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

ORDER PO-1906

Appeal PA_000181_1

Ontario Labour Relations Board

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BACKGROUND:

Before proceeding to discuss the nature of this appeal, I feel it would be helpful to provide the following background information.

The appellant, on behalf of a numbered company, was a party to a proceeding under the *Employment Standards Act* before the Ontario Labour Relations Board (the Board). A hearing was held and a decision rendered. For the purposes of this order, I will refer to this decision as the Board's first decision.

The appellant sought reconsideration of the Board's first decision. As part of the Request for Reconsideration, the appellant stated:

> We request that the [Board's first] decision delivered on [a specified date] be put aside, as the board cannot permit decisions to stand based on perjured testimony or forged evidence.

The request for reconsideration was dismissed by the Board. As part of its decision, the Board stated the following:

> As stated in the Board's [first] decision, [the appellant] maintained under oath that he considered [a named person] to have been dishonest about her ability to return to work because she withheld medical information from him. **He now repeats these accusations and accuses [the named person] of lying under oath** [emphasis added]. ...

For the purposes of this order, I will refer to this decision as the Board's second decision.

NATURE OF THE APPEAL:

The Ministry of Labour (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) relating to a specified Board file. Specifically, the appellant requested the following:

> ... I would like to be provided with the evidence supporting the statements [made] by [the Board] in [its second decision] that: "He now repeats these accusations and accuses [a named person] of lying under oath."

The Ministry subsequently transferred the appellant's request to the Board, since "this is a matter which falls within the responsibility of the Board."

The Board responded to the appellant by advising him as follows:

> The Board has no records corresponding to your request. The Board neither keeps, nor requires to be kept, any official notes of proceedings. While personal notes may be kept on occasion by individual members of the Board as a memory

> aid, even where such notes do exist they have not [sic] official status, and are neither part of the Board file, nor retained by the Board in its control or custody. I have examined the Board file and can advise you that it contains no notes. Such records, if they do exist, would not fall in the custody or under the control of the institution for freedom of information purposes.

The appellant appealed the Board's decision. In his letter of appeal the appellant took issue with the Board's decision concerning Board members' notes. The appellant also felt that additional records responsive to his request should exist. Specifically, the appellant took the following position:

> ... There must be **at least three (3) records in the Boards' custody** to support their decision above [original emphasis].
>
> 1. The initial accusation
>
> 2. The repeat accusation, which cannot be in the form of personal notes, as our appeal was submitted in writing and no proceedings took place in which the undersigned participated
>
> 3. A record supporting the Board's Decision about "lying under oath." This again cannot be in the form of personal notes as no proceedings took place with my presence.

During mediation, the Board explained to the Mediator that if the appellant wishes, he may view his entire Board file and that there are no other records outside of the Board file. The Mediator relayed this information to the appellant, who in turn advised that he already has access to the complete Board file and that he was not seeking access to it. The appellant maintained, however, that additional records responsive to his request should exist. Further mediation was not possible and the matter proceeded to adjudication.

I sent a Notice of Inquiry to the Board initially setting out the issues in the appeal, and received representations in response. I then sent a modified Notice of Inquiry, reflecting matters arising from the Board's representations, to the appellant along with the non-confidential portions of the representations. The appellant also provided representations.

DISCUSSION:

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, the issue to be decided is whether the Board has conducted a reasonable search for the records, as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Board will be upheld. If I am not satisfied, I may order further searches.

The *Act* does not require the Board to prove with absolute certainty that further 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. Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the Board's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

With its submissions, the Board provided an affidavit sworn by the Board's Solicitor, who is also the Board's Freedom of Information and Privacy Co-ordinator. In his affidavit, the Solicitor details the history between the Board and the appellant and provides particulars regarding the Board's decisions with respect to the appellant's Board matter. The Solicitor also provided copies of the Board's two decisions, the appellant's Request for Reconsideration and the various correspondence that has been exchanged between the Board, the appellant and/or his solicitor following the issuance of the Board's second decision.

In his affidavit, the Solicitor explains that he was familiar with the appellant's concerns regarding the Board's decisions and had reviewed the documents, as described above, prior to receiving the appellant's access request. He goes on to state the following:

> I understood [the appellant's] request for evidence supporting [the Vice-Chair's] statement (that [the appellant] was accusing [a named individual] of lying under oath) as a request for a copy of [the Vice-Chair's] hearing notes. Obviously, [the appellant's] assertion regarding [a named individual] could only be contained in a pleading or in a statement made at a hearing. I was aware that in support of his reconsideration request, [the appellant] asserted the following:
>
> > 1. Forgery or Perjury
> > ...
> >
> > We request that the [Board's first] decision delivered on [specified date] be put aside, as the board cannot permit decisions to stand based on perjured testimony or forged evidence.

In his affidavit, the Co-ordinator goes on to state the following:

> In response to [the appellant's] request I personally reviewed the entire contents of the Board file and found no records corresponding to his request. This did not surprise me because, as I was aware from my experience with the Board ..., the Board neither keeps, nor requires to be kept, any official notes, minutes or transcripts of its proceedings.

