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

INTERIM ORDER P-804

Appeals P-9200545 and P-9400197

Ministry of the Solicitor General and Correctional Services

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NATURE OF THE APPEAL:

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). They arise from two requests made by the appellant for copies of records from the Ministry of the Solicitor General and Correctional Services (the Ministry).

The first request was for the police report and Crown brief prepared by a specified Ontario Provincial Police (OPP) detachment, relating to the appellant's son. In this request, the appellant also sought access to the court transcript of the case.

In its response, the Ministry stated that it could not respond to the request under the Act, claiming that the information requested "is governed by section 44.2(2) of the Young Offenders Act ...". Subsequently, the Ministry indicated that it was also denying access to these records under the following provision:

- law enforcement - section 14(2)(b).

The second request was for the following records: (1) a Crown brief prepared by another OPP detachment, also relating to the appellant's son, (2) a copy of the summons served on the appellant's son, (3) the date and method of service of the summons, (4) an explanation of the attendance of a named OPP officer at the appellant's home on a particular date, and (5) any information collected by two named OPP officers.

In response to the second request, the Ministry indicated that item (1) was the subject of the first request, and is the subject of the appeal regarding that request. With respect to the balance of the request, the Ministry stated that "[t]he remaining types of records you are seeking fall outside the scope of the [Act]. You may wish to seek legal advice regarding other available avenues to obtain the type of records you are requesting".

Upon receipt of each of these appeals, the Commissioner's office forwarded a Confirmation of Appeal notice to the Ministry. In this notice, the Ministry was asked to provide copies of all responsive records directly to the Commissioner's office. The Ministry has not provided the requested copies of the records with respect to either of these appeals, taking the view that the Young Offenders Act (YOA) prohibits it from doing so, or that the records simply "fall outside the scope of the Act".

Once these appeals proceeded to inquiry, I determined that the Commissioner's office would need to review the full contents of all responsive records in order to resolve the issues which have been raised. Based on the Ministry's position on this subject, the Notice of Inquiry for each of these appeals requested submissions on the following four questions:

(1) In the context of an appeal of a decision of a head under the Act to the Information and Privacy Commissioner, does the decision-maker have the authority to order production, for his independent

review, of records in the custody or control of the institution that are relevant to the appeal where the institution alleges that the records or parts of the records fall within the scope of the YOA?

(2) Is disclosure or release by the institution of such records to the decision maker, for the purpose of the appeal process, prohibited under the YOA? If yes, under which provisions of the YOA?

(3) If, in your view, the decision maker does not have the authority to order production of such records, how can he satisfy himself, in the context of an appeal relating to such records, that they are not improperly withheld from scrutiny under the Act, that is, that they are in fact records which fall within the scope of the YOA?

(4) Given that, in these circumstances, section 46(1) of the YOA could apply only to records described in section 43(1) of the YOA, the Ministry is asked to substantiate its claim that the records in question fall within the scope of section 43(1) of the YOA.

Representations on these issues were received from the Ministry only.

For the purposes of this interim order, the sole issue which I will address is whether the Ministry must provide all of the responsive records in its custody or under its control to the Commissioner's office. The applicability of the law enforcement exemption, which the Ministry has also claimed in relation to some of the records at issue, will be considered in a separate order.

These two appeals are both being addressed in one interim order, because they were filed by the same individual and relate to the same Ministry, and because they involve similar issues.

DISCUSSION:

PRODUCTION OF RECORDS CLAIMED TO FALL WITHIN THE YOA

The power of the Commissioner (and his delegates) to order production of records from government institutions arises from section 52(4) of the Act, which states:

> In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

In its representations, the Ministry argues that this section "... is constitutionally inoperative in relation to records that are subject to the YOA". An obvious flaw in this argument, in my view, is the fact that it presupposes that the records at issue are "subject to the YOA". In my view, this is a preliminary issue which I must decide, and I cannot do so without receiving copies of the records. I will consider this further in the detailed discussion of the Ministry's arguments, below.

