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

ORDER PO-2479

Appeal PA-050013-1

Ontario Energy Board

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NATURE OF THE APPEAL:

The Ontario Energy Board (the Board) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> …the service agreement filed with the Ontario Energy Board (the "Board") between [a named electricity distribution company] and its affiliate company...

The Board identified the responsive record (the "Services Agreement") and, pursuant to section 28 of the *Act*, notified two companies whose interests could be affected by the request (the affected parties). The two affected parties ("Company 1" and "Company 2") had entered into a contract for Company 1 to maintain and repair Company 2's electrical distribution system on a fee-for-service basis.

In response to the section 28 notice by the Board, Company 2 objected to the disclosure of parts of the responsive record, asserting that section 17 should be applied to exempt certain text from two of the main agreement's articles and the first of its two schedules. Company 1 did not provide a separate response to the Board's notification.

The Board subsequently decided to grant access to the entire main agreement and Schedule A, but denied access to Schedule B on the basis that it is not in the custody or under the control of the Board. The requester, now the appellant, appealed the Board's decision to deny access to Schedule B.

I sent this Notice initially to the Board and the two affected parties. I received representations from the Board and Company 2. It should be noted that the identified representative for Company 1 and Company 2 is the same individual. Accordingly, I have proceeded with my inquiry into this matter on the basis that Company 2 speaks on behalf of both affected parties.

I then sent a Notice of Inquiry to the appellant along with complete copies of the representations received from the Board and Company 2, and invited the appellant's representations. In responding to the Notice, the appellant raised issues to which I felt the Board and affected parties should be given an opportunity to reply and so a reply Notice of Inquiry was sent along with a complete copy of the appellant's representations. Upon receipt of those representations, I sent a complete copy of the Board's representations and invited sur-reply representations from the appellant, which I received.

RECORD:

The sole record at issue is Schedule B to the Services Agreement between the two affected parties.

DISCUSSION:

PRELIMINARY ISSUE

The Board submitted that both affected parties, Company 1 and Company 2, are institutions under the *Municipal Freedom of Information and Protection of Privacy Act*, and that:

> The Board still believes that the appropriate institution from which the appellant should obtain the whole record is [the affected party] itself as [it] has custody and control of the entire record. … [T]he Board understands that a request for the Services Agreement has been made to [Company 1] under the *Municipal Freedom of Information and Protection of Privacy Act*. The Board continues to believe that that is the most appropriate avenue for the appellant to pursue its right to access the record.

The question of which institution should receive a request is intended to be addressed at the request stage, as provided by section 25 of the *Act* which reads, in part, as follows:

> (1) 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.

There is no evidence before me to suggest that any determination was made or steps taken by the Board to forward this request to either of the affected parties pursuant to section 25. As a result, I do not accept the argument that the present request ought to have been made to the affected parties since doing so could effectively subvert the appellant's access rights under the *Act*. It was the Board's responsibility to address section 25 when it received the request, and since the Board failed to do so, I am not prepared to delay the appellant's rights under the *Act* by permitting the Board to rely on this argument at this stage. I will, therefore, proceed with my analysis of the sole issue before me, a determination of whether the Board exercises the requisite degree of custody or control of the responsive record.

CUSTODY OR CONTROL

Section 10(1) reads, in part:

> 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 . . .

Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution. The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner),* (1999), 47 O.R. (3d) 201 (C.A) *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution [Orders 120, MO-1251]. The following list is not intended to be exhaustive: some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [Order P-120]

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner),* above]

- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]

- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]

- Does the institution have a right to possession of the record? [Orders P-120, P-239]

- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198 (S.C.)]

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

I note that the issue in this appeal has been framed as custody or control. The parties agree, however, that Schedule B to the Services Agreement is not currently "in the custody" of the Board. Accordingly, my analysis will focus on whether or not Schedule B is "under the control" of the Board, as that term is contemplated by the *Act*.

Background

The Board's mandate and authority come from the *Ontario Energy Board Act, 1998*, (the "*OEBA*"), the *Electricity Act, 1998*, and a number of other provincial statutes.

As distributors of electricity in Ontario, both Company 1 and Company 2 are licensed by the Board according to the provisions of Part V of the *OEBA*. When licensed under the *OEBA*, electricity distributors must comply with two different documents discussed in this order: the *Affiliate Relationships Code for Electricity Distributors and Transmitters* (the "*Code*") and the Electricity Reporting and Record Keeping Requirements (the "RRR"). The *Code* sets out the standards and conditions for the interaction between electricity distributors or transmitters and their respective affiliated companies. The RRR sets out the Board's current requirements to maintain and file information under the licence conditions.

