



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1416

Appeal P_9700021

Ministry of the Attorney General



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On June 12, 1997, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of the tape of a Small Claims Court trial held in Kitchener on November 6, 1996.

The Ministry responded by advising the requester 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 requester 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 requester (now the appellant) appealed this decision to the Commissioner's office. This office sent a Notice of Inquiry 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)(a) 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 the part of the record falls within one of the exemptions under sections 12 to 22.

It is clear from the wording of section 10(1)(a) 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 whether 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.

Inquiry Officer Cropley also considered what records may be said to fall within a court file in Order P-995. That order dealt 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.
[emphasis added]

The reasoning in Orders P-994 and P-995 was adopted by former Inquiry Officer Anita Fineberg in Order P-1397, which involved a request for the tape recording of the testimony and evidence from a trial. In Order P-1397, the Inquiry Officer found that the tape of the trial testimony formed part of the court records and, therefore, was not in the custody or under the control of the Ministry. I adopt the principles enunciated in Orders P-994, P-995 and P-1397 for the purposes of this appeal. The Ministry in this appeal is the same institution whose decisions were under appeal in Orders P-994, P-995 and P-1397.

On the basis of the above principles, the determination of the issues in this appeal turns on whether the record at issue is a record which relates to a court action and which is in a court file.

The Ministry refers to Order P-994 in its representations and submits that the record at issue is the result of a Small Claims Court proceeding in which the requester/appellant was a participant. Therefore, according to the Ministry, it is a record which relates to a court action. The Ministry states that the court proceedings, including the tape, would then be kept in a court file. There is 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 makes a number of arguments which centre on the question of the possession, storage and disposal of the tape. In its representations, the Ministry acknowledges that it has possession of the record but only "insofar as [it is] housed in the Ministry premises and cared for by Ministry staff." The Small Claims Court is a branch of the General Division of the court. The Ministry points out that the court has a right, under both the Courts of Justice Act and the common law, to supervise and protect its records that are directly related to its court adjudicative function. The Ministry states when records are no longer required to be kept in court offices, they are, pursuant to the Courts of Justice Act, disposed of in accordance with the directions of the Deputy Attorney General "subject to the approval of the chief judge of the respective court."

Having reviewed all of the representations, I find that the tape of the Small Claims Court proceeding is "a record in a court file relating to a court action." The tape is located in a court file and, therefore, the Ministry does not have custody and/or control of it. Accordingly, the tape is not subject to the Act.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Marianne Miller
Inquiry Officer

June 25, 1997