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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 273-1998
November 20, 1998

INQUIRY RE: A request for records relating to an application for early parole eligibility under section 745.6 of the *Criminal Code*

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on July 3, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Ministry of Attorney General, Criminal Justice Branch (the Ministry), concerning the applicant's request for access to records relating to parole eligibility proceedings initiated by the applicant under section 745 (now 745.6) of the *Criminal Code.*

The records at issue in this inquiry all relate to the applicant's section 745 *Criminal Code* court proceedings.

2. Documentation of the inquiry process

The applicant made a series of access requests to the Ministry dated December 28, 29, and 30, 1997 and January 11, 12, and 13, 1998 for copies of various records relating to his parole eligibility hearing (referred to by the Ministry as AGT 98-31-2, 98-33-4, 98-32-3, 98-44-7, 98-43-6, and 98-42-5).

The Ministry dealt with these access requests collectively and initially responded by letter dated February 13, 1998. Some of the information requested was provided (i.e., the names and addresses of all the clerks and Directors for accessing information in British Columbia). The applicant was told that some of the other records requested were not created by or in the custody or control of the Ministry (i.e., the records were created by, and therefore the property of, the Royal Canadian Mounted Police). With respect to one of the records requested ("a copy of the questions for the jury to answer yes or no in

respect to the applicant's number of years of imprisonment"), the applicant was told that the Ministry would "forward this part of your request to the Court Services Branch for processing as the document you have requested does not fall within the scope of the Act, but is a record in a court file." The Ministry declined to provide copies of the remaining records, because all of them had previously been provided to the applicant in the context of his parole eligibility review proceedings.

The applicant requested a review of the Ministry's decision on February 27, 1998. The applicant argues that the Ministry has no right to refuse access to the records sought, because those records were not previously provided to him by the Ministry as a result of an access request under the Act:

> My complaint is the Attorney General has no right to refuse access to information that WAS NEVER ACCESSED UNDER THE Freedom of Information and Protection of Privacy Act ...
>
> These WERE NEVER ACCESSED, as for the Previous disclosures were a right given to me by the court in my Judicial Review, they had to be given to me. Because they were given to me by LAW from the Court the Attorney General of British Columbia CANNOT claim that the material previously been given copies of the material from the court DOES not allow me the RIGHT under the INFORMATION and Protection of Privacy Act to obtain copies. Further The Attorney General does NOT STATE WHAT SECTIONS OF THE ACT applies for him to REFUSE me access to these documents that WERE NEVER ACCESSED BEFORE .... (Applicant's request for review, February 27, 1998)

By letter dated May 1, 1998, and during the mediation process, the Ministry issued a new disclosure decision. The applicant was informed by the Ministry that "since the matter to which your reviews relate is currently before the Courts, the Act does not apply at this time (see paragraph 3(1)(h) of the Act ...) ... Once the criminal proceedings have been completed if a new request is received, the file will then be reviewed to see what, if any, documents can be released to you." Section 3(1)(h) of the Act provides that the Act "applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to ... (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed."

The applicant was not satisfied with the outcome of mediation. On May 29, 1998 the Office gave notice of the written inquiry to be held on June 29, 1998. By written agreement of the applicant and the Ministry, the time limit for the review was extended to permit me to hold a written inquiry on July 3, 1998.

Between the time the initial written submissions were made in the inquiry, but before reply submissions had been received, the Supreme Court of Canada released its

decision in respect of the applicant's leave application. That Court denied the applicant's application. As a result, the Ministry withdrew its application of section 3(1)(h) of the Act.

3. Issue under review and the burden of proof

The only issue in this inquiry is whether the Ministry complied with its duty to assist the applicant under section 6(1) of the Act, which provides as follows:

> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Section 57 of the Act, which establishes the burden of proof on the parties in an inquiry, is silent with respect to a review about the duty to assist under section 6 of the Act. For reasons expressed in some of my earlier Orders, I find that the burden of proof is on the public body, in this case the Ministry, to demonstrate that it has complied with its duty to assist the applicant.

4. The applicant's case

The applicant states that the Ministry has not met its duty to assist him under the Act because he did not previously obtain copies of the records in dispute as a result of an access request to the Ministry under the Act:

> (5) The public body has NOT met its duty to assist the Applicant as required by section 6(1) of the Act. The access to all the documents were from the COURT ORDER and the Law under the Criminal Code pertaining the Applicant's Judicial Review. The Applicant is accessing under the B.C. Information & Privacy (FOIPP ACT). (Reply Submission of the Applicant)

In his reply submission, the applicant said that he only wanted information from records relating to his December 28, 1997 access request. That request was for copies of all the exhibits that were filed in the parole eligibility proceedings. The applicant maintained for the first time in his reply submissions that he had never received copies of these exhibits:

