



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

# **ORDER P-743**

**Appeal P\_9400185**

**Ministry of the Attorney General**



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/Téléc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant, acting as his son's agent, requested copies of all information concerning his son arising from an investigation undertaken by the Metropolitan Toronto Police (the "Police"). For ease of reference in this order, I will use the term appellant to refer to the individual about whom the requested information relates, the son.

The Police transferred part of the appellant's request to the Ministry of the Attorney General (the Ministry) on the basis that it may concern Ministry records. Those records in the possession of the Police were the subject of Order M-341, issued by the Commissioner's office. The Ministry clarified with the appellant that the request was for access to prosecution records located at the College Park Court where the charges which resulted from the investigation were disposed of.

The Ministry indicated to the appellant that the responsive records had been returned to the Police and were no longer in its custody. The appellant appealed the Ministry's decision to the Commissioner's office. A Notice of Inquiry was provided to the appellant and the Ministry, and representations were received from both parties.

## **DISCUSSION:**

### **PRELIMINARY ISSUE**

#### **Application of the Canadian Charter of Rights and Freedoms**

In his representations, the appellant submits that the shifting of partial responsibility for the clarification of a request to an appellant under sections 47 and 48 of the Act violates sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms (the Charter) on the basis that the Charter places the complete burden of proof upon the Ministry. It has been established in previous orders of the Commissioner's office that the Commissioner and his delegates have the requisite jurisdiction to hear and determine a challenge under the Charter concerning the validity of the provisions of the Act.

Sections 7 and 11(d) of the Charter state that:

#### **Life, Liberty and security of person**

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

#### **Proceedings in Criminal or penal matters**

Any person charged with an offence has the right:

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

In Order 106, former Commissioner Sidney B. Linden considered whether section 14(3) of the Act was in conflict with a Charter right. In addressing this issue, he stated as follows:

In my view, even if I were to conclude that I have the jurisdiction to hear and determine a Charter challenge to the validity of provisions of the Act, I would have to be convinced by a clear and compelling argument that the section the appellant seeks to impugn is, in fact, inconsistent with the Charter.

I agree with former Commissioner Linden's view as expressed in Order 106 that I would have to be convinced by a clear and compelling argument that the sections which the appellant seeks to impugn are, in fact, inconsistent with the Charter.

Subsection 47(1) of the Act provides a right of access to personal information as follows:

Every individual has a right of access to,

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

Subsection 48(1) of the Act sets out the nature and form that a request for personal information must take:

An individual seeking access to personal information about the individual shall make a request therefor in writing to the institution that the individual believes has custody or control of the personal information and shall identify the personal information bank or otherwise identify the location of the personal information.

Subsection 48(2) provides that the requirements of subsection 24(2) of the Act apply to a request for personal information.

Subsection 24(2) deals with the clarification of requests and reads as follows:

If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

In Order 33, former Commissioner Sidney B. Linden addressed the obligation on a requester to assist an institution by clarifying the nature of a request in the following manner:

As a matter of common sense an institution will, usually, be in a better position than a requester to know what records are within its custody or control. However,

a requester may well have some knowledge as to the whereabouts of a record of personal information that pertains to him or her. Sections 47 and 48 of the Act place the responsibility for ascertaining the nature or whereabouts of a record of personal information on both the requester and the institution.

It is clear from sections 47 and 48 of the Act that there is some obligation placed on the requester to provide as much direction to an institution as possible to where the records he or she is requesting may be found and/or to describe the records sought. A requester's knowledge as to what records are in an institution's custody and control will vary.

The appellant argues that by shifting to him partial responsibility for the clarification of a request, his rights under sections 7 and 11(d) of the Charter have been impinged upon. With respect to section 11(d), that section applies to persons "charged with an offence" and thus has no application to proceedings under the Act. With respect to section 7, that section requires that there be a deprivation of life, liberty or security. The appellant has not indicated how his life, liberty or security has been or would be affected by the requirement that he clarify the nature of his request.

I do not accept the appellant's arguments on the application of sections 7 and 11(d) of the Charter in this case. I find that I have not been provided with clear and compelling argument that sections 47 and 48 of the Act, which the appellant seeks to impugn, are inconsistent with the provisions of the Charter.

In any event, although the principles regarding the Crown's disclosure obligation discussed in the cases referred to by the appellant may be relevant in the context of other proceedings in which the appellant may be involved, in my view, they have no application in the context of proceedings under the Act.

## **REASONABLENESS OF SEARCH**

The sole remaining issue in this appeal is whether the Ministry conducted a reasonable search for records responsive to the appellant's request.

The Act does not require the Ministry to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

In its representations, the Ministry describes the steps taken to locate records responsive to the appellant's request. Included with the Ministry's representations is the sworn affidavit of the Crown Attorney responsible for the administration of access requests for the Downtown Crown Attorney's office, which includes the College Park Court. This individual coordinated the search for the responsive records.

College Park Court is a Provincial Division Court. The Ministry's submissions state that it is the practice of the Crown Attorney's office to return all prosecution files (also referred to as the "Crown Brief") in cases conducted in Provincial Division Courts to the investigating police force, in this case the Metropolitan Toronto Police, when the proceeding has concluded.

The Ministry further submitted that it contacted the Crown Attorney at College Park responsible for the appellant's prosecution and was advised that she has no records pertaining to the appellant.

The Ministry also indicates that it contacted the Police to retrieve the Crown Brief pertaining to the appellant and was informed that it could not be provided as it was the subject of another access request from the appellant with the Police. The question of whether this document could be released to the appellant was addressed in Order M-341 issued by the Commissioner's office. The Police further advised the Ministry that they had made a decision regarding all records in their custody pertaining to the appellant, including the Crown Brief, and that the appellant's request had been transferred to the Ministry in error.

I have carefully reviewed the representations of the parties and the affidavit provided by the Ministry, and I am satisfied that, in the circumstances, the Ministry has taken all reasonable steps to locate the records responsive to the appellant's request.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ August 19, 1994