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

INTERIM ORDER P-737

Appeal P_9300614

Ministry of Community and Social Services

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked to receive a copy of a report issued by the Ministry of Community and Social Services (the Ministry) regarding the actions taken by a particular Children's Aid Society (the Society) following the disappearance of one of its wards. The requester also sought access to the Society's file on the teenager. The ward in question, who was a Native Canadian, was eventually found dead one year after he left the Society's custody. The requester represents a Native group which has expressed concerns about the Society's conduct in this case.

The Ministry identified a total of 16 records that were responsive to the request but denied access to 15 of these documents in their entirety. It was the Ministry's position that the release of the information found in each of the records would interfere with an ongoing law enforcement matter under section 14(1)(b) of the Act. The Ministry later determined that some of the information contained in eight of the records also fell within the scope of the Young Offenders Act (the YOA) which meant that the Ministry was precluded from releasing this information to the requester. The requester appealed the Ministry's decision to the Commissioner's office.

Upon receipt of the appeal, the Commissioner's office forwarded a Confirmation of Appeal notice to the Ministry. In this notice, the Ministry was asked to provide copies of all responsive records directly to the Commissioner's office.

In response to this document, the Ministry provided the 15 records at issue but made the decision to delete parts of eight records which it considered to fall within the parameters of the YOA. It would appear that there are 39 deletions in total. In the case of one record, the Ministry has deleted all of the information contained in this document. I have provided a general description of each responsive record in this appeal in Appendix "A" to this order.

Once this appeal proceeded to inquiry, I determined that the Commissioner's office would need to review the full contents of each responsive record in order to resolve the issues which had been raised. Based on the Ministry's initial position on this subject, the Notice of Inquiry requested submissions on the following four questions:

(1) In the context of an appeal of a decision of a head under the Act to the Information and Privacy Commissioner, does the Assistant Commissioner have the authority to order production, for his independent review, of records in the custody or control of the institution that are relevant to the appeal where the institution alleges that the records or parts of the records fall within the scope of the YOA?

(2) Is disclosure or release by the institution of such records to the Assistant Commissioner, for the purpose of the appeal process, prohibited under the YOA? If yes, under which provisions of the YOA?

(3) If, in your view, the Assistant Commissioner does not have the authority to order production of such records, how can he satisfy himself, in the context of an appeal relating to such records, that they are not improperly withheld from scrutiny under the Act, that is, that they are in fact records which fall within the scope of the YOA?

(4) Given that, in these circumstances, section 46(1) of the YOA could apply only to records described in section 43(1) of the YOA, the Ministry is asked to substantiate its claim that the deletions in question fall within the scope of section 43(1) of the YOA.

Representations on these issues were received from the Ministry and the appellant. In addition, to date, the Ministry has not provided the Commissioner's office with the complete contents of the eight records as originally requested.

For the purposes of this interim order, the sole issue which I will address is whether the Ministry must provide the entire contents of the eight records to the Commissioner's office. The applicability of the law enforcement exemption, which the Ministry has also claimed in relation to the records at issue, will be considered in a separate order.

DISCUSSION:

THE PRODUCTION OF RECORDS CLAIMED TO FALL WITHIN THE YOA

In its representations, the Ministry submits that the Commissioner's office does not have the authority to order production, for its independent review, of records in the Ministry's custody or control, where the Ministry claims that all or parts of the records fall within the scope of the YOA. The Ministry goes on to state that the YOA provides a comprehensive code for the maintenance and use of records kept pursuant to its provisions and that this statute prohibits the Ministry from releasing the information sought.

The Ministry then notes that sections 44.1 and 45 of the YOA, which were enacted to protect the privacy of young offenders, govern the disclosure or non-disclosure of such records.

The Ministry points out that section 44.1 of the YOA enumerates specific categories of persons who may receive access to information about young offenders. The Ministry then notes that the Information and Privacy Commissioner is not included in this list. The Ministry adds that section 44.1(1)(h) allows a province to designate persons to whom records should be made available and that section 44.1(1)(k) authorizes any person deemed by a youth court judge to have a valid interest in the record, to obtain access to the document under certain conditions.

The Ministry points out that section 45(1) sets out those circumstances where records are not to be disclosed under section 44.1. It notes, however, that a youth court judge may nonetheless order disclosure of a record to any person with a valid and substantial interest in the document. The Ministry then points out that section 46(4) makes non-compliance with the YOA an offence which is punishable by a maximum prison term of two years.

