NBRIOR 2007-22

**IN THE MATTER OF A REFERRAL UNDER PARAGRAPH 7(1)b)
OF THE *RIGHT TO INFORMATION ACT*, R.S.N.B. 1973, c. R-10.3**

Between:

Shawn Berry,
the petitioner

And:

Thomas J. Burke
Minister of Justice
The Minister

RECOMMENDATION

FACTS:

1. This referral arises out of a request for information filed on May 2nd, 2007 with the Minister of Justice and Consumer Affairs and Attorney General. The petitioner is a news reporter with the Daily Gleaner, Fredericton's daily newspaper.

2. The petitioner requested from the Honorable Thomas J. Burke, Attorney-General and Minister of Justice the production of "a copy of the information filed to the Court regarding charges against [John Doe]".

3. The Minister responded to the request by way of letter dated May 23, 2007. The Minister's response states in relevant part as follows:

> Section 2 of the Act states:

> Subject to this Act, every person is entitled to request and receive information relating to the public business of the Province, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any department to which this Act applies.

Subsection 3(4) of the Act states:

> Where a minister receives a request for information that is not kept or filed in the department for which he is appointed, he shall, in writing, notify the applicant of such fact and advise the applicant of the department in which the information may be kept or filed.

The Information requested is not information that is kept or filed in the records of the department of Justice and Consumer Affairs, within the meaning of s.3(4) of the *Right to Information Act.*

The request seeks access to court files. Files of the Court of New Brunswick are not files of the Department of Justice and Consumer Affairs, and therefore information within those files are (sic) not "information" accessible under the Act. Court files are accessed through offices of the appropriate Court. Court staff take direction from judges in responding to requests for access to information or documents.

4. I requested an opportunity to review the responsive records in late June 2007 but was informed that there are none as the request should have been directed to the Court itself. While my staff initially indicated to contacts in the Attorney General's Office that a letter confirming the Minister's decision would be forwarded to the petitioner, closer review of the matter and the law applicable has satisfied me that further disclosure is warranted.

5. It appears that the request in this case is for an Information filed by the Crown in Court regarding a certain individual. While the information may be found in the Court's record, the originating process for the criminal proceedings will have been prepared by the Attorney General and copies of the same admittedly exist in the offices of the Director of Public Prosecutions.

6. In this context the issue which I must determine is whether it lies with the Minister to state in this circumstance, as he did, that "the request seeks access to court files" and that "the files of the Court…are not files of the Department of Justice and Consumer Affairs." The petitioner's request was clearly directed toward the Minister of Justice **and** Attorney General, the Minister signed his response as Attorney General and the Attorney General is a department within the meaning of the *Right to Information Act* and listed in Schedule A of the Regulation – N.B. Regulation 85-68, section 3.

7. The petitioner has subsequently advised that he has experienced difficulty in the past in accessing information from the Court record in Court administrations in

Burton and Fredericton, when insufficient personal information is provided to positively identify a person facing charges. I understand from representations from the Attorney General's Office, that in fact the practice in these particular judicial districts differs from that of other courts around the province in that Court administrators there do not consider the information itself that may lead to a charge as being part of the official court records to which the public may have access. My first recommendation in that regard would be to encourage the petitioner to write to the Court administrators and seek their assistance in defending the principle of an open court and the application of a consistent policy in that respect in Courts around the province.

8. However, where the information sought is also in the control of the Attorney General, and as the Courts themselves are not subject to the Act, it behooves the Attorney General to be fully transparent with respect to the administration of the Criminal law and the conduct of public prosecutions in this Province. If he has the information he should produce it, as he has not indicated any exemption under section 6 of the Act which may apply.

9. The Attorney General maintains that the Director of Public Prosecutions can do no such thing. While he may have initiated the proceedings on the basis of the information sought, he does not have custody or control of the record. He submits that the document is officially part of the court record and that therefore the record is not subject to the Act and only the court can compel its disclosure. The Attorney general maintains that this is a matter of settled law in Canada.

10. I find that there are no cases directly on point in New Brunswick, however, the decision of Chief Justice Daigle, as he then was, in *Duplain v. New Brunswick (Minister of Justice)* (1995) 159 NBR (2d) 277 and the decision of Mr. Justice Stevenson in *Dixon v. Canada (Minister of Justice)* (1985), 62 are helpful references.

11. In *Duplain* the Minister of Justice had established an inquiry into alleged abuses at the Kingsclear Training School. Duplain, a news reporter, filed a request for copies of written submissions that the Commission of Inquiry had invited from persons with standing, at the close of its hearings. The Minister refused the request and the Court agreed, finding that the Commission of Inquiry was not a "department" referred to in the schedule of the Act and that its activities did not constitute "public business" within the meaning of the Act.

