



Information and Privacy
Commissioner/Ontario

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

ORDER P-1451

Appeal P_9700062

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a six-part request under the Freedom of Information and Protection of Privacy Act for access to information relating to the Ontario Legal Aid Plan (the Plan). The Ministry granted access in full to items 2 and 6. The Ministry advised that items 1, 3 and 5 may be obtained directly from the Law Society of Upper Canada (the LSUC). The Ministry advised that due to the broad wording of the request for records covering a period of six months, it would require an extensive search to locate any responsive records that it may have in its custody or control at an estimated cost of \$20-25,000. With respect to item 4, the Ministry advised that “an anticipated review of legal aid has not been announced at this time” and suggested that the requester contact the LSUC directly. The requester appealed the decision.

During mediation, the appellant narrowed the scope of the request to the following:

1.
 - (a) LSUC’s proposal to downsize the Plan
 - (b) Stanley Beck’s review of the financial and policy implications of the LSUC’s cost-cutting proposals to the Plan
 - (c) LSUC’s cost-cutting proposals to the Plan
 - (d) measures to be implemented by the LSUC
 - (e) LSUC’s monitoring procedures
 - (f) memorandum of understanding between the previous government and the LSUC
 - (g) funding agreement reached between the LSUC and the previous government and guaranteed by the current government
 - (h) LSUC’s downsizing plan, including those changes previously approved
 - (i) monthly monitoring procedures
2. Area Directors Manuals from 1966 to present (status report)
3. Policies and procedures of the Plan including changes in October, 1994, August and September, 1995 and Spring, 1996 (status report)
4. List of “Legal Aid Review” sources and reference material.

The Ministry granted access to items 1(i) and 4 and advised the appellant that access had already been granted to the records listed under items 1(b) to (g). The Ministry stated that items 2 and 3 were not in its custody or control. With respect to items 1(a) and (h), the Ministry reiterated its position that while it may have responsive records, an extensive search through the files of 18 Ministry officials would be required. The Ministry added that the search would likely only reveal information “that is already public” and provided the appellant with a fee estimate of \$6,525 for search time of 217.50 hours.

The appellant maintains that records responsive to items 1(a), (h), 2 and 3 are in the Ministry’s custody or control and appeals the fee estimate of \$6,525.

This office provided a Notice of Inquiry to the Ministry and the appellant. Representations were received from both parties.

DISCUSSION:

CUSTODY AND CONTROL

The appellant maintains that records responsive to items 1(a) and (h), 2 and 3, are in the custody and control of the Ministry.

The Ministry states that the records that it has previously disclosed to the appellant are responsive to items 1(a) and (h). The Ministry adds that it may have additional responsive records; however, it will require an extensive search of files of 18 Ministry officials, covering a period of six months, at an estimated cost of \$6,525 for 217.50 hours of search time.

In my view, the Ministry has acknowledged that it has custody and control over records that are or may be responsive to items 1(a) and (h) of the request and therefore, this issue as it pertains to items 1(a) and (h) is moot.

Accordingly, I will only discuss the issue of custody and control in relation to items 2 and 3.

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| Item 2 | Area Directors Manual(s) from 1966 to the present (status report) |
| Item 3 | Policies and Procedures of the Ontario Legal Aid Plan (i.e. changes in October, 1994, August and September 1995 and Spring, 1996 (status report). |

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 the record or part of the record falls within one of the exemptions under sections 12 to 22.

In Order 120, former Commissioner Sidney B. Linden stated that the terms “custody” and “control” should be given a broad interpretation in order to give effect to the purposes and principles of the Act. I agree with former Commissioner Linden’s approach and adopt it for the

purposes of this appeal. In that order, he lists a number of factors pertinent to the creation, maintenance and use of records to be considered when determining the issue of “custody” and “control” of the records:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or an employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution’s mandate and functions?
7. Does the institution have the authority to regulate the record’s use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with the other records held by the institution?
10. Does the institution have the authority to dispose of the record?