The Ministry concludes that if a record is governed by sections 40 through 43 of the YOA, it would be unlawful to release this document to a person except where (1) the person is listed in section 44.1, or (2) a youth court judge overrides section 45(1) and orders such disclosure

pursuant to section 44.1(1)(k) or 45.1(1). The Ministry further states that it is not possible to comply with the requirements of the Act without contravening the YOA.

The Ministry also argues that the doctrine of paramountcy renders the provincial Act inoperative in relation to the records at issue. For this reason, the Ministry reiterates that the Commissioner's office has no authority to order the production of such documents where the Ministry claims that they are subject to the YOA.

Finally, the Ministry submits that the proper procedure for determining whether a record has been properly withheld under the YOA is to make an application to a youth court judge under that statute.

I will now endeavour to address these arguments in the context of the access to information scheme prescribed by the Act. Two of the central principles which underlie the Act, as described in section 1(a) of this statute, are that information should be made available to the public and that decisions on the disclosure of government information should be reviewed independently of government. To further these objects, the Legislature created an independent, expert review authority (the Information and Privacy Commissioner) to determine issues relating to access to information requests.

Section 50(1) of the Act stipulates that a requester may appeal any access related decision made by the head of an institution to the Commissioner's office. Section 54(1) of the Act goes on to provide that, after all the evidence for an inquiry has been received, the Commissioner (or his delegate) must make an order disposing of the issues raised by the appeal.

Under the basic scheme of the Act, a Ministry must determine at first instance whether the YOA applies to any information contained in a record in order to decide whether the information should be released to a requester. Should the requester appeal this decision, section 1(a) of the Act confers a statutory obligation on the Commissioner's office to ensure that the document is not improperly withheld from disclosure under the Act. Such a result would occur, for example, where a Ministry inappropriately characterized certain records as falling within the scope of the YOA.

A similar issue arose in Order P-623, which dealt with the applicability of section 65(2) of the Act. This provision states that the Act does not apply to, among other things, clinical records as defined in the Mental Health Act. In the appeal which lead to Order P-623, the Ministry of Health refused to forward a series of records to the Commissioner's office for the purpose of determining the preliminary jurisdictional issue of whether or not the records were excluded from the operation of the Act. In that order, Inquiry Officer Holly Big Canoe approached the issue in the following fashion:

> In my view, section 65(2) can apply only to the records which fall within the scope of that section. While the Legislature clearly intended that these records should fall outside the purview of the Act, I do not believe that the Legislature intended to have the threshold issue of whether or not records fall within the

> scope of this provision determined by a non-independent body, such as the Ministry, whose decision would not be reviewable.
>
> While the Ministry must determine at first instance whether section 65(2) applies precluding access to the requester, the Commissioner, too, must be satisfied of the relevance and application of the provision to the records upon receipt of an appeal. This duty of the Commissioner is fundamental to the effective operation of the Act, the principle of providing a right of access to information under section 1(a), and the principle that decisions on the disclosure of government information should be reviewed independently of government under section 1(a)(iii).
>
> In my view, notwithstanding a claim by the Ministry that the records in question fall within the scope of section 65(2), the Commissioner (or his delegate) does have the power to compel the production of records claimed to be covered by section 65(2).
>
> This power to compel initially would be exercised for the limited purpose of determining whether or not the records fall within the scope of section 65(2) of the Act. If, having reviewed the records, I determine that the Ministry's claim is correctly made, pursuant to section 65(2) the records would be returned to the Ministry and the appeal would be closed, since I would not have the jurisdiction to conduct a further inquiry. However, if I determine that the Ministry's claim is not validly made with respect to some or all of the records (i.e., that section 65(2) does not apply to some or all of the records), then I will be required to proceed with the inquiry and determine the application of the Act to the records.

The Ontario Court of Justice (General Division) Divisional Court reviewed this order in Minister of Health et al. v. Holly Big Canoe, Inquiry Officer et al. (29 June 1994), Toronto 111/94. In its decision, the court quoted this passage and stated that "we are in agreement with the assessment by the Inquiry Officer ..." The Court then held that section 52(4) of the Act authorizes the Commissioner to have produced any document and more specifically the records which were subject to Order P-623. The Court also stated that the Commissioner must have the procedural mechanism necessary to decide matters of substance.

