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

ORDER PO-2869

Appeal PA08-141

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The requester in this case is a retired Justice of the Peace of the Ontario Court of Justice (the Ontario Court). He made a request to the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following three records:

1. Copy of the legal opinion obtained by [an identified Justice] for indemnification of [the requester's] legal fees and expenses requested by his counsel;

2. Copy of the recommendation dated March 21, 2002 sent by [the Associate Chief Justice of the Ontario Court] to the Attorney General for appointment of [the requester] to full-time position; and

3. Copy of the letter retaining the services of [an identified counsel] to represent the respondents in response to the complaint made by [the requester] to [the Human Rights Commission].

The Ministry issued an access decision in which it stated that a search for records was conducted within the Court Services Division and no responsive records were located.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the parties engaged in discussions regarding offices or individuals that might have the requested records, and the Ministry conducted further searches. As a result of the further searches, the Ministry issued a supplemental decision stating that it had located one record responsive to item 2, but was unable to locate records responsive to items 1 and 3 of the request.

Regarding the record responsive to item 2, the Ministry's decision stated:

> Access to the record is granted. Please note that most of the information in the remainder of the document has been removed as it relates to other matters and other individuals and is therefore not responsive to your request. A copy of the releasable portion of the record is enclosed.

Regarding the records responsive to items 1 and 3, the Ministry's decision stated:

> Searches were conducted in the following areas of the Ministry where it was reasonable and probable that the records being sought might exist: Office of the Deputy Attorney General, Court Services Division, Communications Branch, Criminal Law Division, and Legal Services Division, including Crown Law Office - Civil.
>
> …
>
> Based on the additional searches, there does not appear to be any records responsive to items 1 and 3 of your access request in the Ministry's custody or control.

> …
> In addition, in your request, you state that the requested documents are all in the custody, control and possession of the Office of the Chief and Associate Chief Justice, which is not part of the Ministry. It should be noted that records held by the Office of the Chief Justice, Ontario Court of Justice are not subject to the provisions of the *Act* and therefore not accessible under the *Act*. You may also wish to contact the Office of the Chief Justice of the Ontario Court of Justice directly regarding the documents being requested.
>
> Another area that was suggested to be searched, from information you provided to the Mediator, was the Justice of the Peace Review Council. Again, as noted above, the records held by the Justice of the Peace Review Council are not subject to the provisions of the *Act* and are therefore not accessible under the *Act*.

Also during mediation, the Ministry clarified its reference in the supplementary decision to records held by the Offices of the Chief and Associate Chief Justice of the Ontario Court and the Justice of the Peace Review Council (the JPRC). The Ministry indicated that it had included this statement as an explanation for the appellant, and confirmed that it was not relying on any of the exclusionary provisions in section 65 of the *Act* with respect to records held by the Offices of the Chief and Associate Chief Justice and the JPRC.

The appellant confirmed that he wished to pursue access to items 1 and 3, contending that records with the Offices of the Chief and Associate Chief Justice, and the JPRC, are within the custody or control of the Ministry. The appellant also indicated that he wished to pursue access to those portions of item 2 which the Ministry had marked as being non-responsive to his request.

Mediation did not resolve the remaining issues, and this request was transferred to the inquiry stage of the process. This office sent a Notice of Inquiry to the Ministry, initially and received representations from the Ministry. Following receipt of the Ministry's representations, this office sent a Notice of Inquiry to the appellant, along with a copy of the Ministry's representations. The appellant subsequently provided representations. The appeal was then assigned to me to complete the inquiry. I sought reply representations from the Ministry on the issue of responsiveness of the undisclosed portions of the record that the appellant received. At that time, I provided the Ministry with a copy of the non-confidential portion of the appellant's representations that related to this issue. I received reply representations from the Ministry, in which the Ministry stated that it was relying on its previous representations.