The Ministry's position is based on three assertions made in its representations, which may be summarized as follows:

(1) The Act is a comprehensive provincial law governing access to government information in Ontario, whereas the YOA is federal legislation which provides a comprehensive code for the maintenance and uses of records kept pursuant to it. There is a conflict between the provisions of section 52(4) of the Act and the prohibitions on disclosure contained in the YOA, and by virtue of the doctrine of federal legislative paramountcy, section 54(2) is inoperative with respect to YOA records.

(2) Persons seeking access to YOA records, including the Commissioner and his delegates, must pursue the avenues available under the YOA, such as the approval of a Youth Court Judge under section 45.1(1).

(3) The Commissioner and his delegates have no jurisdiction to make a determination with respect to the application of the YOA to the records at issue.

I will deal with each of these submissions in turn.

Paramountcy

With respect to this submission, summarized under item (1) above, I have the reviewed relevant authorities, including those cited by the Ministry. When, as is the case here, valid legislative acts of the federal government and a province are being considered, it is not sufficient to say that the federal government has "occupied the field" with a complete code. The threshold for the application of the paramountcy doctrine is whether there is **actual conflict** in the operation of the relevant statutory provisions.

In Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, which is referred to in the Ministry's representations, Dickson J. held that the doctrine of paramountcy need only be applied where it is impossible to comply with both legislative enactments:

> In principle, there would seem to be no good reason to speak of paramountcy and preclusions except where there is actual conflict in operation, as where one enactment says "yes" and the other says "no"; the same citizens are being told to do inconsistent things; compliance with one is defiance of the other.

He went on to characterize the test to be whether the application of the provincial law would "displace the legislative purposes of Parliament". In Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, to which the Ministry also refers, the test derived from the Multiple Access case was described by LaForest J. as requiring an overlap of jurisdiction where "dual compliance will be impossible [because] the application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose."

The provisions of the YOA relating to record-keeping, disclosure and non-disclosure are set out in sections 40 through 46 of that statute. These provisions exist to permit the use of YOA records for certain purposes, to prevent their use for purposes not authorized by the YOA, and to protect the identity of young offenders except to the extent that identification is permitted under the YOA. None of these provisions give exclusive authority to any particular Court or other body to determine whether a record is subject to the YOA.

In my view, an order requiring production of the records at issue, for the purpose of determining whether or not they are in fact YOA records, does not frustrate Parliament's legislative purposes. Such an order is not an assertion of substantive authority over the records in contravention of the provisions of the YOA; rather, it is a necessary step in my determination of whether the YOA applies. Only if I find that they are not YOA records would I assert substantive jurisdiction over these records. Accordingly, in my view, no part of this exercise can fairly be said to "frustrate" Parliament's legislative purpose or otherwise stand in conflict with the YOA, and therefore I do not accept the Ministry's paramountcy argument.

YOA Access Provisions

As noted above in item (2), the Ministry argues that if the Commissioner's office requires access to the records, it must obtain them by one of the avenues referred to in the YOA. Once again, this argument presupposes that the records are in fact YOA records. As noted above, however, the YOA does not grant exclusive jurisdiction to any particular Court or body to make that determination. Accordingly, the correct question to ask is: in the circumstances of these appeals, who has the power to determine whether the records fall under the provisions of the YOA? This is the subject of the Ministry's third submission, to which I will now turn.

Commissioner's Power to Determine Application of the YOA

As noted above under item (3), the Ministry argues that the Commissioner and his delegates have no power to determine whether the YOA applies to the records at issue. In the circumstances of this appeal, this is a jurisdictional matter: if the YOA applies to these records, I do not have substantive jurisdiction over them. If it does not apply to the records, then in the absence of other jurisdictional impediments I would have the power to conduct an inquiry under the Act with respect to access to them.

It is clear that a provincial tribunal may construe the provisions of any external statute relevant to its jurisdiction, including a federal statute of general application in the province.

