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**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 195-1997  
October 23, 1997**

**\*\*\*\* This Order has been subject to Judicial Review \*\*\*\***

**INQUIRY RE: A request for records in the custody or under the control of the  
Ministry of Attorney General, Coordinated Law Enforcement Unit (CLEU)**

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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 June 20, 1997 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, Coordinated Law Enforcement Unit (CLEU), (the public body) to withhold records requested by the applicant.

**2. Documentation of the inquiry process**

On January 21, 1997 the applicant requested records from the Ministry of Attorney General, Information and Privacy Program. The applicant's lawyer mentioned that the Coordinated Law Enforcement Unit of the Ministry allegedly had custody of records in relation to the applicant.

CLEU responded to the applicant's request on February 10, 1997 by confirming the existence of records but refusing access under section 15(1)(a) of the Act. The applicant requested a review of its decision on February 14, 1997.

On April 2, 1997 CLEU revised its initial decision and decided that the records fall outside the scope of the Act. According to the public body, the records fall under the jurisdiction of the Criminal Intelligence Service of British Columbia (CISBC) and therefore the request for records should be handled by the Royal Canadian Mounted

Police (RCMP) under the relevant federal access and privacy legislation. The applicant had previously requested records from the RCMP but did not receive them.

On May 14, 1997 the applicant requested an inquiry by the Information and Privacy Commissioner of British Columbia to review CLEU's decision of April 2, 1997 to classify the records as "federal." On May 22, 1997 my Office gave notice to the applicant and CLEU of the written inquiry to be held on June 13, 1997. By consent of both parties, the inquiry was rescheduled to June 20, 1997.

### **3. Issue under review and the burden of proof**

The issue to be reviewed is CLEU's decision of April 2, 1997 to exclude records from coverage of the Act. As well, counsel for the applicant has challenged the delegation of authority exercised by CLEU under section 66 of the Act in its response to the applicant. I find that this is not an issue in this inquiry because of my decision, below, that the records do not fall under the Act.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in a record has been refused, it is up to the public body, in this case CLEU, to prove that the applicant has no right of access to the record or part of the record.

The relevant sections of the Act are as follows:

#### ***Information rights***

4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

....

#### ***Disclosure harmful to law enforcement***

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

....

#### ***Delegation by the head of a public body***

66(1) The head of a public body may delegate to any person any duty, power or function of the head of the public body under this Act, except the power to delegate under this section.

66(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the head of the public body considers appropriate.

....

#### **4. The applicant's case**

The applicant submits, through counsel, that the Intelligence Section of CLEU attended his residence in 1995 with respect to four individuals who had been prevented from entering Canada at Vancouver International Airport in 1993. The applicant subsequently requested access to files about him maintained by CLEU.

The applicant alleges that the person who informed him on April 2, 1997 that he could not have access to his files, because they were under federal jurisdiction, did not have appropriate delegated power under the Act. Counsel for the applicant submits that there has been a "cover up" by administrative officials to prevent him from reviewing his files: "It is our position, and continues to be, that this is a provincial matter, and continues to be a provincial matter. The Privacy Commissioner of B.C. has the jurisdiction to decide this issue and there are valid issues before the Commissioner that support my client being allowed to review his file."

The applicant concludes that a decision in support of CLEU in this inquiry "can only mean that files can be camouflaged by a public body by merely passing to another public body and/or section in order for an individual never to see his or her file. This is an affront to administrative justice and procedural fairness and turns the entire justice system into disrepute." (Reply Submission of the Applicant, p. 5)

#### **5. The Coordinated Law Enforcement Unit's case**

By way of background, CLEU explains that it is housed in the same building in Vancouver (the CLEU Building) as Criminal Intelligence Service British Columbia (CISBC), which is a provincial bureau of the Criminal Intelligence Service Canada. The indication is that CISBC is administered by the Royal Canadian Mounted Police (RCMP). (Submission of CLEU, paragraph 1.03) The purpose of CISBC is to collect, analyze, and disseminate significant criminal intelligence to law enforcement agencies in this province.

CISBC maintains its own records and CLEU's operational records in one secure file room within the CISBC's offices: "CLEU does, of course, have a right of access to its own operational files. However, the records management staff within CISBC retrieve the file from the fileroom." (Submission of CLEU, paragraph 1.03) When an access request is received, records management staff of CISBC search "for *all* records responsive to an applicant's request - this includes both CLEU operational records and CISBC records." (Submission of CLEU, paragraph 1.04) Police officers of the Vancouver Police Department may also be involved at this point in giving advice about

severing and disclosure. The actual decisions on disclosure are made by either federal or provincial officials, depending on whether CISBC or CLEU records are at issue.

The original request in this inquiry went to the Ministry of Attorney General's Information and Privacy Program. I will discuss below the details of how this access request was subsequently handled and the issues of custody and control that have arisen in the course of the inquiry.

