



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2523

Appeals PA-050098-1 and PA-050116-1

Hydro One



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEALS:

Hydro One received two separate requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the same requester. The first request was for copies of expense reports for the period July 2000 to June 2003 for nine identified individuals, and the second was for phone records for the same period for ten named individuals (nine of whom were also named in the first request). Hydro One responded to both appeals with decision letters, and both of these decisions were appealed by the requester (now the appellant). Due to the similarity of the issues raised in these two appeals, I have decided to address the issues raised in both of them in this order.

Background

This order deals with two appeals resulting from two requests made by the appellant. In fact, these two requests were two parts of a seven-part request, which resulted in the opening of five separate appeals. The appellant later submitted at least four additional requests to Hydro One, resulting in three additional appeals. There may be other requests which were submitted by the appellant to Hydro One of which I am not aware.

The requests made by the appellant to Hydro One were detailed and specific, and include requests for certain consultant's reports, personnel records, letters, contracts, weekly manager reports, verification reports, as well as the two requests resulting in the two appeals addressed in this order, namely, expense reports and cell phone records of named individuals. The detailed nature of the requests result in part from the knowledge the appellant has of the circumstances surrounding the creation of the requested records.

Appeal PA-050098-1

This appeal stems from the request received by Hydro One for copies of expense reports from July 2000 to June 2003 for nine named individuals. The request was subsequently expanded to include expense reports from July 2003 through December 2003 for one of the nine named individuals.

In response to the request, Hydro One issued a decision stating that it did not have the expense reports for six of the named individuals, as these individuals "were never employees of Hydro One Inc. or any of its subsidiaries", and that Hydro One did not have such records under its custody or in its control. It also advised the requester that a time extension of an additional 30 days was required to respond to the balance of the request.

Hydro One subsequently issued a second decision, providing access in part to the expense reports from July 2003 through December 2003 for the named individual whose expense claims for that time were requested. Hydro One refused access to portions of those records on the basis of the exemptions in sections 18(1)(c) (economic and other interests) and 21(1) (invasion of privacy) of the *Act*. Hydro One also identified the fees that were payable for the requested information. With respect to the other requested information, Hydro One stated:

- As previously noted, [six named individuals] were never employees of Hydro One Inc. or any of its subsidiaries and hence, [Hydro One] does not have such records in our custody or under our control.
- Original expense reports for [two named individuals] for the period of interest (or until they left our employ, whichever came first) have not been found, despite our search efforts. Original expense reports for [the other named individual, whose expense accounts for July 2003 – December 2003 were provided] for the period July 2000 to June 2003 have not been found, despite our search efforts.

The requester, now the appellant, appealed this decision.

During mediation, the appellant indicated that he was not interested in appealing the severances to the records or the amount of the fees, and these issues were removed from the scope of the appeal. The remaining two issues, namely, whether certain records are in the custody and control of Hydro One, and whether Hydro One conducted a reasonable search for the other responsive records, were not resolved through mediation. This appeal was then transferred to the inquiry stage of the process.

I sent a Notice of Inquiry to Hydro One, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of Hydro One's representations, to the appellant. The appellant provided representations in support of his position that certain additional responsive records ought to exist. I then provided Hydro One with the representations of the appellant, and invited Hydro One to provide reply representations, which it did.

Appeal PA-050116-1

This appeal arises from the request to Hydro One for cell phone records for the period July 2000 to June 2003 for ten named individuals. The requester subsequently stated that he also wanted the cell phone records from July 2003 through December 2003 for one of the named individuals.

In response to the request, Hydro One issued a decision stating that:

- access could not be provided to cell phone records for seven of the named individuals, as these individuals were "never employees of Hydro One Inc. or any of its subsidiaries" and, hence, Hydro One did not have such records in its custody or under its control;
- a time extension was required to search for cell phone records relating the other three named individuals;

- access was granted to “a summary of cell phone costs billed to Ontario Hydro Energy covering the period August 2000 to January 2002” for seven of the identified individuals.

