



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

ORDER P-231

Appeal 890072

Ministry of Natural Resources



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O R D E R

INTRODUCTION:

A request was submitted to the Director of the Conservation Authorities and Water Management Branch of the Ministry of Natural Resources (the "institution") under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") for access to:

...some of the records dealing with previous decisions of the Mines and Lands Commission.

The requester subsequently clarified his request with the institution and included the records of the office of the M&L Commissioner (the "M&L Commissioner") which he believed to be a department within the institution.

By letter dated February 28, 1989, the institution's Freedom of Information and Privacy Co-ordinator informed the requester that access would not be provided since the office of the M&L Commissioner was not covered by the Act.

The institution provided the requester with a further response in which it asked for clarification of his request and provided him with information about fees.

The requester appealed the institution's response to his request and notice of the appeal was sent to the appellant and the institution.

Subsequently the appellant provided the institution with further clarification of his request. The records requested by the appellant are as follows:

1. A complete & up to date Index of all the decisions the M&L Commissioner's department has dealt with since 1973 in regards to appeals under the Conservation Authorities Act, Section 27 part 2C.
2. A complete list of appeals submitted to the Ministers of Natural Resources since 1973 under the Conservation Authorities Act, Section 27 part 2C.
3. Updated schedules of pending appeals to be heard by the M&L Commissioner as directed by the Minister of Natural Resources under the Conservation Authorities Act.
4. Accessibility to all the M&L Commissioner's decisions pursuant to the Conservation Authorities Act.
5. Access to all correspondence between the M&L Commissioner and the Minister of Natural Resources dealing with policies and final judgments of all cases since 1973 pertaining to same.
6. Access to all records outlining the guidelines and policies given to conservation authorities from the Minister

of Natural Resources to calculate the flood lines.

On April 27, 1989, the institution responded to the appellant's clarified request as follows:

1. A complete and up-to-date index of the M&L Commissioner's decisions was provided.
2. A list of appeals submitted to the Minister of Natural Resources since 1973, exists in part.
3. There is no schedule of pending appeals. The M&L Commissioner's office sends individual notices to the Ministry of each separate hearing once the time and place has been decided.
4. The institution was willing to provide access to the decisions of the M&L Commissioner from 1973 that are available in the Conservation Authorities and Water Management Branch (the "CAWMB"). The appellant was asked to arrange a meeting with a named individual to examine the decisions.
5. The institution noted that no correspondence between the institution and the M&L Commissioner dealing with Ministry policies as applied to any cases or the Commissioner's final judgments, exists.

6. The institution noted that copies of "Flood Plain Management in Ontario--Technical Guidelines," are available to the public at the CAWMB for \$25.00 per copy.

The Appeals Officer was unsuccessful in his attempts to mediate a settlement and the appeal proceeded to an inquiry.

Notice that an inquiry was being conducted to review the head's decision was sent to the appellant, the institution and the M&L Commissioner. Enclosed with the notice letter was a report prepared by the Appeals Officer which is intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This Report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the Report.

Representations were received from the institution and the M&L Commissioner. The appellant did not provide representations.

RECORDS AT ISSUE:

The following records are at issue. The appellant is not interested in the "Flood Plain Management in Ontario--Technical Guidelines".

- Record 1. A summary of decisions of the M&L Commissioner dealing with appeals under the Conservation Authorities Act.
- Record 2. A schedule of pending appeals pursuant to the Conservation Authorities Act (inclusive of time and place of hearings).
- Record 3. Copies of all written decisions by the M&L Commissioner "on conservation authority appeals".
- Record 4. Hearing files (including correspondence reports and exhibits) of the M&L Commissioner that correspond to each decision.
- Record 5. A complete list of appeals submitted to the Ministry of Natural Resources since 1973, pursuant to the Conservation Authorities Act.
- Record 6. All correspondence between the M&L Commissioner and the Minister of Natural Resources dealing with policies and final judgments of all cases since 1973 pertaining to same.

PURPOSE OF ACT/BURDEN OF PROOF:

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

Section 53 of the Act provides that the burden of proof that a record falls within one of the specified exemptions in this Act lies with the head of the institution (the "head").

PRELIMINARY MATTER:

There is a preliminary matter which I will address. The institution has taken the position that the Information and

Privacy Commissioner/Ontario does not have jurisdiction to address certain issues in the appeal because the appellant did not appeal its decision of April 27, 1989.