The power of the Commissioner (and his delegates) to determine whether the YOA applies to records was considered by Assistant Commissioner Irwin Glasberg in Order P-736, which dealt with a refusal by the Ministry of Community and Social Services to produce records to the Commissioner's office because of the YOA. In that order, the Assistant Commissioner stated as follows:

A similar issue arose in Order P-623, which dealt with the applicability of section 65(2) of the Act. This provision states that the Act does not apply to, among other things, clinical records as defined in the Mental Health Act. In the appeal which led to Order P-623, the Ministry of Health refused to forward a series of records to the Commissioner's office for the purpose of determining the preliminary jurisdictional issue of whether or not the records were excluded from the operation of the Act. In that order, Inquiry Officer Holly Big Canoe approached the issue in the following fashion:

> In my view, section 65(2) can apply only to the records which fall within the scope of that section. While the Legislature clearly intended that these records should fall outside the purview of the Act, I do not believe that the Legislature intended to have the threshold issue of whether or not records fall within the scope of this provision determined by a non-independent body, such as the Ministry, whose decision would not be reviewable.
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> While the Ministry must determine at first instance whether section 65(2) applies precluding access to the requester, the Commissioner, too, must be satisfied of the relevance and application of the provision to the records upon receipt of an appeal. This duty of the Commissioner is fundamental to the effective operation of the Act, the principle of providing a right of access to information under section 1(a), and the principle that decisions on the disclosure of government information should be reviewed independently of government under section 1(a)(iii).
>
> In my view, notwithstanding a claim by the Ministry that the records in question fall within the scope of section 65(2), the Commissioner (or his delegate) does have the power to compel the production of records claimed to be covered by section 65(2).
>
> This power to compel initially would be exercised for the limited purpose of determining whether or not the records fall within the scope of section 65(2) of the Act. If, having reviewed the records, I determine that the Ministry's claim is correctly made, pursuant to section 65(2) the records would be returned to the Ministry and the appeal would be closed, since I would not have the jurisdiction to conduct a further inquiry. However, if I determine that the Ministry's claim is not validly made with respect to some or all of the records (i.e., that section 65(2) does not apply to some or all of the records), then I will be required to proceed with the inquiry and determine the application of the Act to the records.

The Ontario Court of Justice (General Division) Divisional Court reviewed this order in Minister of Health et al. v. Holly Big Canoe, Inquiry Officer et al. (29 June 1994), Toronto

> 111/94. In its decision, the court quoted this passage and stated that "we are in agreement with the assessment by the Inquiry Officer ..." The Court then held that section 52(4) of the Act authorizes the Commissioner to have produced any document and more specifically the records which were subject to Order P-623. The Court also stated that the Commissioner must have the procedural mechanism necessary to decide matters of substance.
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> In accepting the approach taken in Order P-623, the Court also referred to its earlier decision in Morgan v. Windsor (Roman Catholic Separate School Board) (1979), 112 D.L.R. (3d) 163 at page 168. There, the Court stated that:
>
> > ... an inferior tribunal must, as a preliminary to deciding the main question before it, make a decision upon a collateral or preliminary matter affecting its jurisdiction.
>
> I have carefully reflected on the approach set out in Order P-623, as endorsed by the Divisional Court, and I find that it is equally applicable in the context of the present appeal. In my view, threshold issues respecting whether or not government records fall within the Commissioner's jurisdiction ought not to be determined by a non-independent body, such as a Ministry, where such decisions are not subject to review. This would be the case, particularly, where the government body might be seen to have a self-interest in not disclosing all or parts of the records to a requester.

The Ministry has made two related submissions in this regard, namely: (1) Order P-736 was not correctly decided, and (2) Order P-623, as confirmed by the Divisional Court, is distinguishable from the facts of the present case. Both submissions are based on the Ministry's view that, because the matter to be determined by Inquiry Officer Big Canoe in Order P-623 related to two pieces of provincial legislation (the Act and the Mental Health Act), while both Order P-736 and the present appeals involve the relationship between the Act and the YOA (a federal statute), the doctrine of federal legislative paramountcy means that the Divisional Court decision upholding Order P-623 does not apply to the situation addressed in Order P-736, nor to the situation in the present appeals.

I do not agree with this argument. The issue of paramountcy was canvassed above. As noted in that discussion, paramountcy only operates in cases of **actual conflict**. In the circumstances of these appeals, actual conflict would only occur with regard to records which are **in fact** within the scope of the disclosure and non-disclosure provisions of the YOA, and does not affect the procedure by which that determination is made. Accordingly, the findings of Inquiry Officer Big Canoe in Order P-623, and the Divisional Court ruling regarding that order, are applicable in this situation, and the doctrine of federal paramountcy does not interfere with my authority and obligation to determine matters relating to my own jurisdiction in the circumstances of these appeals.

