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

ORDER P-994

Appeal P-9400628

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 Ministry of the Attorney General (the Ministry) received a request for a copy of the "Information" regarding an assault charge initiated by the requester against a named dentist on October 28, 1993.

The Ministry responded to the requester and advised her that the record she seeks is a "court record", and as such is not subject to the Act. The Ministry further indicated that "court records" are not in its custody and control. The Ministry advised the requester to contact the court office where the proceedings took place, and provided the name, address and telephone number of the Manager of Administration for that office. The requester appealed the Ministry's decision.

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from the Ministry only.

The issues to be determined in this appeal are whether the records at issue are subject to the Act, and whether the Ministry's search for records was reasonable in the circumstances of this appeal.

The Commissioner's office will examine very closely the claim by an institution that certain records fall outside the scope of the Act, for such a finding impacts on both the right of access to information and the right to the protection of personal privacy, which are set out in section 1 of the Act as follows:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

A determination that an institution or certain categories of records are not subject to the Act potentially removes information found therein from the protection provided by Part III of the Act, as well as from the access provisions contained in Part II of the Act.

DISCUSSION:

ARE THE REQUESTED RECORDS SUBJECT TO THE ACT?

Section 10(1) of the Act states:

> 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.

Section 65 of the Act, which provides an exception to this general right of access, states:

> (1) This Act does not apply to records placed in the Archives of Ontario by or on behalf of a person or organization other than an institution.
>
> (2) This Act does not apply to a record in respect of a patient in a psychiatric facility as defined by section 1 of the Mental Health Act, where the record,
>
> (a) is a clinical record as defined by subsection 35(1) of the Mental Health Act; or
>
> (b) contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.
>
> (3) This Act does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with the proceeding.

It is clear from the wording of section 10(1) that in order to be subject to an access request under the Act, a record need only be under the custody **or** the control of an institution. The exception to this general rule, found in section 65 of the Act, states explicitly that certain categories of records, which may be in the custody or control of an institution, are not subject to the application of the Act. Court records are not specifically included as a category of records to which the Act does not apply. Accordingly, the application of the Act to them must be considered within the general framework of the legislation, which provides that, in the absence of any express exclusion, all records within the custody or control of an institution are subject to the Act.

In the circumstances of this appeal, the analysis of the issue of custody and control is complex. In order to facilitate a full examination of the issue, I have broken the analysis down into a series of sub-issues. The ensuing discussion examines each sub-issue in turn.

Nature and Location of the Record at Issue

In my view, before it is possible to make any decision regarding the application of the Act to a specific type of record, it is essential that the nature of the record be clearly defined. The term "court record", as referred to by the Ministry, is not defined in the Act. In determining the scope of what constitutes a "court record", it is helpful to review related definitions which have been employed in other jurisdictions. Both the Alberta and British Columbia Freedom of Information and Protection of Privacy Acts (FOIPPA) contain similarly worded sections which outline the types of records that are subject to their legislation. Section 3(1)(a) of the British Columbia FOIPPA provides, for example, that:

> This Act applies to all records in the custody or under the control of a public body, **including court administration records**, but does not apply to the following:
>
> > a record in a **court file**, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a **judicial administration record** or a **record relating to support services provided to the judges of those courts**. [emphasis added]

Both Alberta and British Columbia distinguish between "court administration records" and records in "court files". British Columbia defines court administration records in its Policy and Procedures Manual, Volume I, produced by the Information and Privacy Branch of the Ministry of Government Services as those files pertaining to non-judicial staffing which deal with personnel issues, position competitions and office management. Although what constitutes a "court file" has not been defined and is, therefore, not clear, I agree, in general, with the distinction between court administration records and other court records.

Alberta and British Columbia have expressly excluded records in a court file from the application of their respective legislation. Although this may provide some guidance in analyzing this issue in the current appeal, it is not, in my view, determinative of the issue.

It is possible that a "court file" may contain many types of records, such as administrative records, records directly related to the action, and records relating to enforcement of orders. The factual circumstances of this appeal do not facilitate extensive discussion of the scope of what constitutes a record in a court file. This issue may, in fact, have to be determined on a case by case basis depending on the nature of the records requested. In my view, future decisions regarding this issue might also include discussion of the distinction between court administration records and records which are normally found in court files, as well as other types of records that find their way into a court file. Generally speaking, however, I am prepared to accept that, what the Ministry refers to as "court records", consist of those records which relate to a court action and which are found in a court file.