Hydro One subsequently issued a second decision, in which it stated:

- As previously noted, access cannot be provided to cell phone records for [seven named individuals] as they were never employees of Hydro One Inc. or any of its subsidiaries and hence, [Hydro One] does not have such records in our custody or under our control.
- Cell phone records for [two named individuals] for the period of interest (or until they left our employ, whichever came first) have not been found, despite our search efforts. Cell phone records for [the other named individual] for the period July 2000 to June 2003 have not been found, despite our search efforts.
- Cell phone records are typically attached to expense reports. Original expense reports for [one named individual] for the period July 2003 to December 2003 have been found and our decision in respect of these reports is as stated above [referring to the decision resulting in Appeal PA-050098-1].

The appellant appealed Hydro One’s decision.

During the course of this appeal, Hydro One confirmed that a summary of the cell phone costs billed to it by the companies that employed five of the named individuals for the period August 2001 to January 2002, as well as a summary of the costs of two other named individuals, had been released to the appellant. Hydro One also stated that partial access was granted to available cell phone records for one of the named individuals (as these formed part of the records in Appeal PA-050098-1), that no additional records were located for one of the other individuals, and that no records were located for another named individual.

Mediation was not possible, and this file was transferred to the inquiry stage of the process. The two issues in this appeal are whether certain records are in the custody and control of Hydro One, and whether Hydro One conducted a reasonable search for responsive records.

I sent a Notice of Inquiry to Hydro One, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of Hydro One’s representations, to the appellant. The appellant provided representations in support of his position that certain additional responsive records ought to exist. I then provided Hydro One with the representations of the appellant, and invited it to provide reply representations, which it did.

DISCUSSION:

PRELIMINARY ISSUE – SCOPE OF THE REQUESTS

Although not raised as a specific issue in this appeal, at one point in his representations, dealing with whether certain expense reports exist, the appellant intimated that the cheques issued by Hydro One for identified expenses would be records responsive to his request. Furthermore, both the appellant and Hydro One refer to invoices which were submitted to Hydro One for certain business expenses. Some of these invoices were provided as “aggregate” amounts, and others were included in invoices provided to Hydro One or its subsidiaries. This led me to consider the scope of these appeals, and whether the requests for records ought to be construed more broadly than specific requests for the identified “cell phone records” and “expense reports” for the named individuals.

I acknowledge that requests for records under the *Act* ought to be construed broadly. Previous orders have confirmed that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*, and that, generally, ambiguity in the request should be resolved in the requester’s favour [Orders P-134, P-880].

I am satisfied, however, that in the circumstances of these appeals, the records responsive to the requests are, specifically, the cell phone records and expense reports requested. In these circumstances, I find that the requests do not extend to invoices, aggregate amounts paid for expenses, or cheques issued by Hydro One. In the background section set out above, I identified the various and specific requests for records made by the appellant to Hydro One, and indicated that there may be other requests of which I am not aware. The appellant also appears to have in his possession some of the specific invoices which contain expense information. Furthermore, at the time of the requests there does not appear to have been any ambiguity nor uncertainty concerning the records the appellant was seeking, and the appellant in the course of these appeals apparently accepted the identified scope of the appeals. Accordingly, given the specific and detailed nature of the requests resulting in these two appeals, as well as the intimate knowledge the appellant has of the circumstances resulting in the creation of the requested records, I am satisfied that the scope of these appeals is restricted to the actual records requested, and does not include additional information, as the appellant seems to suggest in his representations.

CUSTODY OR CONTROL

General

Section 10(1)(a) of the *Act* states as follows:

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 sections 12 to 22

In Order 120, former Commissioner Sidney B. Linden stated that the terms “custody” and “control” should be given a broad interpretation in order to give effect to the purposes and principles of the *Act*.

Representations

As identified above, Hydro One responded to the requests by indicating that six of the nine named individuals whose records were requested in MA-050098-1, and seven of the ten individuals whose records were requested in MA-050116-1, were “never employees of Hydro One Inc. or any of its subsidiaries”. As a result, Hydro One stated that access to the requested records for those individuals could not be provided because Hydro One did not have such records in its custody or under its control.

The six individuals named in the request for expense records, and for whom Hydro One states it does not have custody or control of their records, are included in the seven for whom Hydro One took the same position in response to the request for cell phone records.

In its initial representations in both of these appeals, Hydro One identifies the nature of the business that its subsidiary, Ontario Hydro Energy Inc. (OHE), was involved in and to which the records relate. Hydro One indicates that OHE was involved in actively soliciting customers for its retail electricity, retail water heater and retail long distance businesses. It then identifies that the solicitations were made, under contract, by a variety of third party companies, including the company that employed a number of the people listed in the requests (company A).

