B: If the answer to Issue A is yes, whether I have the jurisdiction to make a determination as to whether the Act applies to the requested records.

In its representations, the Ministry takes the position that I do not have jurisdiction to determine whether a record is properly withheld under the YOA. In the Ministry's view, I must simply accept its claim that the record falls within the scope of the YOA, and that the Act, therefore, does not apply.

The Attorney General supports the Ministry on this issue. He takes the position that where an institution claims that records fall under the scope of the YOA, this claim prevents their release, and the decision to deny access on this basis can only be tested in accordance with the scheme set out in the YOA.

I do not accept this position. In my view, the Information and Privacy Commissioner has both the jurisdiction and a statutory obligation to determine whether the Act applies to records in the custody or under the control of any institution covered by the Act. One of the purposes of the Act as set out in section 1 is to provide the right of access to information in the custody or under the control of institutions in accordance with the principles that decision on the disclosure of government information should be reviewed independently of government. As the Commissioner's delegate, I have a duty to ensure, as best I can, that records are not improperly withheld from scrutiny under the Act on the basis that they are "YOA records" when, in fact, this may not be the case.

ISSUE C: If the answer to Issue B is yes, whether disclosure by the institution of the requested records to me, in the course of my inquiry under the Act is prohibited under the YOA

Three of the appellants submit that disclosure of the records to me, in the context of my inquiry under the Act, is not prohibited under the YOA because the records are not covered by the YOA by operation of section 45(6) of the YOA. They submit that, although two of the appellants were found to be juvenile delinquents under the JDA, the court acting under the JDA made an order committing the appellants to an industrial school under section 20(1) of the JDA and by operation of section 21 of the JDA, the appellants were subsequently dealt with under the laws of Ontario, namely the Training Schools Act. The appellants submit that the order of the provincial secretary of Ontario, pursuant to section 21 of the JDA, "... effectively divested the federal government of jurisdiction ..." over the appellants. Therefore, these appellants claim that records relating to their stay at Grandview are subject to the Act.

Section 21(1) of the JDA reads as follows:

- (1) Whenever an order has been made under section 20 committing a child to a children's aid society, or to a superintendent, or to an industrial school, if so ordered by the provincial secretary, the child may thereafter be dealt with under the laws of the province in the same manner in all respects as if an order had been lawfully made in respect of a proceeding instituted under authority of a statute of a province; and from and after the date of the issuing of such order except for new offenses, the child shall not be further dealt with by the court under this Act.
- (2) The order of the provincial secretary may be made in advance and to apply to all cases of commitment mentioned in this section.

In their representations, three of the appellants cite and refer to a number of court decisions which discuss the purpose and effect of section 21(1) of the Juvenile Delinquents Act. In Regina v. T (1983) 9 C.C.C. (3d) 161 at 171 (Ontario High Court of Justice), Mr. Justice White discussed the section's purpose as follows:

It is my view that it was Parliament's intention as expressed in section 21(1) of the Act that where a juvenile is committed to a training school the provincial authorities are to provide for the discipline, treatment and rehabilitation of the juvenile without impediment or interference from a court exercising criminal jurisdiction (which would include a court having jurisdiction to deal with offenses under the Act) save as to "new offenses".

Two of the appellants also submit that disclosure of their records to me is not prohibited because "[t]he only restricted records under the terms of the YOA are records which 'would serve to identify the young person to whom it relates as a young person dealt with under this act.'" According to these appellants, they have reached the age of majority and have voluntarily identified themselves, and it cannot be said that disclosure of the records to me would "serve to identify" them as these words are used in the JDA.

I do not agree with the appellants' position. Section 45 of the YOA, by operation of section 45(6), applies in respect of **all** records relating to the offence of delinquency under the JDA, and makes no distinction as to when the records are created. In my view, as long as the records relate to the offence of delinquency under the JDA, they fall under the scope of the YOA, regardless of whether the records are created before or after the appellants were committed to Grandview. Further, section 46 of the YOA makes it an offence to disclose any such records or any information contained in them to any person "... where to do so would serve to identify the young person to whom it relates as a young person dealt with under [the YOA]". In my view,

this provision applies whether or not the person requesting the records or the person to whom the records are to be disclosed is aware that the person to whom the information relates is a young person dealt with under the YOA.

Accordingly, I find that section 45 of the YOA does not permit the disclosure by the Ministry of records relating to the offence of delinquency under the JDA to the Information and Privacy Commissioner, in the absence of an order of a youth court judge under section 45.1(1) of the YOA.

ISSUE D: If the answer to Issue C is yes, how do I satisfy myself that the records are not covered by the Act as alleged by the Ministry.

Under Issue A, I found that I do not have authority to order production of any records in the custody or under the control of the Ministry, if they are records that fall within the scope of the YOA. However, I also have a duty to ensure that this restriction on my authority is limited to records which actually do qualify as "YOA records".

In the circumstances of these appeals, I am not satisfied on the basis of the information that has been provided to me by the Ministry that the records which are the subject matter of the four requests "relate to the offence of delinquency" under the JDA, and therefore fall within the scope of the YOA and outside the jurisdiction of the Act. In order to qualify for consideration as "YOA records" the records identified by the Ministry as being responsive to the requests must relate to the offence of delinquency, or would disclose information which would serve to identify someone as a person dealt with under the YOA or the JDA. Based on the information I have so far been provided, it is not clear to me, for example, whether residents of Grandview were necessarily sent there only after being found to be juvenile delinquents; or if some of the responsive records in these appeals relate solely to activities during the time of residency at Grandview and were unconnected to any previous delinquent activity.

Accordingly, I require the Ministry to provide me with a detailed affidavit sworn by an official of the Ministry who has knowledge of and understands the records at issue in these appeals. The contents of this affidavit are outlined in the provisions of my order.

After receiving this affidavit, I will determine if I have sufficient information to make a determination as to whether the records fall within the scope of the YOA or whether they fall outside the scope of that statute and are subject to the provisions of the Act.

ORDER:

I order the Ministry to provide me with a detailed affidavit sworn by an official of the Ministry who has knowledge of and understands the records at issue in these appeals, within 20 days of the date of this Interim Order. As a minimum, the affidavit must contain the following:

- (1) information about the person swearing the affidavit describing his or her qualifications and responsibilities;

- (2) it must state that the person is familiar with the withheld records and the subject matter of the records;
- (3) it must describe the records withheld in reasonably specific detail (without revealing the contents of the records), correlate each record to the provision(s) of the YOA asserted, and demonstrate how the required elements of each provision are satisfied (e.g. how the records at issue relate to the offence of delinquency and how disclosure of the records would "serve to identify" the persons to whom they relate as persons dealt with under the JDA); and
- (4) it must set out the purpose(s) for which each record was created and the circumstances under which each record was created.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ December 8, 1992