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

ORDER MO-1412

Appeal MA_990177_1

Toronto Hydro_Electric Commission

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BACKGROUND:

On January 1, 1998, the Toronto Hydro-Electric Commission (the Hydro Commission) was established by section 9 of the *City of Toronto Act, 1997*. At the time of its inception, the Hydro Commission became an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) by virtue of the definition of "institution" in section 2(1) of the *Act* which, in paragraph (a), includes as an institution a "hydro-electric commission".

On November 7, 1998, sections 142(1) and (2) of the *Electricity Act, 1998* came into force. Those sections required municipalities that generate, transmit, distribute or retail electricity, within two years, to create new corporations to carry out those activities. The new corporations are deemed by the *Electricity Act, 1998* not to be local boards, public utilities commissions or hydro-electric commissions for the purposes of any Act [section 142(6)].

On April 1, 1999, sections 145(1) and 150(3) of the *Electricity Act, 1998* came into force. Those sections allowed municipalities to make by-laws transferring employees, assets, liabilities, rights and obligations of the municipality or its existing hydro-electric commission to a new electricity corporation.

On June 23, 1999, the City of Toronto (the City) incorporated Toronto Hydro Corporation (the Hydro Corporation), as well as two other electricity corporations, pursuant to the *Electricity Act, 1998*. It appears that the City was the sole initial shareholder of the Hydro Corporation, and that the Corporation's officers and directors were appointed under the City's authority.

Effective July 1, 1999, by by-law, the City transferred all of the electricity related assets and liabilities of the City and the Hydro Commission to the Hydro Corporation and the other two new electricity corporations (with some exceptions).

Although the Commission's assets and liabilities have been transferred, it appears that the Hydro Commission still exists, because the legislation establishing it, section 9 of the *City of Toronto Act, 1997*, has not been repealed.

NATURE OF THE APPEAL:

The appellant made a request on May 10, 1999 under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Hydro Commission. The request reads as follows:

> Without limiting the generality of the foregoing, this request is for *full and complete disclosure* of all files, records, documents, notes to files, memos to files, data, information collected about me including files, and records by [named Hydro Commission employee], and investigation data and interview notes and memos collected and made relating to me by [the Chair of the Hydro Commission] in 1996, as per her notification letter of May 13, 1996.

As indicated above, on June 23, 1999, the City established the Hydro Corporation.

By letter dated June 28, 1999, the Hydro Commission advised the appellant that he had met with representatives from its Human Resources Department to view his personnel files on two separate occasions, and that the files he reviewed represent his personnel records. The Hydro Commission then stated that all other information in its possession pertains to records and files relating to matters before the Ontario Labour Relations Board (OLRB) and the Ontario Human Rights Commission (OHRC) and that these records were being withheld in full pursuant to the exemptions at sections 7(1) (advice or recommendations), 11(e), (f) and (g) (economic and other interests) and 12 (solicitor-client privilege) of the *Act*.

On June 29, 1999, the appellant appealed the Hydro Commission's decision to deny access to this office. The appellant also maintained that additional responsive records exist.

On July 1, 1999, the City transferred the Hydro Commission's assets and liabilities to the Hydro Corporation.

Because it appeared that the records may contain the personal information of the appellant and other individuals, this office added the application of sections 2(1), 38(a) and (b) of the *Act* as issues in this appeal. In addition, because it appeared that the records may be excluded from the application of the *Act* by virtue of section 52(3), this office added the application of that section, as well as section 52(4), to the issues in this appeal.

This office sent a Notice of Inquiry setting out the issues in the appeal to the appellant and to the Hydro Commission. The appellant and the Hydro Corporation, on its own behalf and on behalf of the Commission, provided representations in response. The Hydro Corporation's representations did not address any of the issues identified in the Notice of Inquiry. Rather, the Hydro Corporation submitted that this office does not have jurisdiction to conduct an inquiry into this appeal, since the Hydro Corporation is not an institution under the *Act*.

I then sent a Supplementary Notice of Inquiry seeking representations from the appellant, the Hydro Commission, the Hydro Corporation and the City on the jurisdictional issue raised by the Hydro Commission. In addition, I sought representations from the Hydro Commission, the Hydro Corporation and the City on the issues raised in the original Notice of Inquiry. The appellant, the Hydro Corporation on behalf of the Commission and the City all provided representations in response.

RECORDS:

The records identified as responsive to the request include all records and files relating to matters before the OLRB and OHRC involving the appellant.

ISSUES:

WHAT IS THE INSTITUTION FOR THE PURPOSE OF THIS APPEAL?