Representations of the Parties

In its representations, the Board provided the following information about the Services Agreement:

> The record is a contract between two corporations in order for one corporation to provide goods and services to the other … Contracts are used in the normal course of business to govern the terms and conditions of the provision of goods and services. It was a business decision for [Company 2] to share resources and services with an affiliate. Once that decision was made, then [Company 2] had to comply with the Board's [*Code*]. Under the terms of the *Code*, licensed electricity distributors (such as [Company 2]) that share services or resources with an affiliate are required to do so in accordance with a "services agreement" that addresses the elements identified in the *Code*. [italics inserted]

The Board emphasized that the purpose for which the record was created was so that the Board could approve an extension of Company 2's distribution license, but that:

> [t]he Board has not seen Schedule B of the Services Agreement so it is not possible to comment on what it says and how it relates to the Board's mandate and function; however, the Board accepts that it has a responsibility for ensuring that a services agreement conforms to the requirements of the *Code* in carrying out its mandate.

The Board accepts that it has a right to possess the responsive record since the *Code* contemplates that the Board may review a services agreement and the *Code's* associated document, the RRR, explicitly grants the Board the right to request service agreements. The Board points out, however, that originally, Company 2 only provided the Services Agreement and not the schedules to it. Schedule A was obtained by the Board from Company 2 in response to the section 28 notification, pending its proposed release as third party information. Schedule B has not been provided to the Board by either of the affected parties.

The Board submits that there are strong policy considerations in favour of a finding that the Board does not have control of the responsive record simply by virtue of the fact that it has the right to possess it:

> … [The] Board should not be asking for documents it does not require [to regulate the industry] simply to satisfy a person's request under FIPPA.

The Board concludes its representations with the suggestion that a finding of control over the responsive record in this appeal will establish a precedent for later findings that the Board acts as a conduit for the transfer of records, thereby hampering the Board's ability to "carry out its mandate and functions in a timely, efficient and effective manner".

Citing the need to promote a purposive interpretation of the control issue, the appellant submits that the Services Agreement was not created simply "as a contract in the ordinary course of business", but rather as a mandatory component of the Board's regulatory scheme through the *Code* and the *RRR*. The appellant asserts that the provisions of the *Code* and the *RRR* explicitly contemplate the Board being entitled to unrestricted possession of Schedule B.

Furthermore, the appellant suggests, a Services Agreement between an electricity distribution company and one of its affiliates is explicitly regulated and is a mandatory part of the Board's regulatory regime. The "intended use" of the Services Agreement must be to ensure regulatory compliance and this is part of the Board's core function.

In response to the Board's representations referring to the Services Agreement and schedules separately, the appellant states:

> In failing to provide Schedule 'B', the Board has argued that the Schedule was not in the Board's possession or control. The issue of "control" is the specific focus of this appeal… [There] is only one document in issue, i.e. the Services Agreement. No reasoned basis has been articulated by the Board … that would justify treating the schedules to the Services Agreement as separate documents. …
>
> [Company 2's] failure to file Schedule 'B' to the Services Agreement with the Board does not somehow cause Schedule 'B' to become a separate document. Schedule 'B' is not, in and of itself, a separate contract between the relevant parties. It is a part of the Services Agreement.

In its reply representations, the Board states the following:

> … [By] referring to Schedule B separate from the rest of the Services Agreement, the Board was simply differentiating between the parts of the record that were in the Board's custody or control and parts that were not within the Board's custody or control.
>
> If the Board had to take the view that a record can only be released as an entire document, then the Board would have had to refuse access to the main body of the Services Agreement and Schedule A to the Services Agreement on the basis that it did not have custody or control of the record because it did not have custody or control of a given part of it… The Board … released information on [a] basis … analogous to an institution finding that portions of a document are releasable under FIPPA while other portions are exempt from disclosure under FIPPA.

In his sur-reply submissions, the appellant disputes the appropriateness of the Board's analogy between custody or control and severance, stating that:

> Severance, i.e. denying access to a portion of a document, is only possible where there is an identifiable basis under FIPPA to sever that portion of the record. The Board has not put forward any basis upon which the schedule should be severed.

The Board and the appellant both provided me with submissions on the issue of confidentiality in relation to Schedule B. However, for the purpose of determining control of this record, as

opposed to the applicability of the section 17 exemption, which is not before me in this order, I need not canvas those representations.

Company 2 offered brief representations on the exemptions which could possibly be claimed by the Board in the event that an access decision was made, separate and apart from the issue of custody or control. On the sole issue to be determined in this appeal, the affected party stated that: "[t]he issue of 'control' of this Schedule, we will trust the office of the Information and Privacy Commissioner to resolve."