In the circumstances, I am satisfied that an appeal of the institution's decision of February 28, 1989, was filed with this office on March 16, 1989. In my view, any subsequent correspondence between the parties merely clarified the institution's decision of February 28, 1989, as well as the exact nature of the appellant's request. As such, I am of the view that I have the jurisdiction to proceed to address all the issues raised by this appeal.

ISSUES/DISCUSSION:

- A. Whether the office of the M&L Commissioner is an institution under the Act.
- B. If the answer to Issue A is in the affirmative, whether there are any records within the custody or under the control of the M&L Commissioner that would in any way be responsive to the appellant's request.
- C. Whether there are any records within the custody or under the control of the institution that would in any way be responsive to the appellant's request.

ISSUE A: Whether the office of the M&L Commissioner is an institution under the Act.

The definition of institution which appears in subsection 2(1) of the Act reads as follows:

"institution" means,

- (a) a ministry of the Government of Ontario, and

- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;

I have received representations from the institution and the M&L Commissioner stating why they believe that the office of the M&L Commissioner is not covered by the Act.

In its representations, the institution states:

... it is the position of the Ministry that the Mining and Lands Commissioner is a separate institution from the Ministry of Natural Resources. He acts as an independent administrative review tribunal determining rights of individuals under the Conservation Authorities Act and the Mining Act. As such, he exercises his functions similar to administrative appeal boards which are listed as institutions under Ont. Reg. 532/87.

The institution has also noted that the M&L Commissioner is not designated as an institution by regulation.

The M&L Commissioner in his representations states:

The position of this tribunal is that for the purposes of the Freedom of Information and Protection of Privacy Act, 1987 the office of the Commissioner is not an institution within the meaning of the Act.

Firstly the office is not included in the regulation and the inclusion of other bodies related to the management of the resources of the province in the regulation illustrates the intention to exclude the Commissioner from the Act.

An agency, board or commission can be designated as an institution to which the Act applies by regulation made under the Act. A review of the regulations made pursuant to the Act confirms that the office of the M&L Commissioner has not been designated as an institution by regulation. However, in my view, the fact that the office of the M&L Commissioner is not presently designated as an institution by regulation does not lead to the conclusion that this was done intentionally.

As the M&L Commissioner has not been designated as an institution by regulation, the question now turns to whether the office of the M&L Commissioner is a ministry of the Government of Ontario.

In its representations the institution states that:

... under both the Mining Act and the Conservation Authorities Act, the Mining and Lands Commissioner acts as an independent review tribunal. In the case of the latter, he acts as a review of a Conservation Authority's decisions to grant a permit under section 28. In Dupont v. Inglis, the Supreme Court of Canada indicated that the Mining Commissioner acted as an inferior appellate court. The rules of procedure, including procedure for judicial review of his decisions, as set out in Part VIII of the Mining Act and adopted in section 6 of the Ministry of Natural Resources Act, reflect the notion that the Mining And Lands Commissioner acts as an inferior appellate court or independent administrative review tribunal. Thus, in exercising its jurisdictions under both Act, he does so independently of the Ministers of Natural Resources and Northern Development and Mines.

In his representations the M&L Commissioner notes that:

.... it is the position that the Commissioner is not part of the Ministry of Natural Resources for the purposes of the Act. The Commissioner exercises administrative, judicial and quasi judicial functions under several statutes, the most significant of which is the Mining Act which is not at this time administered by the Minister of Natural Resources. The object of the provisions of the various Acts under which the Commissioner operates is to separate the Commissioner as much as possible from the Ministries and provide an independent, impartial tribunal.

This object is apparent in clause 6(6)(b) of the Ministry of Natural Resources Act where the duties dealt with by regulation are "assigned" to the Commissioner as contrasted with the concept of delegation used in section 7. The legal distinction between delegation and assignment is trite and illustrate the object of separation.

Further the element of independence is illustrated by the appeal procedure contained in Part VIII of the Mining Act. Appeals lie to the Divisional Court as contrasted with appeals to the Minister or the Lieutenant Governor in Council illustrating the elements of independence and impartiality.

The representations of the institution and the M&L Commissioner are persuasive. The independence of the M&L Commissioner and the appeal routes established in the pertinent Acts point to the independence of the M&L Commissioner from the institution. In my view, the M&L Commissioner is not a ministry of the Government of Ontario for purposes of the Act.

Accordingly, I conclude that the office of the M&L Commissioner is not covered by the Act.