The appellant made his request to the Hydro Commission, which clearly was an institution under the *Act* at that time. It appears that the records subject to this request were transferred to the new Hydro Corporation on July 1, 1999 and, therefore, it is arguable that the relevant "institution" at this time is the Hydro Corporation. The Corporation submits that it is not an institution as defined in the *Act* and that, therefore, this office has no jurisdiction to proceed with this appeal. On the other hand, it is arguable that the Hydro Corporation is deemed to be part of the City, which is an institution under the *Act*, since it appears that the City appointed the Hydro Corporation's members or officers. Section 2(3) of the *Act* deems a corporation to be a part of the municipal corporation (in this case the City) if all of its members or officers are appointed or chosen by or under the authority of the council of the municipal corporation.

In my view, for the purposes of this appeal, only three scenarios are possible:

(i) the relevant institution is the Hydro Commission, which is an institution under the *Act*;

(ii) the relevant institution is the City (of which the Hydro Corporation is a part), and the City is an institution under the *Act*;

(iii) the Hydro Corporation is not an institution under the *Act*, and the *Act* therefore does not apply in the circumstances.

I have made a finding below that if the institution is (i) the Hydro Commission or (ii) the City, the records are outside the scope of the *Act* by virtue of the application of section 52(3)3. If the relevant institution is the Hydro Corporation on its own, then the *Act* would not apply to the records for that reason. Therefore, no matter which scenario is correct, the *Act* does not apply to the records. Accordingly, it is not necessary for me to make a definitive finding on this issue.

ARE THE RECORDS OUTSIDE THE SCOPE OF THE ACT BY VIRTUE OF SECTION 52(3)?

Introduction

For the purpose of this analysis, I will refer to the Hydro Commission and the Hydro Corporation collectively as "Hydro". As explained above, any reference to Hydro should be construed as referring to the City in the alternative.

Section 52(3) of the *Act* provides:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment_related matters in which the institution has an interest.

Section 52(3) is record-specific and fact-specific. If this section applies to a record, and none of the exceptions listed in section 52(4) applies, section 52(3) has the effect of excluding that record from the scope of the *Act* (see, for example, Orders P-1564 and PO-1772, discussing the provincial equivalent to section 52(3)). It was not submitted that section 52(4) is relevant, and I am satisfied that it has no application here.

Hydro relies on paragraphs 1 and 3 of section 52(3). I will first address the application of section 52(3)1.

Section 52(3)3

In order to fall within the scope of paragraph 3 of section 52(3), the Hydro must establish that:

> 1. the records were collected, prepared, maintained or used by the institution or on its behalf; **and**
>
> 2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
>
> 3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Collected, prepared, maintained or used

Hydro submits:

> As detailed in the Notice of Inquiry, the records which remain at issue are contained in files which the Corporation (and previously the [Commission]) prepared and maintained in relation to applications or complaints initiated by the Appellant before the [OLRB] or the [OHRC] . . . [T]herefore . . . the records satisfy the requirements of s. 52(3)1 because . . . [they] were collected, prepared, maintained, and used by the Corporation or the Commission for the sole purpose

> of responding to applications by the Appellant before the OLRB, and to complaints by the Appellant before the OHRC.

The appellant makes no specific submissions on this aspect of the test for the application of section 52(3)3.

In the circumstances, I am satisfied that the records meet the first requirement specified above. All of the records at issue were collected, prepared, maintained and/or used by Hydro.

In relation to meetings, consultations, discussions or communications

Hydro states:

> The collection, preparation, maintenance and usage [of the records] was in relation to meetings, consultations, discussions and communications. In particular, some of the records in [Hydro's] files relate to:
>
> a) meetings and discussions concerning the employer's response to the proceedings initiated by the Appellant;
> b) preparation for the employer's participation in the various proceedings; and
> c) communications, both within [Hydro] and with external parties such as outside counsel, concerning the proceedings and [Hydro's] participation in the proceedings.

Having reviewed the records, and based on the submissions of Hydro, I am satisfied that all of the records were collected, prepared, maintained and/or used in relation to communications respecting on-going issues between the appellant and Hydro.

About labour relations or employment-related matters in which the institution has an interest

The third requirement looks to both the subject matter of the communications (and whether they were about labour relations or employment-related matters) and whether it is established that Hydro has an "interest" in those matters. It has been said in previous orders that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the institution has an interest must have the capacity to affect the institution's legal rights or obligations: see Orders M-1147, P-1242 and PO-1658 [upheld on judicial review in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2000] O.J. No. 1974 (Div. Ct.), leave to appeal granted (June 29, 2000), Docs. M25698, M25699, M25700 (C.A.)]. Further, there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records [Order PO-1658].

Hydro submits:

> The meetings, consultations, discussions and communications concern the Appellant's allegations about his work environment, working conditions and the alleged conduct of the employer and the Appellant's bargaining agent. Consequently, they are about labour relations or employment-related matters within the meaning of s. 52(3)3. Lastly, [Hydro] has an interest in these matters because it is a party to all of the proceedings initiated by the Appellant. Both the OLRB and the OHRC have the power to issue remedial orders against [Hydro], and thereby affect the [Hydro's] legal rights and obligations.
>
> For the reasons set out above, [Hydro] submits that its interest in these matters is current.

