



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1397

Appeal P_9700063

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 a copy of the tape recording of the testimony and evidence from a trial which took place on March 3, 1994 in a named jurisdiction. The appellant indicated that he was involved in the trial which was held pursuant to the Dog Owner's Liability Act.

The Ministry responded to the appellant by advising him that court records are not in the custody or under the control of the Ministry and, therefore, are not subject to the provisions of the Act. The Ministry further advised the appellant that court tapes and transcripts can be obtained by making a request to the Court Reporter's Office in the jurisdiction where the proceedings took place, and provided him with the address and telephone number of that office. The appellant appealed the Ministry's decision.

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

DISCUSSION:

CUSTODY OR CONTROL

The sole issue in this appeal is whether the Ministry has custody or control of the tape.

Section 10(1) of the Act states:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

- (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

It is clear from the wording of section 10(1) that in order to be subject to an access request under the Act, a record need only be under the custody **or** the control of an institution.

In Order P-994, Inquiry Officer Laurel Cropley considered an argument by the Ministry to the effect that a copy of an "information" (a document used to initiate a criminal prosecution) in a court file was a "court record", and therefore fell outside the scope of the Act. The Inquiry Officer made the following findings which, in my opinion, are equally applicable to the facts in this appeal:

- (1) the Act does not define a class of records called “court records”, nor are records in this category expressly excluded from the Act by any of its provisions;
- (2) the question of whether a so-called “court record” comes within the scope of the Act must therefore be determined based on the general principles enunciated in the Act, and in particular, the principle set out in section 10(1) that a record must be in the custody or under the control of an institution to fall within the scope of the Act;
- (3) courts are not “institutions” under the Act, and, based on the constitutional separation of the judiciary from the other branches of government, courts are not part of any Ministry;
- (4) by virtue of the Courts of Justice Act and the common law, courts have a right to supervise and protect their own records (i.e. records that are directly related to a court’s adjudicative function);
- (5) records of the type at issue in Order P-994 (an “information”) found within a court file are in the possession of the Ministry, but it is only bare possession, and they are not under the Ministry’s control;
- (6) based on Order P-239, “bare possession” does not amount to custody for the purposes of the Act; rather, there must be “some right to deal with the records ...”;
- (7) as a result of points (5) and (6), neither custody nor control were established for “informations” found in court files, and they fall outside the scope of the Act;
- (8) copies of such records which exist independently of a “court file” may be within the custody or control of an institution and, in that event, would be subject to the Act; and
- (9) all of the above findings apply as well to records held by Justices of the Peace.

The Inquiry Officer again had occasion to consider what records may be said to fall within a court file in Order P-995, this time dealing with a request for “evidence” used against an appellant in a prosecution under the Provincial Offences Act. She stated:

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. [my emphasis]

I agree with the conclusions reached by the Inquiry Officer in Orders P-994 and P-995 and adopt them for the purposes of this appeal. I note that the Ministry in this appeal is the same institution whose decisions were under appeal in those orders. The submissions of the Ministry, in this case, are the same as those considered in great detail by Inquiry Officer Cropley in these previous orders to reach the conclusions set out above.

On the basis of the above principles, the 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.

The Ministry submits that the appellant appeared in court before a Justice of the Peace for the purposes of a trial. The record at issue, the tape, relates to this action in that it is a recording of the oral testimony presented at the trial. The court proceedings, including the tape of the oral evidence, would then be kept in a court file. There was no intention that the record be used by the Ministry. The record relates solely to the court proceedings for which it was created and it does not, otherwise, relate to the Ministry's mandate or function. Finally, the Ministry submits that the use of court records is dictated by the judiciary, not the Ministry. Accordingly, it is the Ministry's position that the tape is a court record which is located in the official court file and, as such, is not subject to the Act.

In his representations, the appellant has provided me with several reasons why he requires a copy of the tape. However, he does not provide submissions on the issue of whether such tapes are in the custody or control of the Ministry.

Having reviewed all of the representations, it is my view that the tape of the trial testimony forms part of the court records. Accordingly, I find that the tape is not in the custody or under the control of the Ministry, and is, therefore, not subject to the Act.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ May 23, 1997