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

# ORDER P-1089

## Appeal P-9500406

## Ministry of the Attorney General

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## NATURE OF THE APPEAL:

The appellant made a request to the Ministry of the Attorney General (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to executions or judgments against him in the Judicial District of Sudbury. These documents take the form of writs issued by a court, which are then filed with one or more sheriff's offices. Formerly called "writs of execution", such writs are now known as "writs of seizure and sale", and I will refer to them as such in this order.

In his request letter, the appellant acknowledged that there is another way of obtaining this information, namely, paying the prescribed fee for a search at the sheriff's office for the judicial district in question. The appellant's request also indicates that his purpose in making the request under the Act is to avoid paying the sheriff's search fee.

The Ministry responded to the request by indicating that the records sought are court records, which are not in the Ministry's custody or under its control. Only records which are in the custody or under the control of an institution are subject to the Act.

The appellant filed an appeal of this decision.

The Commissioner's office sent a Notice of Inquiry to the appellant and the Ministry. Representations were received from both parties.

The sole issue to be decided in this case is whether responsive records, if they exist, would be in the Ministry's custody or under its control.

## DISCUSSION:

### ARE THE RECORDS IN THE MINISTRY'S CUSTODY OR UNDER ITS CONTROL?

In Order P-994, Inquiry Officer Laurel Cropley considered an argument by the Ministry to the effect that a copy of an "information" (a document used to initiate a criminal prosecution) in a court file was a "court record" and therefore fell outside the scope of the Act.

The Inquiry Officer reached the following conclusions with respect to the Ministry's argument:

(1) the Act does not define a class of records called "court records", nor are records in this category expressly excluded from the Act by any of its provisions;

(2) the question of whether a so-called "court record" comes within the scope of the Act must therefore be determined based on the general principles enunciated in the Act, and in particular, the principle enunciated in section 10(1) to the effect that a record must be in the custody **or** under the control of an institution in order to fall within the scope of the Act;

(3) courts are not "institutions" under the Act, and, based on the constitutional separation of the judiciary from the other branches of government, courts are not part of any Ministry;

(4) by virtue of the Courts of Justice Act and the common law, courts have a right to supervise and protect their own records (i.e. records which are directly related to a court's adjudicative function);

(5) records of the type at issue in Order P-994 (i.e. "informations") found within a court file are in the possession of the Ministry but it is only a bare possession, and they are not under the Ministry's control;

(6) based on Order P-239, "bare possession" does not amount to custody for the purposes of the Act; rather, there must be "some right to deal with the records ...";

(7) as a result of points (5) and (6), neither custody nor control were established for "informations" found in court files, and they fall outside the scope of the Act; and

(8) copies of such records which exist independently of a "court file" may be within the custody or control of an institution and, in that event, would be subject to the Act.

I agree with these conclusions and adopt them for the purposes of this appeal. Accordingly, I will review the storage and handling of writs of seizure and sale filed with the sheriff, and their relation to the judicial process, with a view to determining whether they are in the Ministry's custody and/or control.

Inquiry Officer Cropley's analysis refers to section 10(1) of the Act as the basis of the "custody or control" threshold for the application of the Act to a record. That section provides for access requests relating to general records. Access requests for records containing one's own personal information are provided for by section 47(1) of the Act. Since the requester in this case is seeking executions or judgments filed against himself, it is clear that such records, if they exist, would contain his personal information.

Therefore, in this appeal, it is the access provisions of section 47(1) which apply. Like section 10(1), these also establish "custody or control" as the threshold for the application of the Act to a record. In my view, the application of section 47(1) in this case does not change the standards established in Order P-994 for the application of the Act to so-called "court records".

The Ministry has provided some factual information about writs of seizure and sale, their issuance and filing in a sheriff's office, and the sheriff's storage and handling of such documents. Pursuant to a court judgment, the judgment creditor or his/her lawyer may requisition the issuance of a writ of seizure and sale. For a fee, the court registrar (who acts as a court official in this regard) would then issue the writ. Subsequently, the writ is filed with the sheriff, for a fee. The sheriff, who is an officer of the court, assigns a file number to the writ and enters it in a computerized writ search system. Writs stay in effect for six years after filing and may be renewed by the judgment creditor. A sheriff may not alter the writ in any way without a court order. Once the writ has been fully satisfied, the judgment creditor **must** have the writ withdrawn, pursuant to the Rules of Civil Procedure. If the judgment creditor does not withdraw a satisfied writ, the judgment debtor may file an application with the court for an order to withdraw the writ.

The Ministry concedes that, in its function of providing administrative services to courts, such writs may at times be in the possession of Ministry employees. However, the Ministry submits that this would be no more than a "bare possession", with no right to dispose of or otherwise deal with them outside of the express or implied supervision of the court. Therefore, the Ministry submits that writs of seizure and sale filed with the sheriff are not in its custody or control, and fall outside the scope of the Act.

The appellant submits that writs of seizure and sale filed in a sheriff's office are in the Ministry's custody and/or control because the Ministry has physical possession, and because of the day-to-day control exercised over the records by Ministry staff. In support of this view, the appellant has provided a copy of a letter outlining a new computerized search facility developed in co-operation with the Ministry of Consumer and Commercial Relations.

My findings in this matter are as follows:

(1) in issuing and dealing with writs of seizure and sale, the Registrar and the sheriff act as officers of the Court;

(2) writs of seizure and sale result from judgments of a court and remain under the court's overriding supervision while in the possession of the sheriff;

(3) despite the Ministry's administrative involvement with writs of seizure and sale, including the manner in which searches for them are conducted by members of the public, the Ministry does not have sufficient powers relating to the acquisition, retention and disposal of writs of seizure and sale by the sheriff to give it "control" over such writs in the hands of the sheriff;

(4) the Ministry's possession of writs of seizure and sale in the hands of the sheriff is a "bare" possession, and does not include sufficient rights to deal with them to amount to "custody" for the purposes of the Act;

(5) accordingly, the Ministry does not have custody or control of writs of seizure and sale in the hands of the sheriff and I find that they fall outside the scope of the Act.

In my view, this disposes of the matter. However, before concluding this discussion, I wish to deal with one more argument raised by the appellant. Both the Ministry and the appellant state that, for a fee of $11 per name, sheriff's offices will conduct a name search for writs against an individual in a given judicial district. In this regard, the appellant states as follows:

> ... [I]n my real estate practice which involves routine searches of this database, easily 95% of the requests come back as "clear" -- no records exist. These searches can be executed and printed in a matter of seconds. Yet the Ministry charges and receives $11 per name for these searches.
>
> This database is nothing but a profit centre for the Ministry.

This argument has no bearing whatsoever on the issue of custody and control. In deciding whether records fall outside the scope of the Act, the fairness or otherwise of prices charged for access to such records is not a relevant consideration.

I would also like to note, for the sake of clarity, that my finding that writs of seizure and sale in the hands of the sheriff are not subject to the Act does not preclude access to these documents. As the appellant notes in his request, and in the representations I have just quoted, the information is available from the sheriff for a fee.

## ORDER:

I uphold the Ministry's decision.

Original signed by: December 28, 1995
John Higgins
Inquiry Officer