RECORDS:

The record identified by the Ministry as partially responsive to item 2 of the request (referred to in this order as "the record") consists of an 8-page letter sent by an identified Justice, to the Attorney General, relating to the possible appointment of the appellant to a full-time position. Portions of pages 1, 6 and 8 were disclosed, and the remaining portions were identified by the

Ministry as non-responsive. The issue I must determine in relation to the record is whether any further portions of it are responsive.

The records which the Ministry claims are not within its custody or control, and for which the reasonableness of the Ministry's search also remains an issue, are those that would be responsive to items 1 and 3 of the appellant's request, in which he sought access to:

- a copy of the legal opinion obtained by an identified Justice for indemnification of the appellant's legal fees and expenses requested by his counsel, and

- a copy of the letter retaining the services of an identified counsel to represent the Respondents in response to the complaint made by the appellant to the Human Rights Commission.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

The Ministry disclosed certain portions of the record to the appellant and denied access to the remainder on the basis that the undisclosed portions were not responsive to the appellant's request.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

The Ministry refers to Order P-880 in its representations, arguing that in order to be responsive to a request, the information must "reasonably relate" to the request. The Ministry takes the position that the requester was specifically seeking information about his appointment to a full-time Justice of the Peace position and that the paragraphs that the Ministry disclosed to the appellant are the only portions of the record that reasonably relate to that subject. The Ministry argues that the severed portion of the record does not contain material that is reasonably related to the request, nor does it contain any reference to the appellant's appointment.

The appellant submits that he made the request to obtain the records at issue in this appeal to support and prove a complaint that he has made with the Ontario Human Rights Commission. The appellant is of the view that he was discriminated against, as he was not appointed to a full-time position, whereas he states that his colleagues were given full-time positions.

The appellant further submits that, seen in that context, the portions of the record that the Ministry has claimed are non-responsive are actually responsive. In particular, the appellant states that item 1 of his request was made with reference to, and in the context of, any recommendation made with respect to him and his colleagues, and the "portion containing others' names was very vital" to the appellant's human rights case.

In addition, the appellant submits that the Ministry's initial denial of the existence of the record and its subsequent severing of the record was an attempt by the Ministry to defeat his human rights complaint. I do not accept this uncorroborated allegation and will not refer to it further in this order.

As previously noted, the wording of the appellant's request indicated that he sought access to a copy of the recommendation dated March 21, 2002 sent by an identified Justice to the Attorney General regarding the appellant's appointment to a full-time position.

In Order P-880, referred to by the Ministry, Adjudicator Anita Fineberg found it is the request itself that "sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request." This same order also established that in order to be responsive, information must be "reasonably related" to the request. In addition, Adjudicator Fineberg concludes that non-responsive portions of a record may be severed and withheld. I agree with her interpretation and will apply it in this order.

The record at issue contains general information about vacancies, and information about specific appointments, including that of the appellant and of other individuals in the province.

The appellant has indicated in his representations that he requires information relating to other individuals' appointments, in addition to his appointment. However, the appellant's request clearly sought information solely relating to his appointment. In my view, the appellant's request cannot be considered to encompass information about the appointment of other individuals even on the broadest possible reading. Therefore, I find that information about other individuals' appointments is not responsive to the request.

Appellants are not permitted to expand their requests during access appeals. Accordingly, if the appellant continues to seek access to information regarding other individuals' appointments, he should file a new request for this information.

In my view, the Ministry has disclosed the responsive portion of the record, namely, the recommendation pertaining to the appellant. I find the remaining information to be non-responsive.

REASONABLE SEARCH

I must now determine whether the Ministry conducted a reasonable search for records responsive to items 1 and 3 of the request. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Ministry submits that it conducted a reasonable search because experienced staff made a reasonable effort to identify and locate responsive records. In particular, the Ministry states that the following steps were taken as part of the search:

- The initial search was of the Judicial Support Services office of the Criminal/POA Policies and Program Branch of Court Services Division. The Senior Manager reviewed the requester's file, the files of the requester's colleagues in similar positions who were appointed at the same time as the requester, and the general correspondence file. No records were located.

- On appeal, at the suggestion of the Mediator, the Ministry conducted additional searches, as follows.

