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

ORDER P-995

Appeal P-9500036

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 request for the following information:

1. Results of a dye test referred to in an appendix of a court order dated August 26, 1991 and any other evidence in support of the allegation that the requester's sewage system was in operation on and/or prior to a particular date.

2. The correct date that should have appeared on the Fine Form 818 in place of the date identified as a typographical error.

3. Why a named Justice of the Peace issued a particular order violating section 6 of the Provincial Offences Act (the POA).

4. Why another named Justice of the Peace violated section 6 of the POA.

The Ministry responded to the requester and advised him that the requested information pertains to a court matter and court records are not covered by the Act. The Ministry indicated, therefore, that it did not have custody or control of a record which would contain the information he was seeking. The Ministry further advised the requester that he should contact the district Court Services Manager, and provided the address and telephone number for that office. The requester appealed the denial of access.

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

This is the second in a series of orders in which I deal with the issues surrounding "court records". Order P-994 was the first.

In Order P-994, I found that the courts, and records which relate to a court action and which are located in a court file, fall outside the application of the Act. I found further that such records, to the extent that they are located in a "court file", are not in the custody or under the control of the Ministry for the purposes of the Act. Finally, I found that copies of these records, to the extent that they exist independently of the "court file", are within the custody or under the control of the Ministry (or any other institution under the Act). I have no evidence before me in the current appeal which would lead me to alter these findings. Accordingly, I adopt these findings for the purposes of a determination of the issues in the current appeal. In Order P-994, however, I acknowledged that the factual circumstances in that appeal did not facilitate a complete determination of all the issues which arose from the Ministry's decision. In particular, I indicated that a full determination of what constitutes records in a court file would have to be decided on a case by case basis. Before I am able to proceed with a discussion of the substantive issues in this appeal, however, a number of preliminary matters arising from the Ministry's representations need to be addressed.

PRELIMINARY MATTERS:

INTERPRETATION OF THE REQUEST

The Ministry's representations have raised a number of issues regarding its interpretation of the four parts of the request. I will deal with each part separately, but not in sequential order.

Part Two

The appellant has requested the correct date that should have appeared on the Fine Form. The Ministry indicates that this form is generated by its "ICON fine-tracking system" once a fine has been imposed and the information inputted into the system. The ICON fine-tracking system is a province-wide database in which all fines owed to the Government of Ontario are input.

As a result of an inputting error, the offence date on the form was listed as June 1, 1991, whereas it should have been July 1, 1991. The Ministry states that the Court Services Manager of the Ontario Court (Provincial Division) in Kenora has provided this information to the appellant on numerous occasions.

While it is possible that a record might exist which would respond to the appellant's query, I am of the view that he is asking for clarification of a typographical error on the form. This clarification was provided to him.

Previous orders of the Commissioner have dealt with the issue of "mootness" in appeals (Orders M-271 and P-942). These orders were concerned with the usefulness of continuing an appeal in circumstances where the appellant had obtained a copy of the record at issue through other legitimate means, which is somewhat different from the present case. However, the principles underlying these decisions are relevant. In Order M-271, Assistant Commissioner Irwin Glasberg made the following general comments regarding this 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 comments. In the circumstances of this appeal, the appellant's request is in the nature of a query which has been answered on numerous occasions. Therefore, I find that this portion of the appeal is moot and no useful purpose would be served by proceeding with it.

Parts Three and Four

The Ministry submits that parts three and four, which ask questions rather than requesting access to records, should not be interpreted as requests under the Act. The Ministry asserts rather, that they are, in effect, complaints which accuse Justices of the Peace of impropriety, and that they should be addressed to the "Justice of the Peace Review Counsel".

In Order M-493, Inquiry Officer John Higgins addressed the argument that a request in the form of questions does not constitute a proper request under the Municipal Freedom of Information and Protection of Privacy Act (the MFOIPPA). With respect to this issue, he stated:

> [E]ven if I agreed with the Board that the request is, for the most part, in the form of questions, I would not agree that, on this basis, the request is not a proper one under the Act. The Board has not provided any authority to substantiate this argument. Moreover, it would be contrary to the spirit of the Act to exclude a request on such a technical basis.
>
> In my view, when such a request is received, the Board is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section 17 of the Act, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", then the Board may have recourse to the clarification provisions of section 17(2).

Inquiry Officer Higgins concluded that the request in that case was a proper request under the MFOIPPA. I agree with his views on this issue, however, the factual circumstances in the current appeal are distinguishable from those in Order M-493.

I agree with the Ministry that the appellant's questions in parts three and four of the request appear to be a reflection of his views (or complaints) regarding the orders which were made. As Inquiry Officer Higgins indicated in Order M-493, where there is uncertainty regarding the request, or if the request does not sufficiently describe the record sought, the Ministry is obliged under section 24(2) to advise the requester of any defect and to assist him in reformulating the request. In this case, the Ministry could have taken steps to clarify the request. However, in my view, the appellant is clearly seeking answers to his questions from the Ministry rather than seeking access to records, which may require the creation of a record.