Section 46 of the YOA

Later in its representations, the Ministry refers to section 46(1) of the YOA, which states:

> Except as authorized or required by this Act, no record kept pursuant to sections 40 to 43 may be made available for inspection, and no copy, print or negative thereof or information contained therein may be given, to any person where to do so would serve to identify the young person to whom it relates as a young person dealt with under this Act.

Section 46(4) of the YOA makes contravention of section 46(1) of that same statute an offence punishable either by way of indictment or summary conviction.

The Ministry submits that it would be violating the provisions of this section if it provided the records to the Commissioner's office, even for the preliminary determination of jurisdiction.

Assistant Commissioner Glasberg considered this issue in Order P-736, stating as follows:

> Finally, I wish to deal with the Ministry's stated concern that, by releasing the information which it considers to be subject to the YOA, for the purpose that I have outlined, it runs the risk of contravening section 46 of the YOA. According to the Ministry, such a risk would be incurred because the disclosure of the information would serve to identify the young person as someone who has been dealt with under the YOA.
>
> The difficulty with this argument is that it presupposes that the Commissioner's office will agree that the information in question falls within the scope of the YOA. As indicated previously, this is precisely the issue which I must determine in this appeal and I cannot resolve the matter without access to the records.
>
> I would note, in any event, that section 55 of the Act prohibits the Commissioner or any person acting on his behalf or under his direction from disclosing any information which comes to their knowledge in the performance of their powers, duties and functions under the Act or any other Act. On this basis, should I determine that any of the requested information falls within the parameters of the YOA, the information would immediately be returned to the Ministry and would not be disclosed to any third party.

I agree with these conclusions and adopt them for the purposes of these appeals. Moreover, any substantive discussion of this section vis a vis the Commissioner's power to compel production under the Act must take place in the context of legislative paramountcy. That issue has been canvassed above.

Order P-736

As is clear from the foregoing discussion, the issues considered by Assistant Commissioner Glasberg in Order P-736 are very similar to those which I must decide in this order. In that case, the Ministry of Community and Social Services refused to produce records to the Commissioner's office because of the

provisions of the YOA. The Assistant Commissioner ordered the Ministry to produce the records to this office. In so doing, he stated, in part, as follows:

> Although the Ministry claims that the information which it has deleted from the eight records in question falls within the scope of the YOA, I find, based on the scheme of the Act, that the Commissioner (or his delegate) has both the jurisdiction and a statutory obligation to determine whether this is, in fact, the case. I further conclude that the Commissioner has the power to compel the production of such records to verify this fact.
>
> I would stress that this power would be exercised initially for the limited purpose of determining the preliminary jurisdictional issue of whether or not the information in question falls within the scope of the YOA. Should I determine that the YOA applies to these records, the doctrine of federal legislative paramountcy would apply and I would not have the jurisdiction to proceed with the inquiry. That would be the case because there is an express contradiction between the disclosure scheme contained in the YOA and the disclosure scheme in the Act (Order P-378).
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> Should I determine, however, that all or parts of the records in question fall outside the scope of the YOA, I would then go on to consider whether any exemption claimed by the Ministry under the Act applies to this information.

Based upon all of the foregoing discussion, I agree with these conclusions and adopt them for the purposes of this appeal. In my view, the circumstances of this case are analogous to those in Order P-736, and I do not agree with the Ministry's arguments, referred to above, to the effect that Order P-736 was not correctly decided.

As previously noted, I have determined that I will require production of the records at issue in order to determine whether I have jurisdiction to proceed with this inquiry, and, if I do decide that I have such jurisdiction, to consider whether access should be granted. It follows, therefore, that the Ministry must provide me with all records in its custody or under its control which are responsive to the two requests.

ORDER:

1. I order the Ministry to produce all records in its custody or under its control which are responsive to the appellant's requests to me within twenty-one (21) days after the date of this interim order.

2. The records referred to in Provision 1 of this interim order should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: November 29, 1994
John Higgins
Inquiry Officer