With respect to the request for copies of expense reports from July 2000 to June 2003 for nine named individuals, which resulted in appeal PA-050098-1, Hydro One states:

... “expense reports” ... are intended to document the business expenses of employees. [Six of the identified individuals] were employed directly by [company A], not by Hydro One Inc. or any of its subsidiaries....

[Company A] submitted *invoices* to OHE for services performed for OHE. Such invoices included fees earned ... as well as aggregate summaries of incurred, reimbursable business expenses. No expense records of individual employees of [company A] were included with these invoices and no such records were requested by OHE.

Consequently, no expense reports for [the six named individuals] have ever been or are today in the custody or control of Hydro One Inc. or any of its subsidiaries.

Hydro One also responded to some of the specific questions which were posed in the Notice of Inquiry as follows:

- the records [for the six named individuals] were not created by an officer or employee of [Hydro One];
- the creator of each record created the records for the purpose of reimbursement of business expenses *by their employer*;
- [Hydro One] does not have physical possession of the employee expense records of any current or past employee of [company A];
- Hydro One or any of its subsidiaries does not have the authority to regulate the use and disposal of the responsive records.

With respect to the request for cell phone records from July 2000 to June 2003 for ten named individuals, which resulted in Appeal PA-050116-1, Hydro One states:

As noted previously, no cell phone records are in our custody or control for [seven named individuals]. These individuals were not at any time employees of Hydro One Inc. or any of its subsidiaries.

However, a summary of cell phone costs billed to OHE by the companies that employed [five of the named individuals] for the period August 2001 to January 2002 was located and released to the requester without severances.

Hydro One also refers to and relies upon the representations it provided in response to the Notice of Inquiry in Appeal PA-050098-1, as set out above.

The appellant responded to the representations of Hydro One. With respect to the issue of whether the responsive records were in the custody or control of Hydro One, the appellant's representations in both of these appeals focus on the status of the named individuals who Hydro One claims were never its employees (six in Appeal PA-050098-1 and those six, as well as a seventh, in Appeal PA-050116-1).

In support of his view that the named individuals were employees of Hydro One, the appellant provides a transcript of a court proceeding in another matter in which one of the three other named individuals, who was an employee of Hydro One, gave sworn testimony. In his initial representations he states:

Hydro One has taken the position that [six named individuals] never worked for Hydro One.

[The Hydro One employee giving evidence] describes [one of the named individuals] as a "co-worker" ... and mentions [two other named individuals].

I have examined [company A's] bank records and neither of [three named individuals] nor companies owned or associated with them received payment from [company A]. Clearly these people worked together for Hydro One.

[Three other named individuals] submitted expenses as part of their invoicing for the [company A] in accordance with their contract with Hydro One.

With respect to the request for the expense reports of the six individuals whose records Hydro One states are not in their custody or control, the appellant also makes representations referring to the requirements for employees to submit expense reports. He states:

Expense reports would have to be made by the employee or officer working for Hydro One in the case of [two of the named individuals]. They would have to be approved by same. In all instances applied for in this request these expense reports would have to be created for basic accounting purposes and in order to reimburse the employee. Also to do Hydro One's taxes, a statutory requirement and core function of any business.

The appellant subsequently provided further representations in support of his position that the seven individuals worked for Hydro One. He states:

Despite Hydro One's claims to the contrary, [the named employee] states under oath that [one of the six named individuals] and [the seventh named individual] were co-workers. [An identified Hydro One letter] refers to a list of cell phone costs billed to Ontario Hydro Energy Inc. that lists [these two individuals]. Ultimately [Hydro One] admits that [the seventh individual] worked for Hydro One and should be required to provide the information required.

The appellant then attaches a copy of another letter from Hydro One to the appellant in the context of a separate appeal, in which Hydro One states: "We have now determined that [the seventh individual] was employed directly by [OHE] as a temporary employee for a period of time ...".

The appellant also relies on these representations in support of his position regarding the custody and control of cell phone records. In addition, the appellant refers to portions of a transcript of a court proceeding in which one of the six named individuals refers to certain cell phone records which she has in her possession, and which she "believes were given to her" by the named Hydro One employee who is still with Hydro One. The appellant then refers to another portion of the transcript which, in his view, confirms that these records are the cell phone records requested in Appeal PA-050116-1.