12. On the other hand, in *Dixon*, Stevenson, J., was faced with a request from an accused person who had been acquitted of certain offences. He applied to the Minister for any information the department had concerning him, after he was refused a firearms acquisition certificate. The Minister refused to release a police report, the statements of two victims of crime and a summary of witnesses. The Court ordered the documents disclosed save for one paragraph from one document which was personal information that had been supplied on a

confidential basis. The Court reasoned that all the information had become public at the trial of the appellant for offences of which he was acquitted and as such there was no basis for the Minister's refusal.

13. On October 2, 2007, I received a more detailed submission on these points from Michael Comeau, Assistant Deputy Minister of Justice. The Minister maintains in this submission that as Courts are not listed under schedule A of Regulation 85-68 under the *Right to Information Act*, court records are therefore exempt from the Act. Decisions from the Ontario Information and Privacy Commissioner are cited in support of this view (See: *IPC Order P-994; IPC Order P-995; IPC Order P-1397 and IPC Order P-1416)*

14. The Minister maintains further that while the Department of Justice provides support to the Courts through Court Services they are "legally separate and apart from the Department." The Department's position is informed also by the Canadian Judicial Counsel's "Model Policy for Access to Court Records in Canada" which states that "court records are exempt from provincial and federal access to information legislation". The Minister also cites McNairn and Woodbury *Government Information Access and Privacy* at p. 2-9, where the authors report:

> Each of the Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Prince Edward Island and Saskatchewan Acts states explicitly that the courts are not government institutions for the purpose of the Act or that the Act does not apply to court records.

15. The submission on behalf of the Minister concludes:

> I respectfully submit that the unifying theme in all of this is that, by constitutional law, the judicial branch is both separate from and independent of the executive and legislative branches of government. A determination that any of the courts of New Brunswick is part of any "department" of the executive branch would be contrary to the constitutional requirements of judicial independence.
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> The information requested in this matter did not exist independently of the court record; that is, it is not in the Department's own record holdings.
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> Finally, I would note that access to court records is dictated by the courts, not the Minister of Justice and Consumer Affairs (see: *A.G. N.S. et al v. MacIntyre* [1982] 1 S.C.R. 175; *Re Regina and Lortie* (1985), 21 C.C.C (3d) 436 (Que. C.A.); and *Vickery v. Prothonotary, Supreme Court N.S.* (1991), 124 N.R. 95 (S.C.C.). As such the applicant should seek to engage the court's jurisdiction over its own records which the common law treats as presumptively accessible to the public. The Applicant should attend at the appropriate court, which is what the Minister recommended in his response Dated May 23, 2007. An applicant

> who is unsatisfied with the response of court staff to a request for access to the court record should seek relief from the appropriate court.

16. With respect, I find that there is in fact no issue in this case that the Courts are subject to the Act in any way. It is clear however, that the Minister is subject to the Act, both as Minister of Justice and as Attorney-General. As indicated above, the request in this case was explicitly directed at both aspects of the Minister's charge.

17. The narrow issue in this matter is therefore whether the records sought form part of the court record and if they do are they exclusively to be considered as such. There is no dispute that the record in this case does exist as an originating process in a criminal matter in the files of the Attorney General. The Minister of Justice and Consumer affairs may not have any responsive records in this matter, but the Attorney General does. Can the requester then seek and obtain disclosure of such a record from the Attorney General or must he proceed with his request in court ?

18. While the guidelines published by the Canadian Judicial Council are helpful in describing the trend in Canadian legislation and jurisprudence on this point, they may be misleading if in fact they are taken as a definitive statement of the law in this province. As McNairn and Woodbury point out in the passage cited by the Minister, eight provincial statutes expressly exempt court records from the Application of the Act. New Brunswick's *Right to Information Act* is one of the laws that has no such express exemption. Ontario's Act is equally silent in that respect, but the Office of the Information and Privacy Commissioner has in four separate orders held that the Ontario Act does not apply to court records. These decisions have, to my knowledge not received separate judicial consideration. Three of the four decisions are decisions of Laura Cropley acting as Inquiry Officer and Order P-1416 of Inquiry Officer Marianne Miller adopts and applies the ratio Cropley's Order P-994, which is, as it were, the *locus classicus* for the Minister's proposition and the statement of law reflected in the Model policy of the Canadian Judicial Council. However, neither Order P-994, nor any of the other three Ontario decisions following it have, to my knowledge, been considered judicially.

19. As in the present case, the requester in Order P-994 was seeking access to an "Information" laid in connection with charges in criminal court. The Attorney General had refused disclosure on the basis that the records were court records and therefore not records subject to the Act. The Inquiry Officer had to consider the issue having regard to the specific wording of the Ontario Statute, which among other things, differs from our *Right to Information Act* in two material respects: i) the general right to information is framed in its subsection 10(1) as 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 records … falls within one of the exemptions…" and ii) the Act outlines in its section 65 a broad exemption in respect of certain categories of records including records in the provincial Archives; psychiatric patient records under the provincial *Mental Health Act*; and

"notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with the proceeding." (my emphasis)

20. In Order P-994, the Inquiry Officer then proceeds on with a complex analysis of the issue of custody and control. It appears further from the decision in Order P-994, that the requester in that case had laid an information in attempt to initiate criminal proceedings against an Ontario dentist, but that no initiating process had issued. The requester then later attempted to obtain a copy of that same Information. The Ministry of the Attorney-General confirmed in that case that the document sought remained in a court file at the Ontario Court at the East Mall.

