



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

ORDER P-714

Appeals P_9400100, P_9400101 and P_9400102

Ministry of the Attorney General



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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 appellant submitted the following three-part request to the Ministry of the Attorney General (the Ministry):

- copies of information contained in all files relating to charges laid against the appellant's son (the accused)
- copies of documentation in the Crown's files that the appellant had threatened the life of witnesses in the above-mentioned matter
- copies of any allegations against the brother of the accused which appear in the Crown's files or notes.

In its decision letter, the Ministry indicated that records were located which were responsive to part one of the request, and partial access was granted to them. With respect to parts two and three of the request, the Ministry claimed that no responsive records exist.

The appellant does not wish to pursue the exemptions claimed by the Ministry regarding part one of the request, but believes that more records should exist relating to his entire request.

A notice of inquiry was provided to the appellant and the Ministry. Representations were received from the Ministry only. The Ministry's representations include a sworn affidavit from the Assistant Crown Attorney (the ACA) who had original carriage of the file relating to the trial of the accused.

DISCUSSION:

REASONABLENESS OF SEARCH

In his letter of appeal, the appellant indicated that physical evidence was submitted at his son's trial relating to part two of the request, and that reference was made to his other son during the trial (which relates to part three of the request).

During the inquiry stage of the appeal, the Ministry located additional records in the custody of the Durham Regional Police Services Board (the Police) which are responsive to parts one and two of the request, but maintain that no records exist in relation to part three of the request. The Ministry's representations indicate that a decision on access has not yet been made. The Ministry does not provide any reasons for the delay in issuing a decision letter, nor does it indicate when a decision will be made. Section 26 of the Act requires access decisions to be made within 30 days after a request is made. I will, therefore, order the Ministry to issue a decision letter to the appellant with respect to these records.

The ACA's affidavit sets out the steps taken to search for responsive records. He indicates that he was initially assigned as prosecutor in the above-noted case, but the case was reassigned to another prosecutor. In responding to the request, he searched and located all files in his possession relating to the trial. He also states that ordinarily he does not retain his copy of old files. He did not make any other inquiries, although he alludes to an awareness that Police files might have contained responsive records. The ACA states that at no time did he advise that the

documents in his possession represented a comprehensive set of material compiled in the investigation.

In his affidavit, the ACA also indicates that during mediation of this appeal, inquiries were made with the Police to determine whether or not responsive records might be in the possession of the Police. The ACA attended at the Records Branch of the Police and determined that records relating to the request were located at these premises. The Ministry did not transfer this portion of the request to the Police, however. Nor was the appellant advised that the Police might have responsive records.

Where the requester provides sufficient details about the records which he 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 any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence which shows that it has made a **reasonable** effort to identify and locate records responsive to the request.

I am not satisfied that the Ministry's search for responsive records was reasonable in the circumstances of this appeal for the following reasons:

- (1) The ACA's affidavit makes vague reference to files located in his personal possession and to his own personal record keeping practices. However, he does not provide any information concerning how Crown files of this nature are ordinarily maintained, how they are disposed of and whether or not any responsive records might be located elsewhere. He does not indicate that any other location was searched or might have contained records responsive to the request.
- (2) He indicates that another prosecutor was assigned to conduct part of the prosecution, yet there is no indication that this individual was contacted to determine whether he might be in possession or have knowledge of the location of responsive records.

In view of the above, I am of the opinion that the Ministry has made a minimal attempt to locate responsive records. Although further records were located in the custody of the Police subsequent to the original decision, for which a decision will be ordered to be made, I am not satisfied that the Ministry has made reasonable efforts to search within its own files for responsive records.

ORDER:

1. I order the Ministry to provide a decision letter to the appellant, relating to the records it currently has in its possession for which a decision has not yet been made, within ten (10) days of the date of this order.
2. I order the Ministry to conduct a further search for records responsive to all three parts of the appellant's request. At a minimum the Ministry should make reasonable inquiries of

the other Crown Attorney who assisted in the prosecution of the accused. In addition, the search should include all locations in which Crown Attorney's files might be maintained upon completion.

3. I order the Ministry to notify the appellant in writing as to the results of the search referred to in Provision 2, within ten (10) days of the date of this order.
4. If, as a result of the further search, the Ministry identifies any records responsive to the request, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26 and 29 of the Act, considering the date of this order as the date of the request and without recourse to a time extension.
5. I order the Ministry to provide me with a copy of the notification referred to in Provision 3 and a copy of the decision letter referred to in Provision 1 within fifteen (15) days of the date of this order.
6. If any records are discovered upon further search, I order the Ministry to provide me with a copy of the decision letter referred to in Provision 4 of this order within thirty-five (35) days of the date of this order.
7. The notice and decision letters referred to in Provisions 5 and 6 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

POSTSCRIPT:

The ACA indicated that he was aware that the Police might have responsive records, but consciously chose not to contact them at the time of the original request. Although steps were taken after the fact to make further inquiries and locate records in the custody of the Police, the appellant was not notified.

Sections 25(1) and (2) of the Act provide for the forwarding or transfer of a request where the Ministry determines that another institution has either custody or control of a record or has a greater interest in the record. In my opinion, had the Ministry made some effort to transfer the appellant's request to the Police when the request was initially made, some of the issues in this appeal might have been avoided.

Original signed by: _____
Laurel Cropley
Inquiry Officer

June 24, 1994