In its representations, the Ministry indicates generally that "court exhibits and original papers" are the types of records that would be found in a court file.

The request was for a copy of an "Information". This document is a written complaint which, once sworn before a Justice of the Peace, commences the criminal proceedings. As such, it may be defined as an "originating document"to the proceedings. In my view, on a plain understanding of court proceedings, an "Information" is a type of document that would clearly fall within the scope of documents which are directly related to a court action, and, accordingly, qualifies as a record which would be contained in a court file.

The Ministry indicates that process in this case was not issued and that there is no "Information". Rather, the record at issue in this appeal is a document which confirms that the appellant attended at the court to swear an "Information" before a Justice of the Peace. The Ministry indicates that this document was located in a court file at the Ontario Court at the East Mall.

I find that the record at issue pertains to the appellant's attempts to initiate criminal proceedings against the named dentist and that it is a type of document which would be, and in fact is, contained in a court file. Accordingly, I am satisfied that the record at issue is a record relating to a court action which is located in a court file. Having established the nature and location of the record, I must now decide whether the Act applies to it.

Are the Courts Institutions under the Act?

As I indicated above, generally, in order to be subject to an access request under the Act, a record must be in the custody or under the control of an institution. As a first step in determining whether the Act applies to records relating to a court action in a court file, it is necessary to examine the status of the courts within this legislative scheme, that is, whether or not the courts are institutions under the Act.

"Institution" is defined in section 2(1) of the Act as follows:

> "institution" means,
>
> (a) a ministry of the Government of Ontario, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;

In its representations, the Ministry notes that the courts are not designated as institutions by regulation. I have reviewed the Schedule to Regulation 460 (R.R.O. 1990), which is the only place institutions are designated under paragraph (b), and I concur that courts are not designated as institutions. With respect to paragraph (a), I will now consider whether the courts constitute a Ministry or part of a Ministry of the Government of Ontario.

In providing a backdrop for its discussion of the issues in this appeal, the Ministry has provided extensive representations with respect to the legal framework surrounding the courts and the administration of court records. In doing so, the Ministry has cited and referred to a number of statutes, including the Courts of Justice Act, S.O. 1984, c.11 (the CJA) [now CJA, R.S.O. 1990, c.43], and leading cases dealing with this issue.

The Ministry also refers to the purposes of the Act as well as the legislative debates which followed the introduction of this legislation by then Attorney General Ian Scott, and submits that a plain reading of section 1 clearly indicates that the access provisions of the Act were intended to provide access to records of the executive branch of government. The Ministry suggests that the courts (i.e. the judicial branch of government), are not, in the usual meaning of the word, a part of government.

In this regard, the Ministry submits that the courts are constitutionally separate from the Ministry, and that this principle is reflected in the CJA. Moreover, the common law has recognized the ability of the courts to control the course of litigation without interference from the executive branch of government (which includes the Ministry) as fundamental to our legal system (R. v. Valente (No. 2) (1983), 41 O.R. (2d) 187 (C.A.), aff'd. (1985), 24 D.L.R. (4th) 161 (S.C.C.)).

Finally, the Ministry points out that the courts are a significant and distinct body. On this basis, had the legislature wished to include these bodies under the Act, it would be logical to assume that they would have been expressly defined as an institution. The Ministry submits further that the purpose underlying Part II of the Act is to ensure public access to information. The courts, however, are already subject to an access regime which provides that court exhibits and original papers are generally available to the public through the court office. The Ministry notes that the application of the Act to the judiciary was specifically considered by the Williams Commission in the Report of the Commission on Freedom of Information and individual Privacy (1980). The report concluded that the Act should not be applied to judicial proceedings.

In my view, the discussions surrounding the evolution of the Act clearly contemplate that the courts and the judiciary (that is, the judicial branch of government) are to be set apart from other types of institutions and from the other branches of government generally. The unique function the courts fulfil within our society is distinct from the usual perception of "government". Accordingly, I find that the courts are not part of any Ministry and are not included in paragraph (a) of the definition of "institution".

