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

ORDER P-993

Appeal P_9500209

Ministry of the Attorney General

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of the Attorney General (the Ministry) received a two-part request for certain information. The first part of the request was for all records in the possession of Crown Counsel relating to a number of charges which were laid against the requester. The second part of the request was for various records relating to any complaints made against or investigations into the conduct of a named Provincial Court Judge and a named Assistant Crown Attorney.

The Ministry initially responded by advising the requester that it understood that the Crown had provided him with full disclosure relating to the charges laid against him. Moreover, the Ministry stated that the Act has no application to this part of the request, as the law of disclosure is fully governed by federal common law and the Canadian Charter of Rights and Freedoms. With regard to the second part of the request, the Ministry responded that no responsive records exist.

The requester appealed the Ministry's decision.

During the mediation stage of the appeal, the Ministry identified a Crown Brief as the record responsive to the first part of the appellant's request and issued an amended decision denying access to it in its entirety under section 19 of the Act (solicitor-client privilege). The Ministry reiterated that it has no records responsive to the second part of the request.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from the Ministry only.

PRELIMINARY MATTER

The sole record at issue relating to the first part of the appellant's request is a Crown Brief which pertains to a number of charges laid against him by the Metropolitan Toronto Police. During the mediation stage of the appeal, the Commissioner's office was informed by the Ministry that this record had already been provided to the appellant by the Crown Attorney through disclosure in the criminal proceeding.

In light of the above, the Notice of Inquiry requested that the appellant provide submissions on the issue of whether any useful purpose would be served by continuing with the first part of the appeal. As indicated above, the appellant did not provide any representations in response to the Notice of Inquiry.

In Order M-271, Assistant Commissioner Irwin Glasberg dealt with a situation in which the appellant was already in possession of the records at issue in the appeal. In that case, he proceeded with the appeal because one of the issues was the appellant's desire to request a correction of personal information under section 36 of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent of section 47 of the Act). He indicated that, in this situation, the institution in question would have to acknowledge that it had custody of the record for which the correction was to be requested. Also, the parties in that case had been involved in a series of ongoing requests and the Assistant Commissioner was of the view that his order might reduce the need for future appeals.

However, he also made the following comments of a more general nature about situations where the appellant already has the record at issue:

> In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner's office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful purpose. In addition, appeals of this nature consume the scarce resources of institutions and impede the ability of the Commissioner's office to deal with the files of other appellants.

I agree with these views and adopt them for the purposes of this appeal. In my view, some appeals may present circumstances (such as those referred to in Order M-271) which would justify proceeding even where an appellant has obtained a copy of the record at issue. However, in the absence of factors such as those present in Order M-271, the fact that an appellant has, by legitimate means, obtained a copy of the record at issue would render the appeal moot as regards that record, because any determination regarding access would have no practical effect.

In this case, the Ministry has advised that the Crown has previously provided the appellant with three copies of the Crown Brief. Despite being requested to do so in the Notice of Inquiry, the appellant has provided me with no reasons to warrant continuation of this part of the appeal. Accordingly, I find that this portion of the appeal is moot and no useful purpose would be served by proceeding.

The sole issue remaining in this appeal is whether the Ministry's search for records responsive to the appellant's second part of the request was reasonable in the circumstances of the appeal.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that such a record does not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with 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 explains that complaints about Provincial Court Judges, if received at the Ministry, would be forwarded to the Ontario Judicial Council for consideration and are not dealt with by the Ministry. Similarly, complaints about Crown Counsel are generally dealt with by the Law Society of Upper Canada. The Ministry submits that if any complaints were received about the two named individuals, they would likely come to the attention of the Assistant Deputy Minister - Criminal. The Ministry submits that this individual considered this portion of the appellant's request and is not aware of any responsive records.

The Ministry's representations include an affidavit sworn by the former senior Assistant Crown Attorney in the Toronto Region, now the Crown Attorney for North York, who conducted the search for responsive records and located the record responsive to the first part of the request. The affidavit states that no records responsive to the second portion of the request exist.

I also note that the Ministry, in both its original and amended decision letters, referred the appellant to the Ontario Judicial Council and the Law Society of Upper Canada, providing him with the relevant addresses for each organization. Neither of these organizations are institutions under the Act.

Having carefully reviewed the affidavit and the representations of the Ministry, I am satisfied that the Ministry has taken all reasonable steps to locate the records which would be responsive to the appellant's request. Accordingly, I find that the search was reasonable in the circumstances of this appeal.

ORDER:

1. With respect to the first part of the request, the appellant's appeal is denied.

2. With respect to the second part of the request, I uphold the decision of the Ministry.

Original signed by: September 1, 1995
Anita Fineberg
Inquiry Officer