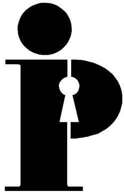

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-396

Appeal P-9200466

The Rent Review Hearings Board

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ORDER

BACKGROUND:

The Rent Review Hearings Board (the Board), an agency of the Ministry of Housing (the Ministry), received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of notes made at a pre-hearing conference (PHC) by the Board member who presided at the PHC.

The Ministry denied access, claiming that any notes that may have been taken were not in the custody or under the control of the Board. The Ministry stated that such notes, if they existed, were a memory aid for the personal use of the Board member making them, and did not form part of the Board's appeal file. The requester appealed the Ministry's decision.

During the course of processing the appeal, the Ministry acknowledged that notes exist, but refused to provide a copy of them to this office, again claiming that they were not in the custody or under the control of the Board.

Mediation was not possible, and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the appellant, the Board, the Board member who took the notes, and the Ministry. Because the issue of custody and control of a Board member's notes has implications beyond the scope of this particular appeal, a group representing the chairs of certain provincial agencies, boards and commissions (the chairs) was added as an affected party and provided with an opportunity to submit representations. A list of the organizations represented by the chairs is attached as an appendix to this order. Representations were received from the appellant, the Board, and the chairs. The Board member and the Ministry adopted the Board's representations.

The sole issue in this appeal is whether the notes of the Board member are in the custody or under the control of the Board.

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 the record or the part of the record falls within one of the exemptions under sections 12 to 22.

In its representations, the Board makes the following points regarding the creation and use of Board members' notes generally:

- Board members store their personal notes separately from Board files;
- the Board member is the only person with access to the notes;

- the Board member determines the form and style of the notes and how long to keep the notes before disposing of them;

- notes are not part of the Board's appeal file, and the Board's standard index does not contain any reference to a Board member's notes;

- the Board does not know if notes have been taken, and there are no guidelines regarding retention or destruction of notes;

- not all members take notes, and it is at the discretion of the individual Board member whether or not personal notes are taken; and

- there is no legal requirement or Board policy, procedure or employment requirement pertaining to the creation, storage, maintenance and disposal of personal notes by Board members.

The chairs' representations focus on the issue of adjudicative independence. In their view, to require a Board member to produce notes to a Board chair for consideration in the context of a request for access under the Act would represent an unjustifiable interference with the adjudicative process. The chairs state:

> Members cannot be compelled to submit to institutional processes which might impair or be seen to impair their independence. Neither the tribunal, the tribunal chair nor the ministry could require a member to take notes or produce them for inspection.
>
> ...
>
> The courts have distinguished between materials which would reveal the adjudicator's thinking processes, which no one has a right to obtain, and materials relating to the general processing of the hearing, which might indicate natural justice concerns.

It should be noted that the representations of the Board and the chairs are both restricted to the situation of notes prepared **by** Board members, and not notes prepared by others **for** Board members. Both parties acknowledge that the rationale for their submissions would not apply to the circumstance of notes prepared **for** Board members.

The application of freedom of information legislation to the notes of members of administrative tribunals has been considered a number of times throughout the history of the development of the Act.

Beginning with the report "Public Government for Private People", The Report of the Commission on Freedom of Information and Individual Privacy/1980, the Williams Commission expressed concern about the effect of "internal" or "secret" law, and recommended that administrative tribunals be subject to freedom of information legislation in the same manner as government ministries. This recommendation was incorporated into Bill 34 (the precursor to the current Act) when it was introduced for consideration by the Legislature in 1985.

Bill 34 included no specific reference to notes prepared by a member of an administrative tribunal. However, it did include a specific section, currently section 65(3), which reads as follows:

> This Act does not apply to 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.

During committee hearings on Bill 34, the then-Attorney General was asked whether section 65(3) would apply to administrative tribunals, to which he responded:

> [It] does not. The quasi-judicial tribunal members, in so far as they make notes and in so far as those notes come within the custody of government may be obliged to disclose them. We had to draw the dividing line somewhere and we drew the line at judge's notes. I think the practical reality is that many tribunal officials, the chairman of the Ontario Labour Relations Board as with judges, may make notes and then destroy them at the end of the day--there is no compulsion
>
> to retain those notes under any statute--or may take them home. That is to say, they are not within the custody of government and therefore not producible. But if the chairman of the Labour Relations Board files his notes in his office in a filing cabinet they will be producible.

It is clear from the Attorney General's comments that section 65(3) was intended to have narrow application, restricted to the notes prepared by and for judges' personal use; and that tribunal members' notes were intended to be considered under the substantive provisions of the Act, provided they were found to be in the custody or under the control of the particular tribunal. However, the Attorney General also clearly felt that, depending on individual circumstances, a particular tribunal member could have personal and exclusive custody and control of his/her notes, and if so, these notes would not fall within the custody and control of that member's tribunal and therefore under the Act.

In its report following the completion of the "three-year review" of the Act, the Standing Committee on the Legislative Assembly made the following statement regarding tribunal members' notes:

> The personal notes of tribunal members are generally regarded as the personal property of the member, and are not considered to form part of the record of an administrative tribunal for judicial review purposes. However, such notes are sometimes retained by a ministry or agency and therefore, would fall within the meaning of a record for the purposes of the Act.