The Ministry is under no obligation, pursuant to the Act, to create records. I agree with the Ministry that determination of the appellant's complaints must be made in another forum. The Ministry indicates that it has provided the appellant with the address of the Justice of the Peace Review Counsel. In my view, it would be appropriate for the appellant to direct his queries to that body. Accordingly, I will not address parts three and four of the request as I believe they should be addressed in another forum.

Part One

The Ministry's representations indicate that this part of the request contains two separate requests. The first is for the results of a dye test referred to in an appendix of a court order. The second part of the request is for any other evidence in support of the allegation that the appellant's sewage system was in operation on, and/or prior to, a particular date. I will deal with the second portion of this part below in my discussion of the issues in appeal.

With respect to the first portion of Part One, the Ministry indicates that since responsive records related to the prosecution of the appellant on environmental offences, it contacted the officer at the Ministry of Environment and Energy (the MOEE) who was responsible for the prosecution (the Prosecution Officer). The Prosecution Officer indicated that he was unable to complete the dye tests as the premises of the appellant were locked and inaccessible at all times entry was attempted. The Ministry states, therefore, that no records exist which are responsive to this part of the request.

In this case, the Ministry has applied a blanket approach to the request, indicating that any records which would be responsive to the request fall outside the jurisdiction of the Act, regardless of the fact that its search determined that a record did not exist with respect to this portion of Part One. In my view, it is only necessary for me to consider this jurisdictional question with respect to records which actually exist.

The Ministry's assertion that no responsive records exist with respect to the first part of Part One of the request is contained only in its representations, and has not been previously communicated to the appellant. Thus the appellant has not been able to appeal this aspect of the matter. Accordingly, I will order the Ministry to provide the appellant with a new decision regarding this part of the request. If he disagrees with this decision, the appellant may appeal it to this office within 30 days pursuant to section 50 of the Act.

DISCUSSION:

I have disposed of the issues relating to the first portion of Part One, and Parts Two, Three and Four of the request above. The second portion of Part One remains to be addressed. Consequently, the only records at issue in this appeal are those which are responsive to that portion of the request, and the substantive portion of this order, therefore, will only deal with the issues arising with respect to this part of the request.

The first issue concerns the application of the Act to the records at issue.

In Order P-994, I found that even if the Act did not apply to the records, to the extent that they are located in a "court file", the Ministry is still obligated to conduct a search through its own record holdings to determine whether such records might exist independently of the "court file". The second issue to be addressed in this order, therefore, concerns the reasonableness of the Ministry's search for responsive records.

ARE THE RECORDS AT ISSUE SUBJECT TO THE ACT?

I have previously found that records related to a court action, to the extent that they exist in a "court file", are not in the custody or under the control of the Ministry, and are, therefore, not subject to the Act. Accordingly, determination of the issues in this appeal turns on whether the records at issue are records which relate to a court action and which are in a court file.

In the current appeal, the Ministry indicates that the second portion of Part One refers to "evidence" used against the appellant in a prosecution. The Ministry submits that these records, if they exist, are located in the official court file at the Ontario Court (Provincial Division) and as such, are not subject to the Act.

Similar to my findings in Order P-994, I find that evidence produced at trial, whether in the nature of documentary exhibits or by way of recorded oral testimony, is clearly the type of information which would fall within the scope of documents which would properly be contained in a court file related to an action. In accordance with my reasons in Order P-994, therefore, I find that the requested records, to the extent that they exist in the court file, are not in the custody or under the control of the Ministry, and are therefore not subject to the Act.

REASONABLENESS OF SEARCH

I have found that the records at issue in this appeal are records relating to a court action contained in a court file. In Order P-994, I found that while the Ministry need not search court files for records relating to a court action requested under the access provisions of the Act, it must search its own record holdings to determine whether it has responsive records within its custody and/or control. As I indicated above, the second issue in this appeal concerns the reasonableness of the Ministry's search for records in the circumstances of this appeal.

In its representations, the Ministry indicates that it contacted the Court Services Manager, Ontario Court (Provincial Division), Kenora, upon receipt of the request. The Manager conducted a search of the court file room, where such records are kept and discovered an exhibits envelope. Although the contents of this envelope were not examined, the Ministry indicates that it is possible that it may contain responsive records. The Ministry submits, therefore, that the records requested, if they exist, are located in the official court file.

The Ministry indicates that since the prosecution of the appellant in 1991 was conducted by the MOEE, it contacted the Prosecution Officer at the MOEE to determine if such records exist other than as part of the Kenora court's record. After searching through his closed files, the Prosecution Officer informed the Ministry that the exhibits used in the 1991 trial were never returned to him by the court.

Where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates, in this case implicitly, 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.

I have carefully reviewed the Ministry's representations, and I am satisfied that it has taken all reasonable steps to locate the records responsive to the appellant's request.

ORDER:

1. I order the Ministry to provide the appellant with a decision regarding the results of its search for records pertaining to the results of a dye test referred to in an appendix of a court order (the first portion of Part One of the request) within fourteen (14) days of the date of this order, without recourse to a time extension.

2. In order to verify compliance with Provision 1 of this order, I order the Ministry to provide me with a copy of the decision letter referred to in Provision 1 within twenty (20) days of the date of this order. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

3. I uphold the Ministry's decision regarding the remaining portion of Part One of the request.

Original signed by: September 6, 1995
Laurel Cropley
Inquiry Officer