As an aside I wish to mention that I gave careful consideration to the value of developing a list of factors which could be applied when determining if a particular agency is or is not

covered by the Act. In the end I concluded that such an exercise would only add confusion to what has been to this point a clear cut definition. In this regard I note that this is the first instance in the three and one half years of the operation of the Act in which the office of the Information and Privacy Commissioner/Ontario has been called upon to decide in an Order if a particular agency is covered by the Act. For reasons which I have set out in the Postscript section of this Order, I believe there is a satisfactory remedy available to address the situation of the non-application of the Act to the M&L Commissioner.

ISSUE B: If the answer to Issue A is in the affirmative, whether there are any records within the custody or under the control of the M&L Commissioner that would in any way be responsive to the appellant's request.

As it is my view that the office of the M&L Commissioner is not an institution, it is not necessary to address this issue.

ISSUE C: Whether there are any records within the custody or under the control of the institution that would in any way be responsive to the appellant's request.

Record 1. A summary of decisions of the M&L Commissioner dealing with appeals under the Conservation Authorities Act.

In its representations the institution states that a summary of decisions of the M&L Commissioner dealing with appeals under the Conservation Authorities Act does not exist. Further, the

representations note that no such record exists in the files maintained by the institution's legal unit. Affidavits of the employees concerned attest to this. Having considered the

institution's representations and the affidavits I am satisfied that Record 1 does not exist.

Record 2. A schedule of pending appeals pursuant to the Conservation Authorities Act (inclusive of time and place of hearings).

The institution acknowledges receiving individual 'Notice of Appointment of Hearing of Appeals'. However, it goes on to state that it does not receive nor does it produce a schedule of pending appeals pursuant to the Conservation Authorities Act. This situation is again attested to in an affidavit by the staff person concerned.

At this juncture, I must determine whether a schedule of pending appeals pursuant to the Conservation Authorities Act exists, and if not, whether the institution is under any obligation to produce such a list.

The term "record" is defined in subsection 2(1) of the Act as follows:

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a

microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

- (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an

institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

In Order 50 (Appeal Numbers 880047, 880049, 880050 and 880051), dated April 10, 1989, former Commissioner Sidney B. Linden stated that:

The term "record", as defined in subsection 2(1) of the Act, encompasses two types of recorded information. The first is material which currently exists in some physical form, such as a book, microfilm, computer tape, etc. The other is a record which does not currently exist, but is "...capable of being produced from a machine readable record...", as outlined in paragraph (b) of the definition.

In my view, the duty of the institution differs according to which part of the definition of "record" applies.

In cases where a request is for information that currently exists, either in whole or in part, in a recorded format different from the format asked for by the requester, in my view, section 24 of the Act imposes a responsibility on the institution to identify and advise the requester of the existence of these related records. It is then up to the requester to decide whether or not to obtain these related records and

sort through and organize the information into the originally desired format.

The Act requires the institution to provide the requester with access to all relevant records, however, in most cases, the Act does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format. In other words, the Act gives requesters a right (subject to the exemptions contained in the Act) to the "raw material" which would answer all or part of a request, but, subject to special provisions which apply only to information stored on computer, the institution is not required to organize this information into a particular format before disclosing it to the requester.

I share Commissioner Linden's views and adopt them for the purposes of this appeal. It is my view that in the circumstances of this appeal, the institution is under no obligation to create a schedule of pending appeals pursuant to the Conservation Authorities Act, if such a schedule does not already exist.

A Compliance Investigator, a member of the Information and Privacy Commissioner's staff, was sent to the institution to investigate whether the institution had taken reasonable steps to identify and locate the records that were requested by the appellant. In this instance, the Compliance Investigator found that information in its "raw form" exists, i.e. the Notice of Appointment of Hearing of Appeals. Therefore, in my view, information responsive to the appellant's request exists although not in the form of a schedule

as requested by the appellant. Provision 1 on page 14 of this Order addresses the question of how access to Record 2 should be resolved.

Record 3. Copies of all written decisions by the M&L Commissioner "on conservation authority appeals".

The institution acknowledges that it has provided the appellant with partial visual access to the decisions that are kept on file by the CAWMB and has provided an affidavit to that effect. The institution has also asked the appellant to schedule another time to view the decisions, which he has failed to do. The institution is willing to provide copies of the decisions within its custody or control upon payment of fees authorized under the Act. The appellant wants to have further visual access to the decisions and to select the decisions for which he wants copies. Provisions 2 and 3 on page 15 of this Order address the question of how access to Record 3 should be resolved.