Again, the Committee appears to feel that there is an ability for a tribunal member to have personal and exclusive custody and control of notes, and that the notes would only fall under the jurisdiction of the Act if they were brought within the custody or control of the relevant ministry or agency.

In 1990, the government proposed an amendment to section 65 (section 1(5) of Bill 169), which would have excluded the following new category of records from the scope of the Act:

> [N]otes prepared by or for a member of a tribunal exercising a statutory power of decision if those notes are prepared for the person's personal use in connection with a proceeding in which the tribunal is required by law to hold a hearing.

Although this amendment was never passed into law, by introducing the amendment, the government implicitly acknowledged that tribunal members' notes were currently covered by the Act, provided they were found to be in the custody or under the control of the tribunal.

In my view, it is not necessary for me to address the issue of adjudicative independence in order to dispose of this appeal. The sole issue is whether the Board member's notes are in the custody or under the control of the Board, not whether the Board is able to demand production of the notes from its member. In my view, the fact that the members of the Board are independent decision-makers and not subject to the control or influence of the Board in the way in which they reach their decisions is not determinative of whether the notes are in the Board's custody or under its control.

In Order 120, former Commissioner Sidney B. Linden made the following comments regarding the issue of custody and control: "I feel it is important that [custody and control] be given broad and liberal interpretation in order to give effect to [the] purposes and principles [of the Act]." I agree. He went on to outline what he felt was the proper approach to determining whether specific records fell within the custody or control of an institution:

> In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the

creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. 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?

5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

8. To what extent has the record been relied upon by the institution?

9. How closely is the record integrated with other records held by the institution?

10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of

> considerations which heads should apply in determining questions of custody or control in individual cases.

A number of orders have dealt with the issue of custody and control (Orders P-239, P-271, P-326, M-59), all of which turn on the particular circumstances of the appeal in relation to the types of factors listed by former Commissioner Linden in Order 120. Similarly, this appeal must be decided on the basis of its particular facts.

I will now review the factual circumstances relating to the "creation, maintenance and use" of the Board member's notes which are at issue in this appeal.

In his representations, the appellant states:

> [The Board Member] made the notes as required by her duty as a Board member and employee of the Board. In short, her Act, job and job description required her to make these notes in the course of her employment.
>
> ...
>
> ... The notes are the record, the best evidence of what took place under the Rent Review Hearings Board's jurisdiction and must, on that basis, be made available to the proper authorities and to the parties involved.

In its representations, the Board states:

> As is her practice, [the Board member] made some personal notes while conducting the PHC.
>
> The only purposes for which the personal notes were created by [the Board member] were (i) as an aid memoire in understanding the issues and recollecting the discussion that took place during the PHC, and (ii) to facilitate her in her decision as to whether or not to make written recommendations, and the nature of those recommendations.
>
> ...
>
> At all times during the PHC and subsequently, [the Board member] was in possession, custody and control of her personal notes; she never allowed any

> other person to see, read, or use her personal notes for any purpose. Further, [the Board member] maintained responsibility for the care and safe keeping of her personal notes.
>
> [The Board member] always kept her personal notes separate from all Board files, including the appeal files. At no time did she provide copies or surrender her personal notes voluntarily or otherwise to any other person.
>
> [The Board member] kept her personal notes for some time at her Board office in a desk drawer, which did not contain any files belonging to the Board. Some time subsequent to the PHC, the member took her personal notes to her residence where the notes are currently stored.

Having reviewed the Board's representations, in my view, it is clear that the notes are not currently in the custody of the Board. The issue of whether the notes are under the control of the Board is more complex.

The notes which are the subject matter of this appeal are currently located outside the Board premises and are in the Board member's personal possession. The Board does not regulate the use of the notes, and has taken no steps to exert control over them. They were created by the Board member for her own personal use and, according to the Board's representations, which have been adopted by the Board member, she never allowed any other person to see, read, or use the notes for any purpose.

Having reviewed the representations of all parties, and bearing in mind the indicia of control identified by former Commissioner Linden in Order 120, I find that the notes created by the Board member are not in the control of the Board, and therefore not accessible under the Act, in the circumstances of this appeal.

However, if the records had been contained in the appellant's appeal file or in any other record keeping system over which the Board had administrative control, in my view, they would properly have been considered in the custody or control of the Board, and governed by the provisions of the Act.

In my view, notes created by tribunal members are not, per se, excluded from the scope of the Act; to do so would require a legislative amendment. The determinative issue is whether particular notes are in the custody or under the control of an institution, based on the circumstances of a particular appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: January 8, 1993
Tom Mitchinson
Assistant Commissioner

APPENDIX A

LIST OF TRIBUNALS

1. Toronto West Psychiatric Review Board
2. Liquor Licence Board of Ontario
3. Ontario Municipal Board
4. Environmental Assessment Board
5. Ontario Energy Board
6. Board of Inquiry
7. Environmental Appeal Board
8. Pay Equity Hearings Tribunal
9. Workers' Compensation Appeals Tribunal