The appellant submits:

> . . . [Hydro] demoted the Appellant in classification position to Assembly B from A to this day. Shortly thereafter, the Appellant filed a human rights violation complaint against the [Hydro] and some of its agents who were the actors in the matter. Since then, the Appellant has been successively subject to series of more serious negative and harmful special treatment including intimidation, harassment, psychological and emotional abuse, threats and attempts of dismissal.
>
> . . . . .
>
> [A named Hydro representative] claimed that "all other information in its possession pertains . . . matters before the [OLRB] and [OHRC]."
>
> With respect to the claim that there is a case before the [OHRC], this is a plain and simple deception. There is no case before the [OHRC] now and *even* at the material time when [named Hydro representative] made the claim. [Named Hydro representative] knew that or should have known. [Hydro's] agents, and lawyers told the [OHRC] that the Appellant's application against [Hydro] and the named co-defendants are best heard by the [OLRB]. The OHRC conceded with the pleading and ruled accordingly. That was years ago. If [Hydro] intends to dispute the claim, the Appellant requests that the Adjudicator ask [Hydro] for written particulars. Specifically, which case, when was the case before the OHRC, when was the last time the OHRC did anything with the case, what is the current legal and statutory status of the case.
>
> . . . . .
>
> While [Hydro] cited OLRB and OHRC as being records and files responsive to the Appellant request, the Appellant will show that there is **no** continuing, or current or pending matter before the OHRC. As for the applications before the OLRB, these have been dragging on since 1994 with no end in sight. [Hydro] and its agents knew this fact . . . The OLRB handling of these applications is a matter for review. However, it is more expedient that the Ombudsman/Ontario do not begin its review until after the OLRB has made decision on them so as not to contribute to the delay.
>
> . . . . .
>
> The Appellant has said that it is characteristic of [Hydro] and its agents to employ numerous kinds of delaying tactics in attempt to turn into open ended case an

> application against them in order to avoid accountability and personal legal liability. [Hydro] and its agents have systematically delayed, prolonged, and misrepresented material facts to the tribunal, be it the OHRC or OLRB. They have played one tribunal against the other . . .
>
> The OLRB Rules of Procedure #33 provide that every statement submitted to it *must* also be sent to the other parties in the case. Therefore, the Appellant reserves the right to file another application with the OLRB against [Hydro] and its responsible agent(s) based upon concealing and withholding crucial material information pertinent to the cases before the labour tribunal . . .
>
> In fact, the underlying cause that gave rise to these issues is [Hydro's] agents unfair treatment of the Appellant by applying unevenly [Hydro's] performance appraisal process, selection process, and personnel policies . . . The Appellant is questioning this uneven playing field through the applications filed before the OHRC and OLRB . . .
>
> [Hydro] cannot claim "*on going legal intent*". It is [Hydro's] and its agents and lawyers who have been employing all kinds of delaying tactics, in effect, turned the cases to open-ended cases . . . [F]or [Hydro] to think if seeking refuge under legal interest is act of bad faith . . .

In his supplemental representations, the appellant states:

> . . . The Appellant has application against the forced leave of absence with the [OLRB]. The Application and an Interim Application were filed with the [OLRB in 1997]. Suffice to say that four years later the [OLRB] still has not decided the matter. The Appellant has made it known to the [OLRB] and [Hydro] that he intends to sue [Hydro] and the actors in the matter . . .
>
> The Appellant feels that he is entitled to this information as they pertained to him and is prepared to take it further if that should be required.

In my view, it is clear from the request, the representations and the records themselves that they were collected, maintained, prepared and/or used in relation to communications about matters relating to the employment of the appellant. I am also satisfied in the circumstances that Hydro has a current and continuing interest in these matters. Although it may be the case that some of the records pertain directly to matters which have been terminated (for example, proceedings before the OHRC), all of the records pertain either directly or indirectly to continuing matters between the appellant and the Hydro, including proceedings before the OLRB, and an anticipated matter before the Ombudsman of Ontario and the courts. I am satisfied based on the material before me that there is a reasonable prospect of the Hydro's rights and obligations being engaged in respect of these matters.

In the circumstances, it is not necessary for me to consider whether Hydro may withhold the records pursuant to the exemptions it relied on.

Finally, the appellant submits that Hydro did not conduct a reasonable search for responsive records. In his representations, the appellant provides detailed descriptions of the records or types of records which he believes Hydro should have identified as responsive to his request. In my view, these records, whether or not they exist or should have been identified by Hydro, would fall within the scope of section 52(3)3, for the reasons outlined above. Accordingly, no useful purpose would be served by making a determination on this issue and, therefore, I will not do so.

ORDER:

I uphold Hydro's decision that the records fall outside the scope of the *Act* by virtue of section 52(3)3 of the *Act*.

Original Signed By: March 28, 2001
David Goodis
Senior Adjudicator