Analysis and Findings

When the parties to this appeal were asked for representations on the issue of custody or control in relation to Schedule B to the Services Agreement, they were provided with a listing of factors to be considered in such determinations.

All of these factors reflect a purposive approach to the "control" question under section 10(1) of the *Act*, which has been adopted in other access regimes in Canada. *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)* (cited above) is a significant decision on the issue of custody or control, in which the Ontario Court of Appeal considered whether backup tapes of Criminal Code Review Board proceedings, in the possession of a Court Reporter, were within the Criminal Code Review Board's control and therefore subject to the *Act*. In deciding that they were, the Court placed substantial reliance on the statutory mandate of the Criminal Code Review Board to keep a record of its proceedings, as required by section 672.52 of the *Criminal Code*. The Court stated (at paras. 22, 26-32):

> The only issue is whether the backup tapes are under the control of the Board. I start with the proposition that the records of the Board's disposition hearings are under its control. Under s. 672.52(1) of the Criminal Code, the Board is required to keep a record of its proceedings. It seems obvious that whatever constitutes that record must be under the control of the Board. If the record is not physically in the Board's custody, then it must be kept under an arrangement by which the Board has access to it. Were it otherwise, the Board would be in breach of its statutory mandate "to keep a record of its proceedings."
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> …
>
> I am also of the view that even if the backup tapes do not constitute part of the Board's record, the Board nonetheless has control over them within the meaning of s. 10(1) of the Act. There are three aspects to the relationship between the Board and the court reporter that are important to this conclusion.
>
> First, the sole purpose for creating the backup tapes was to fulfill the Board's statutory mandate to keep an accurate record.

> Next, it is within the Board's power to limit the use to which the backup tapes may be put. The Board has the broad discretion to exclude the public from hearings or portions of them … and to limit the disclosure of disposition information to the public or to an accused. … It follows that orders of this nature require the Board to exercise control over all the records of a proceeding, including backup tapes. That level of control is implicit in the powers conferred upon the Board by the Criminal Code.
>
> It is reasonable to expect that the Board would ensure, by contract if necessary, that any records of proceedings, backup records included, be used solely for the purposes of the Board. The Board can and should exercise control over the use of all records made by court reporters of its proceedings.
>
> Third, the Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. In either event the Board would require access to all of the records, including backup tapes if any existed, that could be of assistance in order to satisfy itself that the record or transcript is accurate. For this purpose, the Board must have access to the backup tapes regardless of who has physical custody of them.

In *Criminal Code Review Board*, the Court of Appeal also cites the following passage from *Canada Post Corp*. v. *Canada (Minister of Public Works* (1995), 30 Admin. L.R. (2d) 242 (F.C.A.) at 244-245:

> The notion of control referred to in subsection 4(1) of the [federal] Access to Information Act...is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.
>
> ...
>
> It is, in my view, as much the duty of courts to give subsection 4(1) of the Access to Information Act a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature as "[i]t is the duty of boards and courts", as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the Canadian Human Rights Act ... "to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature"... It is not in the power of this court to cut down the broad meaning of

> the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning ... On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information ...

I adopt the approaches in *Criminal Code Review Board* and *Canada Post* for the purposes of this appeal and will apply them in reviewing the factors I consider relevant to my determination of this issue.

It has already been mentioned that the affected parties, as electricity distributors in this province, are subject to the *OEBA* and are licensed according to the provisions of that statute. Section 1(1) of the *OEBA* sets out the following broad objectives for the Board in relation to electricity:

> The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
>
> 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Pursuant to this legislative scheme, the *Code* and RRR impose certain obligations on distributors to prepare - and provide to the Board upon request - written agreements for arrangements entered into with affiliates for the provision of services.

The *Code* is enacted pursuant to section 70.1(1) of the *OEBA*, which states:

> The Board may issue codes that, with such modifications or exemptions as may be specified by the Board under section 70, may be incorporated by reference as conditions of a licence under that section.

It is expressly recognized under item 1 of section 70.1(7) of the *OEBA*:

> The following documents issued by the Board, as they read immediately before this section came into force, shall be deemed to be codes issued under this section and the Board may change or amend the codes in accordance with this section and sections 70.2 and 70.3:
>
> 1. The Affiliate Relationships Code for Electricity Transmitters and Distributors.