This approach has been followed in many subsequent orders. In each case, the issue of custody or control has been decided on the particular facts of the case, the factors outlined in Order 120 and the related considerations which have been articulated in these orders (Orders P-384, P-451 and P-1151). Similarly, this appeal must be decided on the basis of its particular facts.

The Ministry submits that while it does provide the requisite funding for the Plan, its mandate does not include the administration of legal aid nor the right to determine whether or not an individual receives legal aid. The Ministry states that it did not participate in the development of the cost control proposals or in the development of the policies, procedures or manuals needed to implement them.

The Ministry submits that, pursuant to sections 3-26 of the Legal Aid Act, the LSUC has the mandate to establish and administer the Plan. Therefore, it is the LSUC through its Legal Aid Committee and Clinic Funding Committee, which is responsible for policies, procedures and any manuals needed to guide or direct staff in the operation of legal aid services. The Ministry points

out further that all the staff administering the Plan are employees of the LSUC. The Ministry submits, therefore, that the records requested fall within the realm of responsibility of the LSUC and that these records do not relate to the mandate or function of the Ministry.

The appellant argues that the Ministry does have custody and control over the records because the Plan is administered by the LSUC and funded by the provincial government.

I have carefully reviewed the representations of the parties together with all relevant circumstances of this appeal. In Order P-1069, I made a finding which, in my view, has direct application to the present situation. In that order, I addressed a situation where a ministry provided funding to an arm's length entity and enjoyed a limited right of access to certain types of records for specific and limited purposes. I found, in those circumstances, that the funding body did not exercise control over all of the arm's length entity's records for the purpose of section 10(1) of the Act. In my view, this finding applies equally to the circumstances of this appeal and I find that the Ministry does not exercise the requisite degree of control over the manuals and administrative type records held by the LSUC. Accordingly, I find that the Ministry does not have custody or control over the requested records held by the LSUC for the purposes of section 10(1) of the Act.

FEE ESTIMATE

The Ministry has provided a fee estimate of \$6,525 for 217.50 hours of search time. The Ministry indicates that it may have records response to items 1(a) and (h). However, it would require an extensive search through the files of 18 Ministry officials, covering the six-month period between August, 1995 to January, 1996. The Ministry adds that the analysis of the cost control measures was conducted by the LSUC and therefore, the records in the Ministry files, if they exist, will not reveal anything more than the information that is already public.

The charging of fees is authorized by section 57(1) of the Act, which states:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the cost of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

Section 6 of the Regulation also deals with fees. It states, in part,

The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:

- ...
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.

The Ministry submits that the files of 18 Ministry officials would need to be reviewed and that some files would have to be retrieved from off-site storage. The Ministry submits “that given the breadth of information being requested, the time period covered, the number of officials and files involved, and the various locations from which those files must be retrieved”, its estimated number of hours to conduct a search is reasonable and in accordance with the Act.

The Ministry appears to indicate that the request involves a voluminous search of many files but it has not exercised its right to issue an interim notice pursuant to section 26. Order 81 sets out the parameters for an institution to achieve a reasonable fee estimate without actually inspecting all the records. Such an interim notice should also contain reference to the fee waiver provisions in section 57(3) of the Act and solicit representations from the requester regarding the head’s discretion to waive fees.

The Ministry has confirmed that the search involves a review of the files of 18 officials, covering a period of six months. However, the Ministry has not provided sufficient evidence for me to conclude that such a search could possibly require 217.50 hours or over 31 business days of search time. In the absence of such evidence, I find that the fee estimate provided by the Ministry is not reasonable and was not calculated in accordance with the Act and the Regulations. Therefore, I do not allow the search time calculated by the Ministry.

ORDER:

1. I uphold the decision of the Ministry that it does not have custody or control over records listed as items 2 and 3.
2. I do not uphold the Ministry’s fee estimate of \$6,525.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

September 12, 1997