    - Court Services Division reviewed its previous search and no records were located.

    - A Senior Advisor, with other administrative staff, conducted a search in the Office of the Deputy Attorney General. The search focused on the electronic document and correspondence archive,

using key words from the request, including identified justices, the requester, and identified counsel. No records were located.

- The Team Lead for the Correspondence and Public Inquiries Unit conducted a search of the Ministry's Communication Branch. The search was conducted using the search feature of the Unit's database. The record responsive to item 2 of the request, which is being dealt with in this order, was located.

- Legal counsel for the Assistant Deputy Attorney General, Criminal Law Division, with the assistance of administrative staff conducted a search in that Division. The search included a search of the Division's electronic tracking system, as well as of the paper files. Legal counsel also contacted Crown Counsel who might have knowledge of the records. No records were located.

- Staff from the Ministry's Crown Law Office – Civil, including legal counsel, the Issues and Correspondence Coordinator, IT Systems Administrator and the Acting Assistant to the Director conducted searches for responsive records. No records were located.

- The Executive Assistant to the Assistant Deputy Attorney General, Legal Services Division conducted a search in the unit's databases using the requester's name, counsel's name, the justices' names, and the words "indemnify" and "legal fees." No records were found.

A search was not conducted in the Attorney General's office for records responsive to items 1 and 3 of the request because the Attorney General was not a party to the correspondence. The Ministry also did not conduct searches of the Office of the Chief Justice or of the Ontario Court of Justice or the JPRC. The Ministry states that it has no authority to search those offices. In addition, the Ministry submits that, given the nature of records responsive to items 1 and 3 of the request, and the appellant's position that those records are in the custody and control of the Offices of the Chief Justice and the Associate Chief Justice, the Ministry's search of its records was reasonable.

In response, the appellant submits that records responsive to items 1 and 3 of the request are in the custody or control of the Office of the Chief Justice of the Ontario Court, and the Office of the Associate Chief Justice, and that the Ministry failed to conduct a reasonable search in that it failed to forward the request to those offices.

Based upon my review of the parties' representations, I find that the Ministry has performed a reasonable search for records responsive to the appellant's request.

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records, which are reasonably related to the request [Orders M-909, PO-2469, PO-2592]. In this case, knowledgeable employees, whose responsibilities include both the creation of and the management of documents at their respective offices, conducted searches of the electronic and paper record-holdings of numerous divisions of the Ministry. I also note that additional searches were conducted during mediation as outlined above.

The Ministry has provided a comprehensive description of the steps it undertook to locate the records in response to the request and, accordingly, has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

The appellant has not provided me with a reasonable basis for concluding that additional responsive information exists at the Ministry. In his representations, the appellant identifies that the records he is seeking are within the custody and control of the Offices of the Chief Justice and the Associate Chief Justice and that his request should have been forwarded to them by the Ministry under section 25 of the *Act*. This is not a search issue, and the appellant's position in this regard turns on whether these offices are institutions, or part of an institution. This analysis is conducted below under the heading, "custody or control."

In view of the discussion below, in which I conclude that, based on the nature of the records responsive to items 1 and 3 of the request, the Ministry would not have custody and control of them if they were located in the office of the Chief Justice or Associate Chief Justice of the Ontario Court, I find that it was reasonable for the Ministry not to conduct searches at those two offices, and its failure to do so provides no basis for finding that its search efforts did not meet the criteria for a reasonable search.

In summary, I find that the Ministry has conducted a reasonable search for records in response to the appellant's request.

CUSTODY OR CONTROL

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 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.
>
> [Emphasis added.]

The important principle established by section 10(1), for the purposes of this appeal, is that the right of access provided by the *Act* applies only to records that are in the custody or under the control of an institution.

The appellant's argument is, essentially, that records responsive to items 1 and 3 of the request are in the custody and control of the Office of the Chief Justice, the Office of the Associate Chief Justice and the JPRC. In addition, the appellant argues that those offices are institutions, as defined by the *Act* and are, therefore, subject to the *Act*.

