



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

ORDER 59

Appeal 880236

Archives of Ontario



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to personal information under subsection 48(1) of the Act a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On May 16, 1988, the requester asked the Ministry of the Attorney General for various records, including "...all copies of personal letters and replies to the following letters with regards as follows: William G. Davis, Q.C. Premier of Ontario Letter dated March 26, 1983". This part of the request was forwarded to the Archives of Ontario "...pursuant to Section 25 of the Freedom of Information and Protection of Privacy Act because the Archives of Ontario has custody of the records...".

2. By letter dated July 4, 1988, the Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") for the Archives of Ontario (the "institution") wrote to the requester and advised that:

...access cannot be provided because the record could not be located. We have completed a thorough search of the records of the Premier's Office in our custody and control. In the correspondence index we found reference to the letter you have requested, however, upon searching the appropriate boxes it was determined

[IPC Order 59/May 18, 1989]

that the file containing your correspondence was missing. It appears that the record was not sent to the Archives of Ontario at the time the records were transferred to this institution.

3. On July 12, 1988, the requester wrote to my office appealing the institution's failure to provide him with the requested record, and I sent notice of the appeal to the institution.
4. At the suggestion of one of my staff, both the institution and the Premier's Office conducted a further search for the record, however it was not found in either location.
5. On September 14, 1988, notices were sent to the appellant and the institution advising both parties that I was conducting an inquiry to review the institution's decision. Enclosed with this notice was a report prepared by the Appeals Officer assigned to this case, 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. The Appeals Officer's Report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the Report.
6. Representations were received from the institution, and I have taken them into account in making my Order. No representations were received from the appellant.

The issues arising in this appeal are as follows:

[IPC Order 59/May 18, 1989]

- A. Whether the steps taken by the Archives of Ontario to search for the requested records were reasonable and sufficient in the circumstances of this appeal.
- B. Whether the Archives of Ontario made all necessary inquiries to determine if another institution had custody or control of the record, as required by subsection 25(1) of the Act.
- C. Whether the records retention and management procedures followed by the Archives of Ontario are adequate to properly protect the integrity of records transferred to it from other institutions.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the 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. Subsection 1(b) sets out the counterbalancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

It should also be noted that the Act does not specify a burden of proof where access is denied because a record purportedly does not exist. However, as a general principle, the burden of proof rests on the person who asserts a position, so in cases

such as the current appeal, in my view, the institution must establish a reasonable expectation that the record in question does not exist.

ISSUE A: Whether the steps taken by the Archives of Ontario to search for the requested records were reasonable and and sufficient in the circumstances of this appeal.

The institution provided an affidavit, sworn by the Co_ordinator, outlining the steps taken by the institution to search for the requested record.

These steps were as follows.

- a. The Senior Archivist responsible for the historical government records of the Office of the Premier was asked to conduct a search;
- b. The Senior Archivist reviewed the original file card index which was created by the Premier's Office and subsequently transferred to the Archives. This index is apparently organized in alphabetical order by surname of correspondent.
- c. Using the appellant's name, the Senior Archivist located two file cards. One card had three entries indicating correspondence received in three different years, one of which matched the appellant's request. The second card was a cross_reference containing one entry under the name of another individual.

- d. Using the file code indicated in the file card index, the appropriate box was recalled from the off_site government Records Centre.
- e. The box was searched, but the requested record could not be found.
- f. In an effort to ensure that the record had not been misfiled, the search was expanded by recalling three other boxes containing correspondence from the appellant in years other than 1983. This search also included a check of the cross_reference under the name of the other individual identified on the second file card. This expanded search was able to locate the records indicated on the file index card, but not the 1983 correspondence at issue in this appeal. As well, none of the boxes contained a cross_reference page which would have indicated that a record had been removed and forwarded elsewhere.
- g. The Co_ordinator then conducted a personal search to confirm the actions of the other Archives' staff and concluded that the appellant's letter could not be located.

In the Co_ordinator's opinion, "...it appeared the file containing the requested record was never sent to the Archives at the time the 1971_1985 correspondence files of the Office of the Premier were transferred to its control in 1985 through 1988".

In its representations, the institution submits that:

...staff initially pursued all reasonable avenues to search, identify and locate the record to which access

[IPC Order 59/May 18, 1989]

was requested by the appellant. The Archives expanded the search on its own initiative when the requested record could not be located ...Archives' staff searched all possible locations the record might be were it in the Archives' custody and control...

In order to obtain an independent assessment of the adequacy of the search conducted by the institution, a member of my compliance staff attended at the institution's premises and reviewed the steps referred to in the Co_ordinator's affidavit. On the basis of the confirmation obtained from this review and the submissions received from the institution, I am satisfied that the institution took all reasonable steps to locate the requested record.

ISSUE B: Whether the Archives of Ontario made all necessary inquiries to determine if another institution had custody or control of the record, as required by subsection 25(1) of the Act.

Subsection 25(1) of the Act reads as follows:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another

institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within 15 days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

As noted at the outset, the appellant's request was originally filed with the Ministry of the Attorney General, which subsequently transferred part of it to the Archives of Ontario, pursuant to subsection 25(1).

The Co_ordinator's affidavit referred to in my discussion of Issue A also outlined the steps taken by the institution in response to their obligations under subsection 25(1). The affidavit states:

On July 18, 1988 the Manager of Appeals, Office of the Information and Privacy Commissioner, orally informed me that an appeal had been filed from the decision made by the Archives in this request. The Manager of Appeals asked if the Archives would undertake a supplementary search by contacting the Office of the Premier to determine whether the missing file and record remained in their custody.

