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

ORDER P-704

Appeal P_9400015

Ministry of the Attorney General

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ORDER

NATURE OF THE APPEAL:

The Judicial Appointments Advisory Committee (the Committee) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to (1) the current list of Committee members and (2) all documents relating to the selection of a named individual to the position of Judge of the Ontario Court (Provincial Division).

The Ministry of the Attorney General (the Ministry) responded to the request on behalf of the Committee. In its decision letter, the Ministry indicated that the Committee is neither part of the Ministry nor itself an institution for the purposes of the Act. On this basis, the requester was unable to obtain the information which she sought under the legislation. The requester appealed the Ministry's decision that the Committee was not subject to the Act.

During the mediation stage of the appeal, the Chair of the Committee provided the requester (now the appellant) with the membership list for the Committee. Further mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and the appellant. Representations were received from the Ministry only. The Committee indicated that it would also be relying on the representations made by the Ministry.

The records which remain at issue are those documents which relate to the selection of a named individual as a judge.

THE OPERATION OF THE COMMITTEE:

In order to resolve this appeal, I must first determine whether the Committee is a part of the Ministry, which is an institution under the Act, or a completely distinct advisory body. Should I conclude that the Committee is a part of the Ministry, I must then decide whether the records which the appellant seeks fall within the custody or control of the Committee/Ministry.

In its representations, the Ministry provided considerable background information respecting the operation of the Committee and I will highlight the important aspects of these submissions in this order.

The Committee was established in late 1988 as a pilot project to provide advice to the Attorney General on judicial appointments to what is now the Ontario Court (Provincial Division). The Committee's general mandate is to receive applications from individuals who wish to be considered for judicial appointment. The Committee is responsible for establishing selection criteria, evaluating the applications of candidates who apply for judicial positions and for recommending a short-list of individuals to be considered by the Attorney General.

The Committee is presently made up of ten members. Four of these individuals are lay persons, four are lawyers and two are judges. None of these individuals are Order in Council

appointments nor are they Ministry employees. The Ministry indicates that it pays each Committee member a per diem honorarium, as well as expenses which are incurred on Committee business.

It would appear that the working relationship between the Committee and the Ministry is quite informal in nature. According to the Ministry, there does not exist any written agreement, memorandum of understanding or similar document governing the relationship between the Committee and the Ministry or the Ontario Government. In addition, the Committee has not been established by an Act of the Legislature.

From an administrative perspective, the Committee advertises for candidates for judicial appointments, undertakes reference checks and maintains a database of individuals who have expressed an interest in seeking judicial appointments.

In its representations, the Ministry indicates that administrative support for the Committee is provided by the Administrative Officer and Secretary (the Secretary). This individual is a Ministry employee who reports administratively to the Office of Judicial Support Services of the Ministry. According to the Ministry, the Secretary acts on the direction of the Committee Chair and is responsible for maintaining the Committee's filing system, safeguarding the confidentiality of the information received by the Committee and making inquiries of the Law Society of Upper Canada with respect to candidates for judicial appointment.

In an affidavit provided by the Secretary, she indicates that Committee records, which are not in the actual possession of Committee members, are kept in a filing cabinet at the Ministry's offices in downtown Toronto. These records are, however, physically segregated from other categories of Ministry files and Ministry officials are not permitted to obtain access to these records without the prior permission of the Committee Chair. The Secretary also states that records maintained in the Ministry's offices, or kept in the personal possession of Committee members, are not subject to any Ministry guidelines or rules respecting the use, retention or disposal of these types of documents.

WHETHER THE COMMITTEE IS A PART OF THE MINISTRY:

In its representations, the Ministry points out that the Committee is intended to function as an independent advisory body which is free from government interference. The Ministry indicates that, to fulfil its mandate, the Committee has assumed an arms length relationship with the Ministry and that the Ministry does not regard or treat the Committee as one of its branches or units. To support this position, the Ministry has made reference to a statement contained in a Committee document entitled "Final Report and Recommendations". There, the Committee states that:

> The committee is a true nominating committee. It is a completely independent body with a mandate to select, interview and recommend to the Attorney General suitable candidates for judicial appointment.

The Ministry further states that, since Committee members are neither Ministry employees nor retained under contract, it has no formal authority over the Committee or its personnel. The Ministry also believes that the Committee is a distinct advisory body despite the fact that its record holdings are housed on the Ministry's premises.

The Ministry has also drawn my attention to Bill 136 (the Courts of Justice Statute Law Amendment Act, 1993), which is presently before the Legislature. This Bill, if enacted, would establish the Committee as a distinct statutory body.