The appellant takes issue with the Board's interpretation of his request and maintains that additional records responsive to his request should exist. He submits the following:

> The Board deemed warranted to write in their [second] decision ... the paragraph [as stated in the background section of this order]. We were present in front of members of the Board on [a specified date] and in the Board's [first]decision ... they wrote in Paragraph 4 that "[the appellant] stated"..."asserted.." and then

> "stated.." certain issues and in Paragraph 5 that "[the appellant] made several references to [a named individual] have [sic] been observed dancing and babysitting".... We argue that for these references to grow from "stated" and "asserted" and "made several references" in the Boards' [first] decision ... to an ostensible finding of fact and an ostensible quote from the [first] decision (of which it is neither) of "maintaining under oath," "repeating these accusations" and "accusing [a named individual] of lying under oath," **some overwhelming and compelling evidence must have come to the attention of the board which indeed supports their new findings of fact** as the Board found warranted that the expression "as stated [in] the Board's decision," obviously referring to the Boards' [first decision] ... was now in accordance with the new overwhelming and compelling evidence and permitted it to appear as quote and a finding of the prior decision, when it is neither a quote nor a finding. We request that the Board locate and disclose to us as obliged under FOI this evidence. This evidence obviously can not be notes or recollections as the Boards' [second] Decision ... would have qualified their findings accordingly [emphasis added].

I have carefully reviewed the representations of both parties, including the two Board decisions and the various correspondence that has been exchanged between these two parties. Although, as outlined above, the Solicitor states in his affidavit that he understood the appellant's request to be one for a copy of the hearing notes of the Vice-Chair, he also explains that "[the appellant's] assertion regarding [a named individual] could only be contained in a pleading or in a statement made at a hearing." It is clear from the appellant's submissions, however, that he believes that other records should exist, upon which the Board rendered its second decision.

As pointed out above, one of the grounds outlined in the appellant's Request for Reconsideration is "Forgery or Perjury," wherein the appellant stated that "either [a certain document] is forged or that the board's decision is based on or completely ignores perjured and false testimony." In my view, it is reasonable to conclude that the portion of the Board's second decision that is in question was based on the appellant's Request for Reconsideration and that this record is responsive to the appellant's request. It is clear, however, that the appellant is not seeking access to this record and believes that other responsive records exist. Based on all of the material before me, I am not satisfied that the appellant has provided a reasonable basis for concluding that additional responsive records, as described by the appellant, exist.

In the circumstances of this appeal, I am satisfied that the Board has taken all reasonable steps to locate records responsive to the appellant's request. In my view, any additional steps would only be reasonable should I determine that notes which may have been created by the Board member(s) during the hearing are in the custody or control of the Board.

CUSTODY OR CONTROL

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 set out a number of factors that would assist in determining whether an institution has custody or control of a record. These are as follows:

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 records used?

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?

A number of previous orders have considered the issue of custody and control, some of 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:

> The Board relies upon and adopts the analysis and conclusion set out in Orders P_1132 and P-1230. In Order P-1230, the Inquiry Officer adopted the reasoning of Assistant Commissioner Mitchinson in Order P-1132 and 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." **It is respectfully submitted that the hearing notes sought in the present appeal and those**

> **referred to in Order P_1230 enjoy precisely the same status** [original emphasis]. ...
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> ...
>
> It is a feature of independent decision-making that an adjudicator's hearing notes are made (if they are made at all) for the Board member's own use. Such a document would be stored (if stored at all) separately from the Board's file. The Board member would be the only person with access to the document. In any given case, the Board does not know if notes have been made, and there are no guidelines regarding retention or destruction of such documents (except that they are not to be retained by the Board). It is submitted that institutional regulation in this area could fetter the independence of panel members and violate the rules of natural justice.

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 of the records;
- the Board 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's representations focus primarily on his belief that additional records responsive to his request should exist, and that such records should be in the Board's custody or under its control. The appellant does not, however, make any specific submissions on the issue of custody or control concerning notes which may have been created by the Board member(s) during the hearing.

As pointed out by the Board, in Order P-1132, the Assistant Commissioner found that certain records held by a Board member which are not in the physical custody of the Board were not under the Board's control within the meaning of section 10. In that order, the Assistant Commissioner stated:

> Having reviewed the Board's representations, it is clear to me that any responsive records in the possession of the [panel member] were not provided to the Board, and I find that any such records are not in the custody of the Board. I also find that responsive records, should they exist, are not under the control of the Board

> in the circumstances of this appeal. Any records in the possession of the [panel member] are located outside the Board's premises and in the [panel member's] personal possession. The Board does not regulate the use of these records, and has taken no steps to exert control over them.
>
> Having reviewed all of the representations, and applying the various indicia of control identified by former Commissioner Linden in Order 120 to the particular circumstances of this appeal, I find that the records held by the [panel member] are not in the custody or control of the Board within the meaning of the *Act* and, therefore, not accessible under the *Act*.

In Order P-1230, Adjudicator Donald Hale adopted the Assistant Commissioner's reasoning in Order P-1132 and concluded that any notes taken by members of the Board at a particular Board hearing are not in the custody or under the control of the Board.

For the purposes of this appeal, I adopt the reasoning in Orders P-1132 and P-1230 and find that any notes that may have been 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 subject to the right of access under section 10(1) of the *Act*.

ORDER:

I uphold the Board's decision.

Original signed by: May 16, 2001
Irena Pascoe
Adjudicator