In accepting the approach taken in Order P-623, the Court also referred to its earlier decision in Morgan v. Windsor (Roman Catholic Separate School Board) (1979), 112 D.L.R. (3d) 163 at page 168. There, the Court stated that:

> ... an inferior tribunal must, as a preliminary to deciding the main question before it, make a decision upon a collateral or preliminary matter affecting its jurisdiction.

I have carefully reflected on the approach set out in Order P-623, as endorsed by the Divisional Court, and I find that it is equally applicable in the context of the present appeal. In my view,

threshold issues respecting whether or not government records fall within the Commissioner's jurisdiction ought not to be determined by a non-independent body, such as a Ministry, where such decisions are not subject to review. This would be the case, particularly, where the government body might be seen to have a self-interest in not disclosing all or parts of the records to a requester.

It should be pointed out that the Act provides the Commissioner's office with the powers necessary to compel the disclosure of records during the course of an inquiry. Section 52(4) of the Act states that, in an inquiry, the Commissioner may require to be produced and may examine any record that is in the custody or control of an institution, despite any other Act or privilege.

Although the Ministry claims that the information which it has deleted from the eight records in question falls within the scope of the YOA, I find, based on the scheme of the Act, that the Commissioner (or his delegate) has both the jurisdiction and a statutory obligation to determine whether this is, in fact, the case. I further conclude that the Commissioner has the power to compel the production of such records to verify this fact.

I would stress that this power would be exercised initially for the limited purpose of determining the preliminary jurisdictional issue of whether or not the information in question falls within the scope of the YOA. Should I determine that the YOA applies to these records, the doctrine of federal legislative paramountcy would apply and I would not have the jurisdiction to proceed with the inquiry. That would be the case because there is an express contradiction between the disclosure scheme contained in the YOA and the disclosure scheme in the Act (Order P-378).

Should I determine, however, that all or parts of the records in question fall outside the scope of the YOA, I would then go on to consider whether any exemption claimed by the Ministry under the Act applies to this information.

Finally, I wish to deal with the Ministry's stated concern that, by releasing the information which it considers to be subject to the YOA, for the purpose that I have outlined, it runs the risk of contravening section 46 of the YOA. According to the Ministry, such a risk would be incurred because the disclosure of the information would serve to identify the young person as someone who has been dealt with under the YOA.

The difficulty with this argument is that it presupposes that the Commissioner's office will agree that the information in question falls within the scope of the YOA. As indicated previously, this is precisely the issue which I must determine in this appeal and I cannot resolve the matter without access to the records.

I would note, in any event, that section 55 of the Act prohibits the Commissioner or any person acting on his behalf or under his direction from disclosing any information which comes to their knowledge in the performance of their powers, duties and functions under the Act or any other Act. On this basis, should I determine that any of the requested information falls within the

parameters of the YOA, the information would immediately be returned to the Ministry and would not be disclosed to any third party.

In order for me to proceed with this inquiry it follows, therefore, that the Ministry must provide me with the complete text of the eight records for which deletions under the YOA have been made.

ORDER:

1. I order the Ministry to produce to me by August 24, 1994 the full contents of Records 1, 2, 4, 7, 8, 9, 11 and 15 which are more fully described in Appendix "A" to this interim order.

2. The records referred to in Provision 1 of this interim order should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: August 4, 1994
Irwin Glasberg
Assistant Commissioner

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION OF RECORD	NUMBER OF PAGES	NUMBER OF DELETIONS
1	Inter-office memorandum from a lawyer within the Ministry's Legal Services Branch, October 6, 1993	3	1
2	Contentious issue charts	4	1 page
3	Notes for Minister, October 14, 1993	1	0
4	General questions and answers regarding contentious issue	7	1
5	Questions and answers related to adoption of an aboriginal child	2	0
6	Inter-office memorandum from a Ministry Program Supervisor, September 25, 1993	1	0
7	Contentious issue report	7	14
8	Document on Ministry letterhead, "Confidential" handwritten at top	5	entirely deleted
9	Inter-office memorandum from a Ministry Area Manager, September 29, 1993	3	almost entirely deleted
10	Inter-office memorandum from a Ministry Program Supervisor, September 25, 1993	1	0
11	Contentious issue report (duplicate of Record 7)	6	9
12	Newspaper clippings	11	0
13	Inter-office memorandum from a Ministry Information Officer, September 29, 1993	2	0
14	Hansard excerpts, September 27 and 28, 1993	12	0
15	Draft "Interim" Report of Ministry Review Team, October 5, 1993	8	13