Since I have found that the courts are not included in either paragraph (a) or (b) of the definition of "institution", they are not institutions under the Act.

In its representations, the Ministry has acknowledged that it has a special relationship with the courts. In my view, this special relationship impacts on the issue of whether or not records in a court file are in the custody and/or control of an institution. As a preliminary step to determining whether the Ministry has custody and/or control of the record at issue, I will explore this relationship.

Relationship Between the Ministry and the Courts

In general, the CJA establishes that the Attorney General is responsible for all matters connected with the administration of the courts, **except** those matters which are assigned by law to the judiciary. The former category includes providing court buildings and the staff needed to run them. Staff such as Registrars, sheriffs, court clerks and other administrative staff are appointed under the Public Service Act through the Ministry.

With respect to the role of Ministry staff, section 95(1) of the CJA [section 78(1), CJA, 1990] states that:

> In matters that are assigned by law to the judiciary, registrars, court clerks, court reporters, interpreters and other court staff **shall act at the direction of the chief justice** or chief judge of the court. [emphasis added]

In acknowledging that the responsibility over records in a court file is divided between the Ministry and the judiciary, the Ministry maintains that such records are central to the adjudicative process of the courts and are, therefore, intimately related to the judicial function of the courts. Further, the Ministry submits that while recognizing the administrative role the Ministry plays in maintenance of these records, the common law has expressly recognized the right of the courts to supervise and protect their own records (see: Re London Free Press Printing Co. Ltd. and Attorney General of Ontario (1988), 66 O.R. (2d) 693 (H.C.)).

In this regard, the Ministry recognizes that it has possession of such records in that they are housed in Ministry premises and are cared for by Ministry staff, and that, as administrator of the courts, it has a limited right to possess these records, in that responsibility for administrative decisions regarding the establishment of procedures for accessing the records may lie with the Ministry. The Ministry submits, however, that it possesses the records as a "custodian" only and any authority it has over the records' use is subject to supervision by the courts.

I have found that the courts are not institutions under the Act. Moreover, I recognize that the independence of the judiciary is well established in the common law and reflected in the CJA. In my view, the objectives of the Act as set out in section 1 are, to a certain degree, met by the "public" nature of court proceedings and the ability of the judiciary to control the dissemination of sensitive information. In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those records which are directly related to this function. However, because of the administrative relationship of the Ministry to records in a court file, the question remains, does the Ministry have custody and/or control over these records for the purposes of the Act.

Indicia of Custody/Control

In Order P-239, Commissioner Tom Wright considered whether records in the possession of the Ministry of Government Services, but prepared by the Ombudsman (which is not an institution under the Act), were subject to the Act.

With respect to the issue of "control", he said:

> In my view, the fact that there may be limits on the institution's ability to govern the use of the records is relevant to the issue of whether the institution has control of the records, but does not preclude an institution from having custody.

He went on to consider the issue of "custody", and stated:

> I agree that bare possession does not amount to custody for the purposes of the Act. In my view, there must be some right to deal with the records and some responsibility for their care and protection.

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. He stated further:

> 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.

He then set out a number of factors that would assist in determining whether an institution has custody or control of a record. These are as follows:

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 records used?

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?

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. Similarly, this appeal must be decided on the basis of its particular facts.

In its representations, the Ministry has addressed each of the ten factors set out above, and has identified several additional factors for consideration. The following encapsulates the Ministry's submissions in this regard.

The record at issue was generated by the appellant, not the Ministry, for the purpose of placing the matter before a court. Although the Ministry may become involved once process is issued, in this case, process was not issued, and the Ministry had no role to play in the matter.

As I indicated above, the Ministry submits that it has possession of the record as a "custodian" only and any authority it has over the record's use is subject to supervision by the courts.

Moreover, the Ministry submits that the record does not relate to its mandate and functions, but rather relates to the court proceedings for which the record was created. Further, the record is not integrated with Ministry records in any way.

With respect to the disposition of the record, section 95a of the Courts of Justice Amendment Act, 1989, S.O. 1989, c.55 [section 79, CJA, 1990] provides that court records are to be disposed of in accordance with the directions of the Deputy Attorney General. However, these directions are subject to the approval of the chief judge of the relevant court.