I have carefully reviewed the contents of this proposed legislation. The provisions of the Bill essentially codify the present mandate and manner of operation of the Committee. Under section 43(7) of the Bill, the Committee will continue to make recommendations on judicial appointments to the Attorney General. In addition, Bill 136, if enacted, will not have any retroactive effect.

A final point which I would make is that the 1993/94 version of the Directory of Records which the Ontario Government is required to publish under section 45 of the Act lists "Provincial Court Judges and Masters - Applicants for Appointment" as one of the personal information banks maintained by the Ministry. The Ministry acknowledges that this is the case but indicates that the listing will be removed when the next update is published.

With this information in hand, I have reviewed the orders issued by the Commissioner's office which have considered whether various types of organizations are subject to the Act. In my view, the decision which comes closest to the present fact situation is Order P-494. There, the question to be determined was whether the Psychiatric Patient's Advocacy Office (the PPAO) was part of the Ministry of Health and, consequently, whether the Ministry had custody or control of the records which the appellants were seeking.

After considering the representations of the parties, Commissioner Tom Wright resolved this issue in the following fashion:

> ... In my view, by entering into the Memorandum [of Understanding] 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 the responsibility to maintain, to the exclusion of the Ministry, to which the PPAO is ultimately accountable.
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> 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 purposes of the Act.

I must now consider whether the conclusion reached in Order P-494 is equally applicable to the facts of this appeal.

In the present case, and unlike the situation in Order P-494, there does not exist a memorandum of understanding or similar agreement to define the operating relationship between the Committee and the Ministry. On this basis, I must look to other sources of information to determine how the Committee and the Ministry relate to one another.

I have carefully reviewed the representations of the Ministry in conjunction with all the circumstances of this case. In my view, the evidence points to the conclusion that the work of the Committee is closely connected to the activities of the Ministry with the result that the Committee can be said to be a part of the Ministry. I have arrived at this determination for the following reasons:

(1) The Committee was not created by statute and has no legal status separate from that of the Ministry.

(2) The Committee's functions tie in closely with the mandate of the Attorney General under section 42(1) of the Courts of Justice Act which is to make recommendations to Cabinet about the appointment of Provincial Court Judges.

(3) There does not exist a memorandum of understanding or related agreement which establishes that the Committee is to be viewed as a distinct and separate advisory body.

(4) The Directory of Records published by the Ontario Government stipulates that applications received from individuals to be appointed as Provincial Court Judges constitute a personal information bank maintained by the Ministry.

(5) Committee members are not appointed through Orders in Council.

(6) The Ministry both funds the operations of the Committee and provides administrative support to this group.

(7) The Committee's office is located in the same building as the Ministry and Committee records not in the possession of individual Committee members are filed on the Ministry's premises under the supervision of a Ministry employee.

I further find, based on the approach taken in Order P-494, that even if Ministry staff are not entitled to directly access Committee records, this does not mean that the Committee has exclusive possession of the records for the purposes of the Act.

Since I have concluded that the Committee is a part of the Ministry, it follows that the records maintained by the Committee fall within the overall custody and control of the Ministry for the purposes of the Act.

WHETHER THE COMMITTEE OR OTHER AREAS OF THE MINISTRY HAVE CUSTODY OR CONTROL OF THE RESPONSIVE RECORDS:

I must now determine whether the Committee or any other program area of the Ministry has custody or control of the specific records which the appellant seeks.

Section 10(1) of the Act introduces the concepts of custody and control. This provision states that:

> 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 unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

In Order 120, former Commissioner Sidney B. Linden stated that the concepts of custody and control should be given a broad and liberal interpretation in order to give effect to the purposes and principles of the Act. The Commissioner then proceeded to outline the following approach for determining whether specific records fell within the custody or control of an institution:

> In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.
>
> In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:
>
> (1) Was the record created by an officer or employee of the institution?
>
> (2) What use did the creator intend to make of the record?
>
> (3) Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
>
> (4) If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
>
> (5) Does the institution have a right to possession of the record?
>
> (6) Does the content of the record relate to the institution's mandate and functions?
>
> (7) Does the institution have the authority to regulate the record's use?
>
> (8) To what extent has the record been relied upon by the institution?
>
> (9) How closely is the record integrated with other records held by the institution?
>
> (10) Does the institution have the authority to dispose of the record?
>
> These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the

> custody or under the control of a institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

This approach has been followed in many subsequent orders. In each case, the issue of custody and/or control has been decided based on the particular facts of the case, the factors outlined in Order 120 and the related considerations which have been articulated in these orders. Similarly, this appeal must be decided on the basis of its particular facts.