The appellant submits that he originally made the request for the records to the Office of the Chief Justice and the Office of the Associate Chief Justice, and that those offices, not the Ministry, should have rendered a decision letter and claimed any exemptions.

The appellant also argues that the nature of the records in this appeal differs from those in the appeal that resulted in Order P-994, in which Adjudicator Laurel Cropley found that court records in a court file are not subject to the *Act*. In this appeal, the appellant states, the records consist of correspondence "purely of an administrative nature," which could not be considered to be the record of a judge or of a judicial nature. In addition, the appellant states that the records at issue are physically in the custody of the Court's administrative, not judicial, staff, and are, therefore, subject to the *Act*.

The appellant also appears to argue, more broadly, that the courts are institutions under the *Act*. In that regard, he states:

> Section 2(1) [of the *Act*] has included "the Assembly," meaning the "Legislative Assembly" the other organ of government besides the Executive (the Ministry) and the Judiciary. No violence will be done to the rule of interpretation to regard the court or judiciary as an "institution." There is no clear and/or strict separation of powers between the 3 organs of the state … for the reason judges are being appointed by the Attorney General, the Executive branch of the government.
>
> When section 65(3) to (6) and section 67(6) have expressly set out the exemptions in relation to records generated by judges and courts to the exclusion of any others, the *Act* has brought others though generated by judges or courts within the ambit and scope of the *Act*. Implicit in this and it follows as a corollary that in respect of those excluded, the *Act* has deemed the courts and judges as an "institution" to attract its jurisdiction. This would apply to [records responsive to items 1 and 3 of the request].

…

> On the same footing, if not on a lower scale [the JPRC] also could be regarded as an institution and no exemption for its proceedings has been expressly provided for either by section 65 or 67(6).

Section 67(6) does not appear in the *Act*. With respect to sections 65(3)-(6), I do not accept the appellant's argument that these sections have the effect of making records responsive to items 1 and 3 of the request subject to the *Act*. While section 65 may exclude certain records from the scope of the *Act*, it is not the basis for finding that the *Act* applies to a record at first instance. That function is fulfilled by section 10(1), which indicates that this determination is based on whether the records are in the custody or under the control of an institution.

In the context of this appeal, the appellant's remaining arguments under the heading of custody or control raise the following questions:

(1) Are the offices of the Chief Justice and Associate Chief Justice of the Ontario Court, and the JPRC, either institutions or part of an institution for the purposes of the *Act*?

(2) Are the records in the custody or under the control of the Ministry for the purposes of the *Act*?

I will address each of these questions in turn.

Are the offices of the Chief Justice and Associate Chief Justice of the Ontario Court, and the JPRC, either institutions or part of an institution for the purposes of the *Act*?

The term "institution" is defined in section 2 of the *Act*. The definition states:

> "institution" means,
>
> (0.a) the Assembly,
>
> (a) a ministry of the Government of Ontario, and
>
> (a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;

The appellant also refers to section 25(5) in arguing for an expansive interpretation of the term, "institution." Section 25 deals with transfers of requests from one institution to another. Section

25(5) indicates that for the purposes of section 25, "institution" includes institutions under the *Municipal Freedom of Information and Protection of Privacy Act*. But the offices referred to by the appellant are not institutions under that statute. In my view, section 25(5) does not assist the appellant.

With respect to whether the Office of the Chief Justice and the Office of the Associate Chief Justice of the Ontario Court are "institutions" or part of an institution, the Ministry submits that it is clearly established that the courts are not an "institution" within the meaning of the *Act*, are not a designated "institution" in regulation 460 under the *Act*, and are not part of any Ministry so as to make them part of an institution. The Ministry states that Order PO-994 found that the courts are not an institution under the *Act*, and this finding has subsequently been adopted and relied upon in other orders.

