



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

ORDER P-1230

Appeal P-9600190

Ontario Labour Relations Board



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/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ontario Labour Relations Board (the Board) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to proceedings before the Board involving the requester and another individual. Specifically, the requester sought access to any notes taken by a named Labour Relations Officer as well as notes, minutes or transcripts of a Board hearing, including any notes taken by the members of the Board.

The Board located the file pertaining to the requester's hearing and denied access to it, in its entirety, claiming the application of section 52(3) of the Act. This office has confirmed that the Board referred to the provision in the Municipal Freedom of Information and Protection of Privacy Act which is the equivalent to section 65(6) of the Act in error. In addition, the Board advised the requester that notes, minutes or transcripts responsive to his request do not exist and that even if notes made by the Labour Relations Officer had not been discarded, they would be exempt from disclosure under section 17(1)(d) of the Act. The Board further informed the requester that it does not have custody of or exercise control over notes taken by Board members at its proceedings.

The requester, now the appellant, appealed this decision. During the mediation of the appeal, the Board advised this office that it would reserve on the question of the application of section 65(6) to enable this office to address the other issues raised by the appeal. A Notice of Inquiry was provided to the appellant, the Board and to the three members of the Board who adjudicated the appellant's case before the Board. Representations were received from the Board and the appellant.

The issues which were raised in the Notice of Inquiry are:

1. Whether the Board's search for records responsive to the appellant's request for notes, minutes or transcripts was reasonable.
2. If records responsive to the appellant's request for Board members' notes exist, are they in the custody or under the control of the Board?
3. If notes taken by the Labour Relations Officer exist, are they exempt from disclosure under section 17(1)(d) of the Act?

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that such records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board 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, the Board must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

The Board has submitted a sworn affidavit of its Freedom of Information and Privacy Co-ordinator in which he describes in detail the efforts made to locate any notes taken by the Labour Relations Officer and the requested minutes or hearing transcripts. The affiant states that the Board's file does not contain any records containing information compiled by the Labour Relations Officer in the course of his mediation efforts. The Co-ordinator states that he was advised by the Labour Relations Officer that any such records which he might have collected or recorded were discarded by the Labour Relations Officer once the mediation process had been exhausted and the matter referred to a hearing. Further, the Co-ordinator states that no transcripts or minutes are taken at Board hearings, so no records responsive to that portion of the request exist.

Based on the Board's submissions and the evidence presented by the Co-ordinator, I am satisfied that the Board's search for records responsive to these portions of the appellant's request was reasonable.

CUSTODY OR CONTROL

The Co-ordinator further indicates that the notes taken at the hearings by three Board members **may** exist but that the Board does not have custody of or exercise control over such records.

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 section 12 to 22.

In Order 120, former Commissioner Sidney B. Linden outlined 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 the particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

A number of orders have considered the issue of custody and control, including some which dealt with the proper characterization of certain records held by tribunal members (Orders P-239, P-271, P-326, P-396, P-505 and M-59). All of these cases turn on the particular circumstances of the appeal in relation to the principles enunciated by former Commissioner Linden in Order 120. Similarly, this appeal must be decided on the basis of its particular facts.

The Board submits that the following considerations identified in Order 120 are relevant in the present appeal:

- the records, if they exist, were made for the personal use of the adjudicators;

- the Board is not in possession and has no right to possession of the records;
- the Board has no authority to regulate the records' use;
- the records are not relied upon by the Board;
- the records are not integrated with other records held by the Board;
- the Board has no authority to dispose of the records.

The appellant has not made any submissions on the applicability of any of the factors listed in Order 120 to the circumstances of this appeal.

In Order P-1132, Assistant Commissioner Tom Mitchinson found that notes taken by Board members in the course of a hearing which are not in the physical custody of the Board were not under the Board's control within the meaning of section 10.

For the purposes of this appeal, I adopt the reasoning of Assistant Commissioner Mitchinson and find that any notes taken by members of the Board at the hearing involving the appellant are not in the custody or under the control of the Board. Any such records are, accordingly, not accessible under the Act.

ORDER:

I uphold the Board's decision.

Original signed by: _____
Donald Hale
Inquiry Officer

July 17, 1996