



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

ORDER P-575

Appeal P-9300406

Ontario Native Affairs Secretariat



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ORDER

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of a legal opinion purportedly authored in response to an information bulletin that the requester had submitted to the Ministry. That bulletin discussed the application of the Supreme Court of Canada's decision of R. v. Sparrow to native land claim respecting Algonquin Park. The Ministry determined that the Ontario Native Affairs Secretariat (the Secretariat) had a greater interest in the record requested and, thus, transferred the request to this institution.

The Secretariat subsequently advised the requester that, as a result of a search which was undertaken, it determined that records relating to the request did not exist. The Secretariat further informed the requester that any consultations which it had carried out with respect to the information bulletin were verbal in nature and that no written legal opinion had been produced. The requester expressed the view that a written legal opinion must exist and appealed the Secretariat's decision.

The mediation of this appeal was not successful and notice that an inquiry was being conducted to review the Secretariat's decision was sent to the Secretariat and to the appellant. Representations were received from both parties.

The sole issue in the appeal is whether the Secretariat's search for the legal opinion was reasonable in the circumstances of this case.

In the Notice of Inquiry, the Secretariat was asked to respond to a number of specific questions relating to the steps which it took to search for the legal opinion or other records responsive to the request. Among other things, the institution was asked to provide affidavit evidence on the types of files searched and their physical locations. The appellant, in turn, was asked to provide further information to support his belief that a legal opinion did, in fact, exist.

In his letter of appeal, the appellant sent to the Commissioner's office several letters which were provided to him by officials of the Ministry. Based on the contents of these letters, the requester submits that there is a strong inference that a written legal opinion on the contents of the information bulletin was prepared. The requester also states that, because of the importance of the Supreme Court of Canada's decision, it is unrealistic to believe that legal advice on the contentious issues raised in the information bulletin would only be obtained verbally.

In his representations, the appellant then indicates that the Government has, in the past, prepared detailed written legal opinions on the implications of various court decisions on the land claim involving Algonquin Park. To support this contention, the appellant has provided the Commissioner's office with several written legal opinions authored by Government lawyers on the subject. The appellant expresses the view that, consistent with past practice, legal opinions respecting this particular claim are communicated in writing.

As part of its representations, the Secretariat provided the Commissioner's office with an affidavit sworn by an individual holding the position of legal counsel in the institution. This individual is also responsible for processing access requests within the Secretariat including the one filed by the requester.

The affidavit indicates that the Ministry approached one of the Secretariat's senior negotiators in order to provide assistance in responding to a letter authored by the requester. The senior negotiator then approached the legal counsel (who swore the present affidavit) with a view towards obtaining his comments on the legal position expressed in the information bulletin. In his affidavit, legal counsel then indicates that he provided his comments to the senior negotiator orally and that no written legal opinion was produced.

Finally, legal counsel indicates that he also raised with the senior negotiator, who has overall responsibility for the land claim in question, whether another lawyer in the office might have produced a legal opinion on the subject. The response was that such a legal opinion did not exist.

Where a requester provides sufficient details about the records which he or she is seeking and an institution indicates that additional records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that a institution prove to the degree of absolute certainty that such records do not exist, the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be found.

While the affidavit supplied by the Secretariat indicates that verbal inquiries were made to determine whether any responsive records might exist, there is no evidence before me that any physical search of the institution's records holdings actually took place. In addition, while the affidavit indicates that the subject of the existence of legal opinions was canvassed with the senior negotiator, it appears that similar discussions did not take place with other legal counsel within the institution.

Based on the evidence provided to me and bearing in mind that the affidavit tendered by the Secretariat did not indicate whether a physical search for responsive records was undertaken, I am unable to conclude that the search which the institution carried out was reasonable in the circumstances of the case. On this basis, it will be necessary for the Secretariat to conduct a broader search for responsive records.

ORDER:

1. I order the Secretariat to conduct a further search for responsive records and to notify the appellant of the results, within 20 days of the date of this order.
2. I further order that the search in question be undertaken by an employee or employees with knowledge of the Secretariat's records management system and the subject matter of

the request. In particular, I order that the Secretariat search all physical locations where such records might reasonably be found to include the offices of the senior negotiator responsible for the claim and all legal counsel in the Secretariat involved in the provision of advice on the native land claim in question.

3. If, as a result of this further search, the Secretariat identifies any records responsive to the request, I order the Secretariat to provide a decision letter regarding access to these records to the appellant 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.
4. In order to verify compliance with this order, I order the Secretariat to provide me with a copy of the decision letter referred to in Provision 3 within 20 days of the date of this order. This copy should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

November 8, 1993