In Order P-994, Adjudicator Laurel Cropley stated as follows:

> … the Ministry submits that the courts are constitutionally separate from the Ministry, and that this principle is reflected in the [*Courts of Justice Act*]. Moreover, the common law has recognized the ability of the courts to control the course of litigation without interference from the executive branch of government (which includes the Ministry) as fundamental to our legal system (R. v. Valente (No. 2) (1983), 41 O.R. (2d) 187 (C.A.), aff'd. (1985), 24 D.L.R. (4th) 161 (S.C.C.)).
>
> Finally, the Ministry points out that the courts are a significant and distinct body. On this basis, had the legislature wished to include these bodies under the Act, it would be logical to assume that they would have been expressly defined as an institution. The Ministry submits further that the purpose underlying Part II of the Act is to ensure public access to information. The courts, however, are already subject to an access regime which provides that court exhibits and original papers are generally available to the public through the court office. The Ministry notes that the application of the Act to the judiciary was specifically considered by the Williams Commission in the Report of the Commission on Freedom of Information and individual Privacy (1980). The report concluded that the Act should not be applied to judicial proceedings.
>
> In my view, the discussions surrounding the evolution of the Act clearly contemplate that the courts and the judiciary (that is, the judicial branch of government) are to be set apart from other types of institutions and from the other branches of government generally. The unique function the courts fulfil within our society is distinct from the usual perception of "government". Accordingly, I find that the courts are not part of any Ministry and are not included in paragraph (a) of the definition of "institution".

I agree with Adjudicator Cropley. For all the reasons cited by her, I conclude that courts are not institutions under the *Act*, nor are they part of the Ministry or any other institution under the *Act*. In my view, the same analysis also leads to the conclusion that the offices of the Chief Justice and Associate Chief Justice are not institutions or part of any institution under the *Act*. Records found in those offices would be subject to the same criteria as all other "court records" in order to determine whether they are in the custody or control of the Ministry, a question I will review below.

In this case, the records responsive to items 1 and 3 of the request are alleged to be in the possession of either the Chief Justice or Associate Chief Justice of the Ontario Court. They concern the appointment of a Justice of the Peace to a full time position.

With reference to the fact that the record concerns a Justice of the Peace, I note that Order P-994 itself deals with a record found in the file of a Justice of the Peace. Adjudicator Cropley refers to the *Justices of the Peace Act* and *Reference re Justices of the Peace Act* (1984), 16 C.C.C. (3d) 193 (also found at 48 O.R. (2d) and [1984] O.J. No. 3393) (Ont. C.A.) to establish that Justices of the Peace possess judicial independence in the same way as courts. She then states that "the discussion of all issues in this order with respect to the Courts applies equally to a Justice of the Peace." Accordingly, her finding (and mine) to the effect that the courts are not, themselves, institutions, includes Justices of the Peace. In addition, court-held records concerning the appointment and supervision of Justices of the Peace will be analysed in the same manner as court-held records concerning the appointment and supervision of judges.

For the purposes of the discussion here, these conclusions dispose of the appellant's argument that he is entitled to access records responsive to items 1 and 3 under the *Act* because the courts, or the offices of the Chief Justice or the Associate Chief Justice of the Ontario Court, are institutions, or part of an institution, under the *Act*. They are not institutions, nor are they part of an institution.

The remaining questions relating to custody or control of records responsive to items 1 and 3 of the request are: (1) whether the JPRC is an institution or part of an institution, and (2) whether the Ministry *itself* has custody or control. I turn now to the first of these questions, and the second one is addressed below.

With respect to the JPRC, the Ministry submits that it is not listed under section 2(1) of the *Act*, nor is it a designated institution in regulation 460 under the *Act*. Therefore, the Ministry argues, the JPRC is not an institution for the purposes of the *Act*.

The Ministry further submits that the JPRC is not part of the Ministry. In coming to this conclusion, the Ministry refers to Order P-994 and a number of court decisions. The Ministry refers to the passage from Order P-994 quoted above, in which Adjudicator Cropley stated:

> [J]udicial independence accorded the courts is similarly applicable to Justices of the Peace and […] the discussions of all issues in this order with respect to the courts apply equally to a Justice of the Peace.