It is clear from the Co_ordinator's statement that the institution did not consider whether another institution might have had custody or control of the records until after the appeal was filed in my office and it was suggested by one of my staff that the Co_ordinator contact the Premier's Office to ask them to search for the missing record. Had that Office then been able to locate the record, this appeal would not have been necessary.

In the circumstances of this appeal, the Premier's Office did eventually search approximately seven cubic feet of correspondence relating to former Premiers Davis and Miller, and could not locate the requested record. The institution also submitted that, in its view, there was no other institution which might have had custody or control of the requested record.

As a result, I am satisfied that the institution ultimately discharged the responsibilities imposed by subsection 25(1) of the Act. However, in the future, it is important for the institution to be aware of the Act's requirement that consideration of the provisions of subsection 25(1) take place within 15 days after the request is received.

ISSUE C: Whether the records retention and management procedures followed by the Archives of Ontario are adequate to properly protect the integrity of records transferred to it by other institutions.

As I have stated in a number of previous Orders, I see improvements in records management systems throughout the government to be one of the major long-term benefits of the Freedom of Information and Protection of Privacy Act, 1987. I realize and accept that the introduction of effective records management practices can be complicated, time consuming and costly. However, the fundamental new rights of access to government-held records and protection of personal privacy provided to the public under the Act will continue to be compromised unless and until proper and adequate record-keeping practices have been implemented by all government institutions.

In my view, the public has a right to expect that each government institution:

- (a) knows what records it has in its custody or control; and
- (b) knows where these records are located, so they can be retrieved as required.

While effective records management systems are important for all institutions, they are absolutely vital for the Archives of Ontario.

Section 3 of the Archives Act, R.S.O. 1980, c. 27, provides:

Subject to the regulations, all original documents, parchments, manuscripts, papers, records and other matters in the executive and administrative departments of the Government or of the Assembly, or of any commission, office or branch of the public service shall be delivered to the Archives for safekeeping and custody within twenty years from the date on which such matters cease to be in current use.

It is simply not possible for the Archives to carry out its mandate as the Ontario Government's custodian of historical information without adequate systems which will ensure the proper maintenance, retrieval, storage and disposition of the records under its control.

As far as the present appeal is concerned, the institution provided the following outline of the steps taken with respect to records transferred from the Office of the Premier:

...the records [at issue in this appeal] were covered by a pre-approved Records Retention Schedule that established the retention and disposition of the records... When former Premier William G. Davis resigned, the Records Manager, Officer of the Premier, contacted the archivist responsible for the historical government records [and] arrangements were made... to transfer the scheduled records from the control of that institution to the Archives of Ontario. However, because no additional storage space was available in the building occupied by the Archives this exchange assumed the form of a "paper transfer". While control of the records was transferred to the Archives of Ontario, physical custody of the records remained with

the government Records Centre... Upon receiving notice of the transfer from the Records Manager, the archivist completed an "Accession Record Form" for each unique record series. A copy of each Accession Record Form was subsequently returned to the Records Manager acknowledging receipt of all the record series

transferred. Arrangements for the transfer commenced in June 1985 and were completed by April 1986. In total, approximately 900 cubic feet of Premier's Officer records dating 1971-1982 were transferred at one time. In each of the next three years an additional year's records were transferred to the Archives' control by the Premier's Office.

As noted in the institution's submissions, the Premier's Office had supplied the Archives with supporting documentation specifically listing the transferred records. This then allowed the Archives, at the suggestion of my staff, to ask this Office to conduct a search for the missing records. However, the institution advised in its representations that:

[i]n the majority of cases the Archives is not supplied by an institution or Ministry with adequate supporting documentation when records are transferred. Consequently, there is often no list of what specific files were transferred to Archives' control. Moreover, indices and file classification plans that may be necessary to determine what coded files have been transferred are rarely included. Given such inadequate finding aids, the Archives is more often than not unable to determine whether certain records or files were ever created or transferred by the originating institution or Ministry.

The investigation conducted by my compliance staff confirmed these representations, and revealed that the vast majority of records transferred to Archives are not classified or indexed in a manner amenable to the speedy retrieval of specific records.

In the Archives' opinion, this classification function should be performed by the transferring institution, because it has the most detailed knowledge of the contents of transferred records. The Archives is also hampered by the fact that many of the transferred files are maintained at storage sites operated by the Ministry of Government Services. However, despite these difficulties, the task of manually reviewing and classifying transferred records currently falls to Archives' staff.

In addition, even where classifications or indices are provided by the transferring institution, there is the problem of ensuring accuracy. That appears to be the situation in the present appeal. The file card index prepared by the Premier's Office and transferred to the Archives with the corresponding records contained an entry matching the record requested by the appellant. However, the ensuing search did not locate this record, prompting the Archives to conclude that "...it appeared the file containing the requested record was never sent to the Archives". In addressing this problem on a larger scale, the institution submitted that "...the volume of records transferred to the Archives annually by all government institutions (approximately 7,000 cubic feet) relative to the staff resources available precludes any audit to ensure that files purportedly transferred have indeed been sent".

It is clear to me that, despite it's best efforts, the Archives is experiencing significant difficulties in carrying out its statutory mandate. As a result of my investigation, I do not think it is appropriate to order any of the parties to this appeal to take specific action or adopt specific procedures, since the solutions to these problems will require resource commitments from the Government. It is my understanding that

these and other issues relating to the Archives are currently under active discussion, and I would encourage those who are engaged in this process to consider and address the problems which I have identified. As I stated earlier in this Order, it is my strong belief that the principles of the Freedom of Information and Protection of Privacy Act, 1987 cannot be fully implemented unless these records management-related problems are rectified.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ May 18, 1989
Date