> ... With respect to request AGT-98-31-2, Crown Counsel had made a mistake when he confirmed that these records had been provided previously to the Applicant. The Applicant NEVER RECEIVED them From the Court nor Crown Counsel. This part of the request deals with documents the Applicant myself submitted for filing to the court registry, which is PART OF THE PUBLIC BODY. The court registry requires that applicants to the court submit at least two copies of documents to be filed.... The Court Registry then returns to the Applicant a filed copy of those same documents including exhibits, to the Registry

for filing. The Court REGISTRY never returned the documents nor did the CROWN receive these copies. On August 21st 1997 the Applicant informed the Court of this and CROWN COUNSEL ... and he informed the Court that he DID NOT RECIEVE his Copies. Further the Court had ordered that the Applicant had to testify in person to all these EXHIBITS that the Applicant Filed and was to be SERVED on The Crown Counsel. The Registry NEVER provided the copies of those documents and exhibits to the crown counsel, nor provided the applicant his copies. The record transcript of the Judicial Hearing, the Transcript proves this of the court. THE APPLICANT JUST WANTS COPIES OF ALL THESE EXHIBITS HE FILED ONLY. (Affidavit of Applicant, paragraph 3)

5. The Ministry's case

The Ministry argues that it has fulfilled its duty to assist the applicant:

> …With respect to requests AGT-98-31-2, 32-3, 33-4, 42-5 and 44-7, the Public Body submits that it has fulfilled its duty to assist the Applicant by virtue of the Public Body having provided the Applicant, through the criminal law process relating to the Section 745 Application, with copies of all records relating to those requests that are in its custody or under its control. With respect to request AGT-98-43-6, the Applicant was served with these records during the criminal law process relating to the Section 745 Application by legal counsel for …. The Public Body further submits that its duty to assist under section 6(1) of the Act does not extend to requiring that the Public Body provide copies of such records again to the Applicant where the Public Body knows that the Applicant is already in receipt of those same records ….
>
> The Public Body submits that the previous disclosures to the Applicant of records relating to the Applicant's Requests through the criminal law process satisfies the duty on the Public Body to assist the Applicant under section 6(1) of the Act. The Act does not replace other procedures for access to information (s. 2(2)), or limit the information available by law to a party to a proceeding (s. 3(2)). As discussed in the Manual (C.1, p. 2), there are two methods for gaining access to the records of government: (1) routine channels; and (2) formal requests under the Act. The first method satisfies the needs of most information seekers. Formal FOI requests made under the Act provide a method of seeking access to information that is not otherwise available. (Submission of the Ministry, paragraphs 4.09 and 4.11)

Because the applicant submitted new evidence in his reply submission, I granted a request by the Ministry for leave to file further submissions on the applicant's claim that the court registry never returned exhibits to the applicant. The Ministry filed further affidavit material in relation to its position that copies of all of the records in dispute,

including the exhibits referred to in the applicant's affidavit, had been provided to the applicant.

Based on my careful review of the affidavit of the applicant and the affidavits filed by the Ministry, I find that the applicant has received all of the records in dispute, including the exhibits referred to in his December 28, 1997 application.

6. Discussion

The extent of a public body's duty under section 6 of the Act must be considered in light of the Act's broad purposes, including that of promoting public accountability by giving the public a right of access to records, and in light of section 2(2) of the Act which provides:

> 2(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

It is clear that this applicant has been provided with all of the copies of all of the records which he is now seeking from the Ministry. These records were previously provided to him during the criminal process relating to his parole eligibility application under section 745 of the *Criminal Code*. (Affidavits of Randy Street and Lisa Wrinch) In earlier Orders, I have considered issues similar to the one raised in this inquiry and have held that if the public body demonstrates that the records sought have already been disclosed to the applicant through another process, and there are no other records responsive to the request, it will have satisfied its duty to assist the applicant under section 6 of the Act: Orders No. 86-1996, February 27, 1996; and Order No. 160-1997, April 23, 1997.

It is my view that the Ministry's duty to assist the applicant has been satisfactorily discharged in this case. Where the records in dispute have already been provided to the applicant in the judicial process, as in this case, no useful purpose would be served by requiring a duplicative process of disclosure under the Act, beyond placing an unnecessary burden on the taxpayers. I agree with the Ministry when it submits:

> ... The mere existence of other avenues to access information does not preclude an applicant from using their access rights under the Act. However, where an applicant has already used those other avenues to obtain records, it would not be consistent with common sense or the efficient administration of government for that same applicant to use the Act to obtain those same records again. (Submission of the Ministry, paragraph 4.24)

I also agree that the Ministry has made every reasonable effort to assist the applicant that a fair and reasonable person would expect to be done in the circumstances. (Submission of the Ministry, paragraph 4.26)

7. Order

I find that the Ministry of Attorney General has complied with its duty to assist the applicant under section 6(1) of the Act.

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David H. Flaherty
Commissioner

November 20, 1998