Further, in this regard, the Ministry indicates that the responsibility for making decisions about access is vested in the "head". The head of the Ministry is the Attorney General. The Ministry submits that if court records were subject to the access requirements of the Act, the Attorney General would be responsible for making access decisions and this would alter the common law approach, which vests judges with this authority. This could, the Ministry argues, impair the constitutional separation between the courts and the executive branch of government.
I have carefully considered the Ministry's representations, and I find that although the Ministry is in "possession" of records relating to a court action in a court file, its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to "custody" for the purposes of the Act. Nor do I find, in applying the factors set out in Order 120 to the evidence before me, that there are indicia of "control" over these records by the Ministry.

For these reasons, I find that the Ministry does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the Act and, accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the Act.

I am not satisfied, however, that this conclusion extends to copies of such records which exist independently of the "court file". Accordingly, to the extent that copies of these records also exist independently of the "court file", they would fall within the custody and/or control of the Ministry and, therefore, would be subject to the Act.

The record at issue in this appeal is a record which is found in a file of a Justice of the Peace. The Ministry submits that the judicial independence of Justices of the Peace has been established by statute (Justices of the Peace Act, R.S.O., 1990, c. J.4.) and the common law (see: Reference re Justices of the Peace Act (1984), 16 C.C.C. (3d) 193 (Ont. C.A.), and that its submissions on the status of the courts generally should be equally applicable to records held by a Justice of the Peace. I am satisfied that the judicial independence accorded the courts is similarly applicable to Justices of the Peace. Accordingly, the discussion of all issues in this order with respect to the courts applies equally to a Justice of the Peace.

In conclusion, I have found that the record at issue is a record in a court file relating to a court action. Accordingly, I find that, to the extent that this record exists in a court file, the Ministry does not have custody and/or control of the record, and it is, therefore, not subject to the Act.

REASONABLENESS OF SEARCH

I have found that the record at issue in this appeal is a record relating to a court action located in a court file. While the Ministry need not search court files for records relating to a court action which have been requested under the access provisions of the Act, such as the record requested in this appeal, it must search its own record holdings to determine whether it has copies of responsive records within its custody and/or control. As I indicated above, the second issue in this appeal concerns the reasonableness of the Ministry's search for records in the circumstances of this appeal.

In its representations, the Ministry submits that the requested record exists only in a court file and is, therefore, accessible from the court only. The Ministry outlines the steps taken to search for the requested records. The details of that search are set out in a sworn affidavit of the Assistant Co-ordinator, Freedom of Information and Privacy Office, which the Ministry provided with its representations.

In her affidavit, the Assistant Co-ordinator indicates that she contacted the Manager of Administration at the Ontario Court at the East Mall to inquire how a document in a court file could be obtained. This information was provided to the appellant in the decision letter. In addition, the Assistant Co-ordinator asked the Manager to confirm the existence of the requested document. The Manager advised that there was no "Information" but that there was a record at the court which confirmed that the appellant attended the court to swear an "Information" before a Justice of the Peace. The Manager also indicated that no further action had been taken on this matter.

The Ministry submits that since no process issued, and no charge was actually brought, there would be no prosecution and no reason for the Ministry to have any record of this matter. It was, therefore, not necessary to conduct a further search for responsive records.

Where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates, in this case implicitly, that such a record does 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 record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

I have carefully reviewed the Ministry's representations and the affidavit of the Assistant Co-ordinator, and I am satisfied that the Ministry has taken all reasonable steps to locate the record responsive to the appellant's request. In this regard, I have one observation to make about the Ministry's approach in conducting its search for responsive records. Although I found above that records relating to a court action in a court file are not subject to the Act, the Ministry's approach in contacting the court office was consistent with the principles of the Act, and I would encourage it to continue to process these types of requests in a similar fashion.

ORDER:

I uphold the Ministry's decision.

Original signed by: September 5, 1995
Laurel Cropley
Inquiry Officer

POSTSCRIPT:

It is important to note that although I have found that records relating to a court action which are located in a court file are not subject to the Act, this does not necessarily constitute a denial of access to the information contained in such records. Rather, the appellant must secure the information from a different source. The Ministry has indicated to the appellant that she may access the information by contacting the relevant court office in accordance with the procedures that have been established for making records in a court file available to the public.