In its representations, the Ministry states:

> The only records at issue ... are ... records of the Advisory Committee pertaining to the selection of [a named individual] as a Provincial Court Judge. All such records on the premises of the Ministry were destroyed on or about July 5, 1993 before the appellant made her request by the Administrative Officer and Secretary to the Advisory Committee ... The chair of the Advisory Committee advises that he has some records that respond to the request in his personal possession. It is not known whether any other current or past members of the Advisory Committee have any records relating to the appellant's request in their personal possession.

The first question for me to determine is whether the Committee or any other area of the Ministry currently has **custody** of the records which are responsive to this request. Based on the representations provided to me, it would appear that the Committee has destroyed the documents relating to the appointment of the named individual which were previously located in its premises.

While on this subject, I would note that the appellant has filed a companion request for the same information directly with the Ministry. In its decision letter, the Ministry identified a number of records which were responsive to the request. These documents include the candidate's letter of application and the Committee's written recommendation with respect to his appointment. The Ministry subsequently decided to deny access to these records and the resulting appeal (which has been designated as P-9400187) is presently before the Commissioner's office. When considering the appellant's two requests together, there is no dispute that the Ministry does have some responsive records in its custody.

Given that the Committee, itself, no longer has custody of the records which were originally in its possession, I must now go on to determine whether the Committee/Ministry has **control** over any of these documents. In its representations, the Ministry has indicated that the Chair of the Committee has some of the responsive records in his possession and that other members of the Committee may have copies of these documents as well.

As indicated previously, the Ministry has argued that the Committee is a legal entity separate and apart from the Ministry for the purposes of the Act. Since I have concluded that the Committee is, in fact, a part of the Ministry, I will not revisit these arguments in this section of the order.

Based on the analysis set out in Order 120 and the reasoning contained in several subsequent orders, the Ministry argues that it (and presumably the Committee as well) does not exercise

control over the records held in the possession of individual Committee members. The Ministry's principal reasons for making this argument are the following:

(1) Because Committee members are not Ministry officers or employees, materials in the possession of the Committee or its members do not belong to the Ministry.

(2) The Committee's records are not integrated with the Ministry's other document holdings.

(3) Except for staff members who work directly for the Committee, Ministry employees are not entitled to obtain access to records retained by the Committee.

(4) The Ministry does not have any meaningful right to deal with the Committee's records.

There are, on the other hand, a number of important considerations outlined in Orders 120 and P-494 which support the conclusion that these Committee records fall within the control of the Ministry. The most salient of these reasons are the following:

(1) The records in question are held by Committee members because of their Committee responsibilities and for no other reason.

(2) The contents of the records clearly relate to the mandate and function of the Committee and the Ministry.

(3) The Committee and the Ministry have likely relied on some or all of these records for the purpose of determining whether the individual should be appointed as a judge.

(4) Given that the Committee is part of the Ministry, it follows that the Ministry would have the authority under the various provisions of the Act to regulate the use, disclosure and destruction of the personal information contained in the records.

It should also be noted that records of the type being sought in the present appeal are typically found in competition or similarly labelled files maintained by the relevant government organization. In this context, the Selection Directive issued by Management Board of Cabinet specifies that each competition file maintained by a Ministry must contain, among other things, the selection criteria, the original applications, the identity of the selection board members, rating and ranking materials, and sufficient information to explain the treatment of every applicant, including screening, rating and ranking steps.

Following a careful weighing of the facts of this case and having regard to the considerations outlined in the relevant orders, I have reached the conclusion that the records which are in the possession of Committee members fall under the control of the Committee/Ministry for the purposes of the Act. On this basis, it will be necessary for the Committee as the Ministry's agent to obtain copies of the records from the Committee members and to re-establish formal custody over these documents. Once this step has been taken, the Ministry will be required to issue a new decision letter to indicate whether it is prepared to disclose the documents at issue.

In forming the conclusion that the Ministry/Committee has control over the records at issue in this appeal, I would emphasize that I have not also determined that these documents should be disclosed to the appellant. In this respect, the Ministry is free to avail itself of the exemptions set out in sections 12 through 22 of the Act in determining whether or not it is prepared to release the relevant documents.

I further believe that my conclusion that the provisions of the Act apply to the Committee records is entirely consistent with the stated intention of the Ontario Government of making a scheme for appointing judges more transparent to members of the public.

ORDER:

1. I order the Ministry to obtain from the Chairman of the Judicial Appointments Advisory Committee or any such other member as the Ministry deems appropriate copies of all documents relating to the selection of the named individual to the position of Judge of the Ontario Court (Provincial Division) within twenty-one (21) days of the date of this order.

2. I order the Ministry to provide the appellant with a new decision letter regarding access to the records to which the Ministry obtains custody under Provision 1 of this order within thirty (30) days of the date of this order.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the decision letter which is provided to the appellant pursuant to Provision 2 of this order.

Original signed by: June 16, 1994
Irwin Glasberg
Assistant Commissioner