21. The Inquiry Officer determined that the records sought was a "court record" in a court file and then addressed the issue as to whether Courts were "institutions" within the meaning of the Act and found that they are not. She then considered whether the Attorney General had custody or control of the records in question and held that he did not. The Inquiry Officer reviewed the case-law outlining the indicia of control and considering the interpretation of the word "custody" and concluded as follows:

> Further, in this regard, the Ministry indicates that the responsibility for making decisions about access is vested in the "head". The head of the Ministry is the Attorney General. The Ministry submits that if court records were subject to the Access requirements of the Act, the Attorney General would be responsible for making access decisions and this would alter the common law approach which vests judges with this authority. This could, the Ministry argues, impair the constitutional separation between the courts and the executive branch of government.
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> I have carefully considered the Ministry's representation, and I find that although the Ministry is in "possession" of records relating to a court action in a court file, its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to "custody" for the purposes of the Act. Nor do I find, in applying the factors set out in Order 120 to the evidence before me, that there are indicia of "control" of these records by the Ministry.
>
> For these reasons, I find that the Ministry does not have custody or control over records relating to a court action in a court file within the meaning of section 10(1) of the Act and, accordingly, to the extent that such records are located in a "court file", they cannot be subject to an access request under the Act.
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> I am not satisfied, however, that this conclusion extends to copies of such records which exist independently of the "court file". Accordingly, to the extent that copies of these records also exist independently of the "court file", they would fall within the custody and /or control of the Ministry and, therefore, would be subject to the Act.

22. I do not wish to adopt the reasons of Inquiry Officer Cropley. Indeed it seems to me that the argument she has advanced is difficult to reconcile with the legislative

choice expressed in section 65 of the Ontario Act which was to exclude from the scope of the Act only the personal notes of judges and materials prepared by them or their staff in preparation for a hearing. Be that as it may, it is equally apparent to me, upon a careful reading of Order P-994 that it does not stand for the legal proposition that any record or copy thereof that is identified as a court record is immediately rendered exempt from the application of the Act, wherever it may be found. Quite to the contrary, Officer Cropley, expressly found that copies of records in the court record in the possession of the Attorney General or another Ministry may be subject to disclosure under the Act.

23. Order P-994 was an exceptional case which dealt with the situation of a disgruntled justice seeker who was unimpressed with the Crown's refusal to proceed with criminal charges on the basis of an Information which he had laid. The case before me is much more commonplace and consequent. It deals with the right of a member of the press to view records and report upon the carriage of criminal matters by the Attorney General of this Province before the courts.

24. The general usage is that the courts themselves govern their own process and provide who may have access to records relating to the proceedings before them. The principle of the open court is the general rule and is a rule which brooks few exceptions. (See *A.G. N.S. v. Linden MacIntyre* [1982], 1 S.C.R. 175, Dickson, J. ; *Toronto Star Newspapers Limited v. Ontario,* [2005] 2 S.C.R. 188 para.1-4) It is as important to the proper functioning of our courts as is for instance Canada's own approach to the separation of powers between our executive, legislative and judicial branches of government (See Hogg, *Constitutional Law in Canada* 4th ed. pp.190 ff.).

25. However, the Attorney-General must also be accountable and operate transparently when it comes to the administration of criminal justice in the Province. If, for whatever reason, in one judicial district or another, a rule evolves in which the court restricts the rule in relation to the openness of court proceedings, a requester such as the petitioner may seek a remedy by appealing to the presiding judge in that judicial district and if necessary to the chief judge of that Court. However, if it suffices for his purpose to ask and obtain the information sought from the Attorney General himself, there is nothing in our *Right to Information Act* or under our constitutional law to preclude him from doing so. In fact it is no doubt preferable that such a check or balance be left in place, so that transparency with respect to criminal law matters can be safeguarded in several ways rather than being left to the vagueries of a single decision-maker.

26. What is still less defensible is that access to such important records be granted sparingly and according to varying rules from one judicial district to the next in this province.

27. **In the result, I would recommend that the Attorney General disclose to the petitioner the Information sought in his initial request and I would recommend further that the Minister of Justice communicate this record of decision to the Chief Justice of the Provincial Court and invite the court to devise means of harmonizing the practice among the judicial districts in relation to these important matters of public access to court records.**

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Bernard Richard, Ombudsman
October 10, 2007