The Ministry also refers *Valente v. R.*, [1985] 2 S.C.R. 673, in which the Supreme Court of Canada explored the relationship between judges, the Provincial Court (Criminal Division) and the executive branch of the government of Ontario, specifically the Ministry. The issue before the Court was whether a judge of the then Provincial Court (Criminal Division) (now the Ontario Court of Justice) was an independent tribunal within the meaning of section 11(d) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The Court held that a provincial court judge is an independent tribunal.

As already noted, in *Reference re Justices of the Peace Act*, the Ontario Court of Appeal held that Justices of the Peace have the same judicial independence as judges. This finding is affirmed in *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 and *Ell v. Alberta*, [2003] 1 S.C.R. 857.

The Ministry submits that the guarantee of judicial independence provided in section 11(d) of the *Charter* contains three elements, namely, security of tenure, financial security and institutional independence. The function performed by the JPRC and its records relate to the security of tenure of justices of the peace.

The Ministry states:

> The Attorney General is responsible for recommending the appointment of justices of the peace. Once justices of the peace are appointed, however, they become part of an independent branch of government and are given security of tenure to ensure that independence. The Attorney General has put the [JPRC] in place to make independent recommendations about whether justices of the peace should be removed from office. To comply with constitutional requirements, this process is and must be independent of the Attorney General. That is, while the Attorney General controls the appointment of justices of the peace, he does not control the process by which a recommendation is made that a justice of the peace be removed from office.

In addition, investigations and recommendations regarding complaints about Justices of the Peace are carried out by the JPRC. A Justice of the Peace may be removed from office only by order of the Lieutenant Governor in Council. The Ministry submits that it does not have a role in the investigation and hearing of a complaint against a Justice of the Peace.

The Ministry advises that the JPRC has its own facility, recruits and supervises its own staff, has its own budget that is separate from the Ministry's operating budget, and holds its own records apart from the Ministry. As well, the JPRC exercises a supervisory role with respect to Justices of the Peace, whom I have already concluded enjoy judicial independence in the same way as judges.

In *Ontario (Attorney General)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1997), 34 O.R. (3d) 611, the Court of Appeal considered whether the Ministry had control over

records in the hands of the Chair and the individual members of the Judicial Appointments Advisory Committee (the Committee), for purposes of section 10(1) of the *Act*. The Court quashed Order P-704, in which former Assistant Commissioner Irwin Glasberg had found that the Ministry did have control over the records on the basis that the Committee was part of the Ministry. The Assistant Commissioner ordered the Ministry to obtain copies of all records relating to the selection of a named individual to the position of judge in the Ontario Court (Provincial Division) and make an access decision.

In my view, the role and nature of the Committee is closely analogous to the JPRC. Writing for the panel in *Attorney General*, Justice Goudge outlined the history and role of the Committee in the following manner:

> Judges of the Ontario Court (Provincial Division) are appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General, pursuant to s. 42 of the *Courts of Justice Act* …
>
> The [Judicial Appointments Advisory] Committee was set up in December 1988 by the Attorney General of the day, Ian Scott. Attorney General Scott described its purpose and mandate to the Legislature as follows:
>
> > The lay-dominated advisory committee will do a great deal to remove any unwarranted criticism of political bias or patronage appointments to the judiciary while enhancing community and public involvement and reinforcing confidence in the judiciary and the justice system. Such a committee, with a broad base of representation from across the province, will ensure that the justice system reflects the needs, the values and the attitudes of the community as a whole.
> >
> > The Advisory Committee on Judicial Appointments will have the following mandate: First to develop and recommend comprehensive, sound and useful criteria for selection of appointments to the judiciary, ensuring that the best candidates are considered; and second, to interview applicants selected by it or referred to it by the Attorney General and make recommendations. ([1988] Ont. Leg. Debates 6835)
>
> In its Final Report dated June 1992, the Committee described it role this way at p. 20:
>
> > The committee is a true nominating committee. It is a completely independent body with a mandate to select, interview and recommend to the Attorney General suitable candidates for judicial appointment.

