



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

ORDER P-1188

Appeal P-9600057

Ontario Hydro



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

Ontario Hydro (Hydro) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to a copy of "... all records concerning any request, referral or communication made to the Ministry of Environment and to the Ministry of Municipal Affairs or the appropriate "municipal" ministry at that time that led the then Minister of the Environment to request Cabinet to grant Order In Council No. 2887/76" (the OIC). The OIC exempted Hydro from the requirement to file environmental assessments for certain projects which were partially constructed and which had already undergone a form of review or assessment when the Environmental Assessment Act came into force.

The Ministry of the Environment and the Ministry of Municipal Affairs are more properly known as the Ministry of Environment and Energy (Environment) and the Ministry of Municipal Affairs and Housing (Municipal Affairs) respectively.

Hydro denied access in full to the records it had identified as responsive to the request pursuant to section 22(a) of the Act (information publicly available). The requester (now the appellant) appealed Hydro's decision claiming that further records should exist.

During mediation, the appellant explained that the records identified by Hydro were not responsive to his request in that they would not have been submitted to Environment by Hydro in order to obtain the exemption. He clarified his request and, as a result, Hydro undertook a further search for responsive records.

This search failed to locate any records. Hydro consented to the disclosure to the appellant of the results of this search and its explanation as to why no records existed. The appellant was not satisfied with this response.

Accordingly, this office sent a Notice of Inquiry to Hydro and the appellant. Representations were received from both parties. The appellant's submissions raised the issue of the possible application of section 25(1) of the Act which deals with the obligations of an institution when it determines that it does not have custody or control of responsive records. Accordingly, a Supplementary Notice of Inquiry was sent to the parties. This document sought representations on the application, if any, of section 25(1) of the Act. Submissions on this issue were received from the appellant and Hydro.

The issues I will consider in this order are: (i) whether Hydro's search for records responsive to the appellant's request was reasonable in the circumstances; and (ii) whether section 25(1) applies in the circumstances of this appeal and, if so, whether Hydro fulfilled its obligations under this section.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and Hydro indicates that such a record does not exist, it is my responsibility to ensure that Hydro has made a reasonable search to identify any records which are responsive to the request. The Act does not require Hydro to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, Hydro must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Hydro has submitted the sworn affidavit of its Freedom of Information and Privacy Co-ordinator who was the employee responsible for the search to locate responsive records. The affidavit indicates that all records responsive to the request have been located and the appellant has been advised that they are publicly available at Hydro's Public Reference Centre. The affidavit also includes the steps taken to locate responsive records, which included searches in three of Hydro's program areas - the Environmental Section of the Transmission Projects Business, Corporate Real Estate Division and the Law Division.

The affidavit also reviews the additional steps taken during the mediation stage of this appeal to locate responsive records and goes on to submit that no further responsive records were located. It includes the explanation provided to the appellant by a lawyer from the Law Division as to why it was quite likely that no documentation was submitted to support the OIC.

Based on the information provided by Hydro, I am satisfied that its search for records was reasonable in the circumstances of this appeal. I accept Hydro's position that no responsive records exist within its custody or under its control.

THE APPLICATION OF SECTION 25(1)

Section 25(1) of the Act states:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head **shall make all necessary inquiries to determine whether another institution has custody or control of the record**, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution. [emphasis added]

This section imposes mandatory obligations on Hydro in situations where another institution has custody or control of responsive records which Hydro does not have in its own custody or control. These obligations include making inquiries and, where another institution has a responsive record under its custody or control, forwarding the request to that other institution and notifying the requester that this has been done.

The relevance of section 25(1) arises from statements in the appellant's submissions. In his original representations, the appellant submitted that the steps taken by Hydro to locate responsive records should have included contacting certain officials with Environment who may have been able to augment/enhance Hydro's recollection. In his submissions in response to the Supplementary Notice of Inquiry, the appellant maintains that section 25(1) of the Act is relevant and that:

... it was patently obvious from our request that the Ministry of the Environment would have been the recipient of such information from Ontario Hydro. One would have believed that it would have been reasonably foreseeable for Ontario Hydro upon discovering that they may not have any information, to make inquiries of the Ministry of Environment, but that appears not to have been done.

It is clear from Hydro's affidavit of search and information provided to the appellant during the course of the appeal that it did not consider whether another institution might have custody or control of the records. In response to the Supplementary Notice of Inquiry, Hydro submitted that "... the request was addressed to Ontario Hydro and it was reasonable to assume that the requester was seeking access to Ontario Hydro produced records."

I agree with Hydro that the records sought by the appellant were those **produced** by Hydro. However, in my view, once Hydro determined that it did not have custody or control of any responsive records, it was obliged to inquire of Environment, Municipal Affairs and Management Board of Cabinet to determine if any of these institutions held responsive records. These institutions are clearly referred to in the appellant's request. In addition, based on the wording of the OIC and the legislative process for the passage of such an order, it appears that at least Environment and Management Board of Cabinet may have custody or control of the records which the appellant is seeking.

I find that Hydro failed to comply with the requirements of section 25(1) of the Act when responding to the appellant's request. Hydro should have made all necessary inquiries and, if it determined that another institution had custody or control of responsive records, transferred the request under section 25(1)(a), and advised the appellant accordingly, as required by section 25(1)(b). Therefore, I will order that Hydro make all the necessary inquiries to determine whether another institution has custody or control of the responsive records.

ORDER:

1. I find that Hydro's search for responsive records was reasonable and this aspect of the appeal is dismissed.
2. I order Hydro to make all necessary inquiries pursuant to section 25 of the Act to determine whether another institution has custody or control of responsive records. These inquiries should include, but not be limited to the Ministry of Environment and Energy, Management Board of Cabinet and the Ministry of Municipal Affairs and Housing.

3. I order Hydro to make the inquiries described in Provision 2 by **June 10, 1996** and advise the appellant in writing of the results of its inquiries by sending him a copy of the results by **June 14, 1996**.
4. Should Hydro determine that another institution has custody or control of the responsive records, it should follow the procedures outlined in section 25 of the Act.
5. I order Hydro to forward, within 5 days of sending them to the appellant, copies of the correspondence referred to in Provisions 3 and 4 (if any) to my attention c/o Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____

Anita Fineberg
Inquiry Officer

_____ May 24, 1996 _____