



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

ORDER P-509

Appeal P-9300137

Ministry of Health



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ORDER

BACKGROUND:

The Psychiatric Patient Advocate Office (the PPAO) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records related to the new Advocacy Act and in particular "documents created prior to the drafting of the Act, during the preparation of and presentation of the Act and after the Act has been passed and/or proclaimed." The PPAO asked for clarification of the request and simultaneously gave a fee estimate for provision of the responsive records. The requester appealed.

During mediation, the appellant confirmed that the request was strictly for general records, not for personal information or clinical records. Because the PPAO was identified as a program area of the Ministry of Health (the Ministry) by the Acting Freedom of Information and Privacy Coordinator for the Ministry, the Appeals Officer provided the Ministry with the request and asked it to issue a proper decision letter pursuant to section 26 of the Act. The Ministry wrote to the requester, stating:

With respect to your request (which was sent directly to the program area) ... please be advised that in concurrence with Order Number P-271 of the Information and Privacy Commissioner/Ontario, it is the Ministry's decision that files held by the Psychiatric Patient Advocate program are not within the custody and control of the Ministry of Health ...

Further mediation was not possible and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the appellant and the Ministry. Representations were received from both parties.

ISSUES:

- A. Whether the records are in the custody or control of the Ministry.
- B. If the answer to Issue A is yes, whether the Ministry has complied with sections 26 and 29 of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the records are in the custody or control of the Ministry.

The appellant states that while the Memorandum of Understanding clarifies the position of the PPAO, it does not derogate from the Ministry's obligations and responsibilities under the Act with respect to PPAO records.

The Ministry submits that the PPAO is sufficiently independent of the Ministry that the Ministry does not have custody and control of the PPAO files. The Ministry refers to the Memorandum of Understanding signed by the Minister of Health and the Acting Director of the PPAO.

Although the Ministry has not referred to it in its representations, in its letter to the appellant the Ministry refers to Order P-271 in support of its position. Order P-271 involved a request made to the Algonquin College of Applied Arts and Technology for access to records in the possession of the College Ombudsman. Former Assistant Commissioner Tom Mitchinson found that the College Ombudsman was an entity operating independently from the College, and the records in his possession were not properly considered to be in the custody or under the control of the College within the meaning of the Act.

In my view, the facts of this appeal are distinct from those considered in Order P-271. In Order P-271, Assistant Commissioner Mitchinson noted that the College Ombudsman was appointed by and reported to a committee on which the College did not hold majority membership. The Memorandum of Understanding between the Ministry and the PPAO indicates that the Minister of Health is responsible for appointing the Director and certain other senior staff of the PPAO. The agreement also indicates that the Director of the PPAO shall report on a regular basis directly to the Deputy Minister on policy matters relating to advocacy and psychiatric patients' rights, and that the Director is accountable to the Legislature of Ontario through the Minister of Health.

According to the terms of the Memorandum of Understanding, the PPAO must provide the Minister of Health with such information concerning the PPAO's operations as the Minister may require for reports to the Legislative Assembly and its committees and Cabinet and its committees, policy advice regarding issues related to the mandate of the PPAO, and quarterly reports on the status of the PPAO's activity. In Order P-271, the College had formally agreed that it was precluded from any direct or indirect dealings with the College Ombudsman's files.

In Order P-271, the College and the Student's Association provided equally shared funding of the Ombudsman Service. The Memorandum of Understanding relevant to this appeal indicates that the PPAO's funding is provided solely by the Ministry of Health.

In addition, I agree with Commissioner Tom Wright's reasoning in support of his finding in Order P-494 that the PPAO records are in the custody and control of the Ministry:

I have carefully considered the representations of the Ministry and the PPAO as they relate to the relationship between the Ministry and the PPAO. In this regard I have also reviewed the Memorandum of Understanding. In my view, by entering into the Memorandum the Ministry did not abdicate its authority over the PPAO. The Memorandum provides that the PPAO is responsible for maintaining confidential records relating to its advocacy operations. In my opinion, this does not mean that the PPAO has **exclusive** custody and/or control over records which it has been given responsibility to maintain, to the exclusion of the Ministry, to which the PPAO is ultimately accountable.

In my opinion, the PPAO is fundamentally an internal program of the Ministry. It is not an entity that was created by statute, with its own separate legislative authority. Since I have concluded that the PPAO is a part of the Ministry, it follows that the records maintained by the PPAO fall within the overall custody and control of the Ministry for the purposes of the Act.

In my view, the requested records are in the custody and control of the Ministry for the purposes of the Act.

ISSUE B: If the answer to Issue A is yes, whether the Ministry has complied with sections 26 and 29 of the Act.

The appellant submits that since the Ministry has refused to process the request, it has not complied with its obligations under sections 26 and 29 of the Act and is in a state of "deemed refusal".

In its representations, the Ministry indicates:

Should the Commissioner find in the affirmative to Issue A, then the Ministry would not have fulfilled its statutory obligations under sections 26 and 29 of the Act and therefore, would be required to do so.

Having found in Issue A that the requested records are within the Ministry's custody and control, I find that the Ministry has not fulfilled its statutory obligations under sections 26 and 29 of the Act.

ORDER:

1. I order the Ministry to process the request and issue a proper decision letter in compliance with its statutory obligations under section 26 and 29 of the Act, considering the date of this order as the date of the request.
2. In order to verify compliance with this order, I order the Ministry to provide me with a copy of its decision letter pursuant to Provision 1, **only** upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

August 3, 1993