



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

ORDER P-646

Appeal P-9300501

Ministry of the Attorney General



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ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for all correspondence and investigation documents relating to a particular court file.

The Ministry replied that court records filed in the course of either civil or criminal proceedings are not subject to the Act. The Ministry also informed the requester that the court office in St. Catharines had been contacted and had advised the Ministry that all correspondence relating to this particular court file was in the court file itself.

The requester appealed the Ministry's decision, stating that she did not request access to court records. For that reason, the Ministry's statement in its initial decision, that such records are not subject to the Act, is not an issue in this appeal.

In her letter of appeal, the appellant clarified her request, stating that she seeks access to the following: (1) all documents addressed to the Attorney General's office from the appellant, (2) all documents from the Attorney General's office addressed to the appellant, and (3) all documents, etc., held by the Attorney General's office relating to their investigation of the disappearance of her court file. The appellant was of the view that records responsive to her request, as clarified, should exist within the custody or control of the Ministry, outside the court file.

After the Ministry was advised of the clarified request, it conducted a series of searches and located some responsive records. No new decision regarding these records was issued prior to the time which had been specified for the commencement of the inquiry process. Therefore the appeal could not be resolved by mediation. Accordingly, notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from both parties.

During the inquiry stage of the appeal, a supplementary decision letter with respect to these records was sent to the appellant, disclosing them in full.

REASONABLENESS OF SEARCH:

After she received the Ministry's supplementary decision letter, the appellant advised the Appeals Officer that she still believes additional responsive records exist. Therefore this remains an issue in this appeal. Where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that additional records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify responsive records. While the Act does not require that the Ministry prove to the degree of absolute certainty that such records do not exist, the search which the Ministry undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

In this appeal, the Ministry located and disclosed a number of records relating to the missing court file. These included correspondence between the Ministry and the appellant, an internal Ministry memorandum and a briefing note. The Ministry's representations indicate that searches were conducted at the Minister's Correspondence Unit, the Program Development Branch of the Courts Administration Division, the Office of the Regional Director -- Metropolitan Toronto, the Office of the Regional Director -- South Central Region, and the Office of the Court Services Manager -- St. Catharines Court Office.

Where the relevant Records Transfer Lists indicated this was appropriate, records were also retrieved from the Records Centre and reviewed. In some cases, where no responsive records were located, a second search was conducted.

Details of these searches were verified in affidavits sworn by five Ministry employees which accompanied the representations. I am satisfied that the searches carried out by the Ministry to locate responsive records were reasonable in the circumstances.

TRANSFER OF REQUEST:

Section 25(1) of the Act states as follows:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

This section imposes mandatory obligations on the Ministry in situations where another institution has custody or control of responsive records which the Ministry does not have in its own custody or control. These obligations include making inquiries and, where another institution has a responsive record or records under its custody or control, forwarding the request to that other institution and notifying the requester that this has been done. The relevance of section 25(1) in this appeal arises from statements in the Ministry's supplementary decision letter, and in a letter from the appellant.

The relevant passage from the supplementary decision letter states as follows:

The [Minister's Correspondence] Unit maintains its records for four years and then they are transferred to the Archives of Ontario. You may wish to make an access request to the Ministry of [Culture,] Tourism and Recreation, Archives of Ontario ...

In correspondence during the inquiry stage, the appellant has asked whether it is her responsibility to seek access to any records which might be in the possession of the Archives of Ontario (Archives). This implicitly raises the issue of whether the Ministry should have forwarded the request to the Ministry of Culture, Tourism and Recreation (of which Archives is a part) under section 25(1).

In response to a question asked by the Appeals Officer during the inquiry, the Ministry indicated that it did not follow the procedure set out in section 25(1) because that section directs that transfers are to take place within 15 days after the request is received. In this case, the Ministry was of the view that the initial request was clear, so it did not seek clarification from the appellant. It was not until the mediation stage of the appeal, after the request had been clarified, that the Ministry realized that some responsive records could have been transferred to Archives pursuant to retention schedules.

Section 25(1) states that requests are to be forwarded to the other institution "where the head determines that another institution has custody or control of the record". In the circumstances of this appeal, there is no evidence to indicate that Archives actually possesses responsive records, so I am not in a position to order that the request be forwarded to Archives.

While the use of section 25(1) might have facilitated matters for the appellant, I accept the Ministry's explanation for not doing so in the circumstances of this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
John Higgins
Inquiry Officer

_____ March 18, 1994