Record 4. Hearing files (including correspondence reports and exhibits) of the M&L Commissioner that correspond to each decision.

The institution in its representations (supported by the affidavit of the staff person concerned) states that "The Ministry has no direct involvement with the hearings before the Commissioner and does not have files containing such material. The requested documentation can only be found in the offices of the Mining and Lands Commissioner." The affidavit of the staff person notes:

I have reviewed our files relating to the Mining and Lands Commissioner. ... There are no files relating to individual appeals before the Commissioner which could be considered "hearing" files, i.e. containing exhibits, reports, etc.

I am satisfied based on the information provided that Record 4 does not exist within the custody or under the control of the institution.

Record 5. A complete list of appeals submitted to the Ministry of Natural Resources since 1973, pursuant to the Conservation Authorities Act.

The institution's representations note that a list of appeals for the period prior to 1982 does not exist. In a letter to the appellant dated April 27, 1989, the institution stated, "For item 2) of your request, namely a complete list of appeals submitted to the Minister of Natural Resources since 1973, such a record exists in part. These appeals are routinely passed from the Ministry to the Mining and Lands Commissioner."

In its representations the institution indicates that information as to appeals filed with the Minister prior to 1982 was contained in regulations. The institution goes on to state:

If [the appellant in this appeal] wishes to know the names of those who submitted appeals to the Minister, he may obtain this information by reviewing the regulations made pursuant to The Ministry of Natural Resources Act between 1972 and 1982. Prior to 1982, an individual

regulation for each appeal submitted to the Minister was passed assigning the Mining and Lands Commissioner the power to hear the appeal. Each regulation would

identify the name and address of the appellant [in the matter before the M&L Commissioner].

It is my view that the institution should have informed the appellant that the information he requested was available in the regulations for the years 1972 - 1982. As the appellant is now aware of this there is no remedial order to be made.

Record 6. All correspondence between the M&L Commissioner and the Minister of Natural Resources dealing with policies and final judgments of all cases since 1973 pertaining to same.

The institution indicates that it does not have either custody or control of this record. It states:

... request a search was made through the Ministry's files and no such correspondence between the Mining and Lands Commissioner was found to exist. As the Mining and Lands Commissioner is an independent tribunal which has been assigned, the power to hear appeals under section 28(5) of the Conservation Authorities Act, pursuant to Ont. Reg. 364/82, it would be inappropriate for the Minister to discuss individual appeals before the Mining and Lands Commissioners.

Having considered the institution's representations, I am satisfied that Record 6 does not exist.

ORDER:

1. I order the head to provide the appellant with a decision concerning access to individual Notices of Appointment of Hearing of Appeals which existed prior to his request. The decision should be provided to the appellant within twenty

- (20) days of the date of this Order. I further order the head to provide me with a copy of his decision within five (5) days of the date that it is made.
2. I order the head to provide the appellant with visual access to Record 3, within twenty (20) days of the date of this Order unless otherwise agreed to by the appellant. After the appellant has completed his visual access of Record 3, he can provide the head with a list of those decisions for which he would like a copy. At the same time he should indicate to the head any additional factors that should be considered regarding access to Record 3.
 3. I order the head to provide the appellant with a decision regarding access to Record 3 within fifteen (15) days of the head receiving the list of decisions requested. I further order the head to provide me with a copy of his decision within five (5) days of the date that it is made.
 4. The said notices should be forwarded to my attention c/o
Information and Privacy Commissioner/Ontario, 80 Bloor
Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

POSTSCRIPT

As indicated it is my view that the Office of the Mining & Lands Commissioner is not presently covered by the Act. At the same time, it appears that similar tribunals are institutions covered by the Act by virtue of being included by regulation. As I see

no reason why the Mining and Lands Commissioner should not be covered by the Act, I am sending a copy of this Order to the Chair, Management Board of Cabinet, who is the government Minister responsible for the Act. Accompanying the Order will be my recommendation that the Mining and Lands Commissioner be designated an institution by regulation.

As a final note, I wish to point out that the finding that the Mining and Lands Commissioner is not presently covered by the Act in no way precludes it from disclosing information in accordance with the principles and spirit of the Act.

Original signed by: _____
Tom A. Wright
Commissioner

_____ May 6, 1991
Date