The Court unanimously held that the Committee was not part of the Ministry. The Court states:

> Individual Committee members were not employees of the Ministry. Even if they were in some respects agents of the Ministry, that is not enough to make them part of the Ministry. If it were, any agency of a ministry would automatically be subject to the *Act* and s. 2(1)(b), designating specified agencies to come within the *Act* would be superfluous. Nor could the nature of the work of the Committee have made its members part of the Ministry. Nothing in the definition in s. 2(1)(a) suggests this. Nor would the Legislature have intended that simply by giving independent advice to the Attorney General individuals would be subjected to the access provisions and recordkeeping obligations of the *Act*. Hence, in my view, the records in question could not be said to have come within s. 10(1) on the basis that individual Committee members were part of the Ministry. They were not.

Although the subject matter before judges and justices of the peace may differ, their roles and status of independence from the Ministry are very similar, as confirmed in *Reference re Justices of the Peace Act* (cited above). The JPRC fulfils an analogous function to the role of the Committee whose records were considered in the *Attorney General* case I have just quoted. Both bodies provide an independent assessment of the suitability of individuals; in one case to become a judge and in the other, to continue to hold the office of Justice of the Peace. The JPRC has its own premises and staff, its own separate budget, and it records are not integrated with the Ministry's. For all these reasons, I conclude that the JPRC is not part of the Ministry or any other institution.

I also accept the Ministry's arguments that the JPRC is not an institution. It is not a body described in the definition of "institution" in section 1, nor is it listed in Regulation 460.

Accordingly, I find that the JPRC is not an institution or part of an institution, and the appellant's argument to this effect does not provide a route of access under the *Act*.

To summarize, I have found that the courts, the offices of the Chief Justice and Associate Chief Justice of the Ontario Court, and the JRPA, are not institutions under the *Act*, nor are they parts of any institution, and the appellant has not therefore established this as a basis for a right of access to their records under the *Act*.

Because these bodies are not institutions, I also conclude that the Ministry was not required to transfer items 1 and 3 of the request to them under section 25 of the *Act*, as the appellant argues in his representations.

The remaining question is whether the records are in the Ministry's custody or under its control.

Are the records responsive to items 1 and 3 of the request in the custody or under the control of the Ministry for the purposes of the *Act*?

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- 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 employee? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the record? [Orders P-120, P-239]

- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record? [Order M-315]

- Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the

records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

In Order P-994, Adjudicator Cropley discussed what types of court records might be in the custody or control of the Ministry, which provides courtroom and office space, as well as administrative support staff, to members of the judiciary. She stated:

> In general, the [*Courts of Justice Act*] establishes that the Attorney General is responsible for all matters connected with the administration of the courts, **except** those matters which are assigned by law to the judiciary. The former category includes providing court buildings and the staff needed to run them. Staff such as Registrars, sheriffs, court clerks and other administrative staff are appointed under the Public Service Act through the Ministry.
>
> With respect to the role of Ministry staff, section 95(1) of the [*Courts of Justice Act*] … states that:
>
> > In matters that are assigned by law to the judiciary, registrars, court clerks, court reporters, interpreters and other court staff **shall act at the direction of the chief justice** or chief judge of the court. [emphasis added]
>
> In acknowledging that the responsibility over records in a court file is divided between the Ministry and the judiciary, the Ministry maintains that such records are central to the adjudicative process of the courts and are, therefore, intimately related to the judicial function of the courts. Further, the Ministry submits that while recognizing the administrative role the Ministry plays in maintenance of these records, the common law has expressly recognized the right of the courts to supervise and protect their own records (see: Re London Free Press Printing Co. Ltd. and Attorney General of Ontario (1988), 66 O.R. (2d) 693 (H.C.)).
>
> In this regard, the Ministry recognizes that it has possession of such records in that they are housed in Ministry premises and are cared for by Ministry staff, and that, as administrator of the courts, it has a limited right to possess these records, in that responsibility for administrative decisions regarding the establishment of procedures for accessing the records may lie with the Ministry. The Ministry submits, however, that it possesses the records as a "custodian" only and any authority it has over the records' use is subject to supervision by the courts.