## **6. Discussion**

### ***Processing of the applicant's access request***

CLEU initially informed the applicant on February 10, 1997 that his records were being withheld under section 15(1)(a) of the Act. CLEU now says that this "was a mistake and an incorrect response" because the records are CISBC records, not those of CLEU. (Submission of CLEU, paragraph 1.06) During mediation of the request for review, CLEU "discovered that the records responsive to the Applicant's request were not in the custody or under the control of the Public Body [CLEU], and changed its earlier decision." (Submission of CLEU, paragraph 1.07)

I am further informed that CLEU has a written policy (dated January 16, 1997) for responding to information access requests, but that it "was not fully followed in responding to the Applicant's request." (Submission of CLEU, paragraphs 1.02, 1.06) The applicant is not very impressed with this state of affairs.

### ***Section 4(1): Custody and control of records***

An individual has a right of access to records under either the custody or control of a public body. (See Order No. 141-1996, December 20, 1996, pp. 4, 5) CLEU submits that it does not have "custody" of the records in dispute in this inquiry. (Submission of CLEU, paragraph 4.03) I have no difficulty with the submission that CLEU does not have custody or access to CISBC records:

CISBC is a federal agency which provides law enforcement agencies, such as CLEU, with access to criminal intelligence records if CISBC is satisfied that there is a need to disseminate this information for law enforcement purposes, and only after the third party who provided the information to CISBC approves this disclosure. [Third party rules] (Submission of CLEU, paragraph 4.07)

Based on my Order No. 11-1994, June 16, 1994 and Ontario Interim Order 120 (issued November 22, 1989), CLEU submits that the CISBC records in dispute were not created or compiled by CLEU staff and, applying a number of "indicators of control," that they are not in the custody or under the control of CLEU.

I am intrigued, however, by the following submissions from CLEU concerning its application of the following indicators of control:

The contents of the records may, depending on the circumstances, relate to CLEU's mandate and functions.

....

CISBC may grant access to these records to law enforcement agencies, including CLEU, if in CISBC's opinion the information is required for law enforcement purposes. (Submission of CLEU, paragraph 4.09)

CLEU confirms that CISBC does have custody and control of a file on the applicant in this inquiry. (Affidavit of Peter G. Howes, paragraph 6)

CLEU further submits that the records "are not being held by an officer or employee of the Public Body for the purposes of his or her duties as an officer or employee." My reading of these statements led me to the conclusion that what needed to be known in this inquiry was whether the records in dispute were ever in the custody of CLEU for action of any sort. If they were so used, for example, to make a decision about the applicant, then it might be that the records remain CLEU records for purposes of the Act, even if they had now been returned to their resting place in the secure file room of CISBC. Since these should be matters of fact, I invited further submissions in this regard. It was not enough for CLEU to say that these records are not "CLEU operational records." (Submission of CLEU, paragraph 4.09) I also realize that, at the end of the day, CLEU might still be able to withhold access to the records in dispute under section 15(1)(a) of the Act, but that is not an issue in this inquiry.

The applicant's position is that the affidavit of Peter Howes "does not state that CLEU members or other law enforcement agencies have not been given disclosure of the file. It is our submission that CLEU members do know what the file contains and still do have this file in its possession." (Reply Submission of the Applicant, p. 2) The applicant added, later: "The facts are plain, CLEU did have custody of this file under section 4(1) of the Act." Counsel for the applicant wanted also to cross-examine the two persons who signed the successive letters to his client on behalf of CLEU.

In response to two specific queries that I posed, CLEU responded that it has never used the applicant's records in carrying out its mandate. It has also not produced any documents concerning the applicant, other than the records created for the purpose of responding to his request for records (which is the subject of this inquiry). This submission was based on an affidavit by Peter Engstad, Director of the Policy Analysis Division of CLEU. On this basis, I do not agree with the reply submission of counsel for the applicant to the effect that CLEU did have the applicant's records, and I see no reason that he should be given an opportunity to cross-examine Mr. Engstad.

CLEU states, simply, that CISBC staff conducted the review of the applicant's records, not Mr. Engstad: "CLEU does not have a right of access or possession to CISBC

records. CISBC has the custody and control of the Applicant's records .... CLEU has never had custody or control over these records." (CLEU's Reply to the Reply Submission of the Applicant) Finally, CLEU makes the following relevant statement:

What the Applicant fails to appreciate is that if CLEU had ever used the Applicant's records in carrying out its mandate, CLEU would have a record, in its custody, of this very fact. Furthermore, if CLEU had produced any documents concerning the Applicant, CLEU would have a copy of such a record within its custody.

## **7. Order**

I conclude that the records in dispute are not in the custody or under the control of the Ministry of Attorney General, Coordinated Law Enforcement Unit. Accordingly, CLEU is authorized to refuse access. Under section 58(2)(b) of the Act, I confirm the decision of the head of CLEU to refuse access.

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David H. Flaherty  
Commissioner

October 23, 1997