Sections 2.2.1 and 2.8.2 of the *Code* read:

> 2.2.1 Where a utility shares services or resources with an affiliate it shall do so in accordance with a Services Agreement, the terms of which may be reviewed by the Board to ensure compliance with this *Code*. The Services Agreement shall include:
> (a) the type, quantity and quality of service;
> (b) pricing mechanisms;
> (c) cost allocation mechanisms;
> (d) confidentiality arrangements;
> (e) the apportionment of risks (including risks related to under or over provision of service); and
> (f) a dispute resolution process for any disagreement arising over the terms or implementation of the Services Agreement.
>
> 2.8.2. In addition to any other reporting requirements contained in this *Code* a utility shall provide the following information, in a form and manner and at such times as may be requested by the Board:
>
> …
>
> (c) the utility's specific costing and transfer pricing guidelines, tendering procedures and Services Agreement(s).

By Decision and Order RP-2002-0140, dated October 23, 2002, the Board implemented reporting and record keeping requirements for electricity licensees, including distributors. The Board's Order reads, in part, as follows:

> The Board orders that the existing subsections of electricity licenses referred to below be replaced with the following:
>
> A Distribution License subsection 10.1
> The Licensee shall maintain records of and provide, in the manner and form determined by the Board or the Director, such information as the Board or Director may require from time to time.

The RRR represents the Board's current requirements for record keeping. The relevant excerpts from the RRR read as follows:

> 1.4 These reporting and record keeping requirements apply to all electricity distributors, transmitters, retailers, wholesalers and generators licensed by the Ontario Energy Board under Part V of the Act. All licensed distributors, transmitters, retailers, wholesalers and generators are obligated to comply with the reporting and record keeping requirements as a condition of their license…

> 2.3.4 A distributor shall maintain, as required by the [*Code*] subsection 2.8.2., and provide in a form and manner and at such times as may be requested by the Board, records on corporate relationships as follows:
>
> …
>
> 3 the utility's specific costing and transfer pricing guidelines, tendering procedures and services agreement(s).

Having reviewed the relevant provisions of the *Act*, I am satisfied that the Board has a clear statutory power and duty to ensure regulatory compliance in the electricity industry and, by virtue of the *Code* and the RRR, this extends to the activity that resulted in the creation of the Services Agreement.

Under this scheme, which derives from and is intended to fulfil its statutory mandate, the Board has a direct interest in supervision of the Services Agreement which, similar to the record in the *Criminal Code Review Board* case, was created to fulfil statutorily mandated requirements. I accept the submission of the appellant that the Services Agreement was not simply created "as a contract in the ordinary course of business", but rather as a mandatory component of the Board's regulatory scheme through the *Code* and the RRR. It is also clear that the Board has a right derived from its statutory mandate and through Decision and Order RP-2002-0140, pursuant to the provisions of the *Code* and RRR outlined above, to request the Services Agreement from either of the affected parties.

As already stated, services agreements are drafted and available for use or review by the Board to ensure regulatory compliance. The frequency with which the Board requests such agreements under this authority is not determinative of whether it is properly considered as a core, central or basic function of the Board's mandate. Similarly, the fact that the other schedule to this Services Agreement was requested only following the appellant's access request for it is not determinative of the issue. I find that the activity of ensuring compliance through use or review of service agreements of the type at issue here is properly considered a part of the Board's function and mandate. In my opinion, this finding weighs in favour of a conclusion that the Board does have control over the Services Agreement.

The Board has admitted that it has the right to physical possession of the Services Agreement and I am reiterating that point because I agree with the appellant's submission that there exists no reasonable basis for making a distinction between the Services Agreement and any one, or both, of the schedules to it. Certainly, in the course of reviewing the representations before me, I have not been provided with a satisfactory explanation for the Board's release of the Services Agreement and Schedule A, followed by the subsequent assertion that it could not release Schedule B because it did not have control over it.

Similarly, I do not afford any significant weight to the Board's "policy-based" argument against a finding of control by the Board in this appeal. There is, and will continue to be, a case-by-case determination of custody or control in relation to each record in any appeal in which the issue is raised.

Based on the statutory framework as implemented by the Board, and the factual circumstances of this appeal, I have concluded that the Board does have the requisite degree of control over the responsive record to bring it within the ambit of the *Act*. Accordingly, I find that Schedule B to the Services Agreement between the affected parties is within the control of the Board.

ORDER:

1. I order the Board to request a copy of the record responsive to the request from Company 2 **by July 12, 2006**.

2. I order the Board to issue a decision under the *Act* to the appellant regarding access to the record obtained from Company 2 pursuant to Provision 1 within ten (10) days of the date of receipt of the record from Company 2.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the decision letter which is provided to the appellant pursuant to Provision 2.

Original signed by: June 27, 2006
Daphne Loukidelis
Adjudicator