> I have found that the courts are not institutions under the Act. Moreover, I recognize that the independence of the judiciary is well established in the common law and reflected in the [*Courts of Justice Act*]. In my view, the objectives of the Act as set out in section 1 are, to a certain degree, met by the "public" nature of court proceedings and the ability of the judiciary to control the dissemination of sensitive information. In order for the judiciary to maintain its independence with respect to its adjudicative function, this must necessarily entail the ability to control those records which are directly related to this function. However, because of the administrative relationship of the Ministry to records in a court file, the question remains, does the Ministry have custody and/or control over these records for the purposes of the Act.

This office has considered the issue of custody or control of "court records" in a number of other orders including Order P-1089 (writs of seizure and sale), Order P-1151 (jury roll information), Order P-1397 (tape recordings of testimony and evidence) and Order PO-2446 (informations). Unlike the situation in this appeal, the records at issue in those orders, with one exception, were records that related to specific court proceedings.

The exception is Order P-1151, which dealt with postal code information of jurors. In that order, former Assistant Commissioner Tom Mitchinson found that the information contained in the jury roll was prepared under the *Juries Act* by the sheriff, who acted as an officer of the court in preparing and administering the jury rolls. He also found that the responsibility for the preparation and the administration of the jury list, and the supervision and management of the jury selection process is under judicial control. In addition, he found that the information contained in the database was not integrated with other records held by the Ministry. Having regard to all of these circumstances, Assistant Commissioner Mitchinson found that the information requested was not in the custody and/or under the control of the Ministry. This order is an important illustration of the manner in which the *Act* respects judicial independence over court records and over administrative matters under judicial control.

Based on the jurisprudence I have referred to in relation to the independence of the judiciary and Justices of the Peace, and bearing in mind the role of the JPRC, I have concluded that records held by members of the judiciary, relating to employment-related issues concerning individuals who have been appointed as Justices of the Peace, are under judicial control. In my view, these are not "administrative" matters under the Ministry's control. I Therefore find that records responsive to items 1 and 3 of the request are *not* under the Ministry's control for the purposes of the *Act*.

Given the possibility that records responsive to items 1 and 3 of the request may be in the Ministry's physical possession if it provides office space to the Chief Justice or Associate Chief Justice of the Ontario Court, the question arises whether that would amount to "custody" within the meaning of section 10(1). In Order P-239, former Commissioner Tom Wright considered when records in the possession of an institution could be considered to be in its custody. He stated:

> I agree that bare possession does not amount to custody for the purposes of the Act. In my view, there must be some right to deal with the records and some responsibility for their care and protection.

In my view, if such records did exist in the files of the Chief Justice or Associate Chief Justice and the premises are provided by the Ministry, this would amount to no more than bare possession. The records would be subject to control by the judiciary, and the Ministry would not have the right to deal with them in a manner that would amount to "custody."

The Ministry's submissions also indicate that it conducted a search for records responsive to items 1 and 3 of the request, and it does not have custody or control of them. The Ministry submits that it has no knowledge of them, does not have physical possession of them, and does not know where they are located. The Ministry states that, based on the appellant's submissions, the records at issue were created by individuals who are not employees of the Ministry. In addition, the Ministry submits that it does not have any right to possess the records, no right to regulate their use or disposal, has not relied on the records, and has not integrated the records with any records held by it. I have already found that the Ministry's search was reasonable, and I also accept the Ministry's evidence to demonstrate that the records are not located within record holdings which are in its custody or under its control.

For all these reasons, I find that records responsive to items 1 and 3 are not in the Ministry's custody or under its control.

ORDER:

1. I uphold the Ministry's decision.

Original signed by: January 29, 2010
John Higgins
Senior Adjudicator