After reviewing the appellant's representations, I shared them with Hydro One, and invited Hydro One to provide reply representations. In particular, I asked Hydro One to respond to the appellant's representations on whether certain individuals ever worked for Hydro One.

Hydro One provided representations responding to the appellant's submissions. Hydro One refers to its earlier representations in support of its position that four individuals never worked for Hydro One or its subsidiaries. It then confirms that the remaining issue is whether the three individuals whom the appellant refers to in his representations (two of the six named individuals, and the seventh named individual) ever worked for Hydro One. Hydro One then states:

[Two of the named individuals] were never employees of Hydro One Inc. or any of its subsidiaries. ...

All of the individuals of interest were involved in some way in the business of OHE; all were based for varying periods of time at the OHE offices. However ... the appellant did not allow for the possibility that the relationship between OHE and some of the individuals of interest was not one of "employer" and "employee" respectively, in the way those definitions have been applied in various statutes and various courts and tribunals ...

Hydro One then refers to the three individuals and provides representations as follows:

[One of the named individuals] was an independent contractor, who provided consulting services to OHE for the purpose of helping to develop a strategy for new acquisitions. He submitted invoices to OHE for his services and his expenses; he was not paid a salary or wage by OHE. The provision of invoices clearly indicates that [he] was performing as a person in business on his own account.

[Another named individual] was an independent contractor, under contract to [company B]. [Company B] ... provided support to field sales forces who were acting as agents on OHE in a variety of sales activities (door to door campaigns, trade and recreational shows, etc.). These field sales forces were also independent contractors under contract to another third party, [company A], who recruited and trained them. [Company B] submitted invoices to OHE; [the named individual] was not paid a salary or wage by OHE. The provision of invoices clearly indicates that [company B] was a business in a commercial relationship with OHE, and that [the named individual], by virtue of his arrangement with [company B], was performing as a person in business on his own account.

Hydro One states that, since neither of these two named individuals were employees of OHE, there is no reasonable basis to believe that the responsive records are in the custody or under the control of Hydro One.

Hydro One then reviews the searches it conducted to confirm whether these individuals were ever employees, and the results of those searches. It states that its search confirmed that no individuals with those names were ever employed by Hydro One or any of its subsidiaries.

Hydro One also states that the seventh named individual was employed by OHE as a temporary employee. Hydro One states that she was originally not identified as such because the computer system differentiates “permanent” and “temporary” employees. Once Hydro One recognized and corrected for this differentiation, the searches conducted identified that she was a temporary employee of OHE.

Hydro One also states that it consulted with individuals who were employed by OHE or Hydro One and knew of the relationships between Hydro One, OHE and the independent companies working with them. Through this process the relationships between the named individuals were confirmed, as set out above.

Findings

Section 10(1)(a) of the *Act* states as follows:

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 sections 12 to 22

In Order 120, former Commissioner Sidney B. Linden stated that the terms “custody” and “control” should be given a broad interpretation in order to give effect to the purposes and principles of the *Act*. I agree with former Commissioner Linden’s approach and adopt it for the purposes of this appeal. In that order, he lists a number of factors pertinent to the creation, maintenance and use of records to be considered when determining the issue of “custody” and “control” of the records. The factors relating to “control” are the following:

Was the record created by an officer or employee of the institution?

What use did the creator intend to make of the record?

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?

Does the institution have a right to possession of the record?

Does the content of the record relate to the institution’s mandate and function?

Does the institution have the authority to regulate the record’s use?

To what extent has the record been relied upon by the institution?

How closely is the record integrated with other records held by the institution?

Does the institution have the authority to dispose of the record?

This approach has been used in many subsequent orders. In each case, the issue of custody and/or control has been decided based on the particular facts of the case. Similarly, this appeal must be decided on the basis of its particular facts.

Generally, based on the submissions of the parties, I accept the position of Hydro One with respect to custody and control of the two categories of records for which this issue was raised. Based on the representations provided by Hydro One, both its initial and reply representations addressing the specific questions raised by the appellant, Hydro One has provided sufficient evidence to satisfy me that the six named individuals were not employees of Hydro One or its subsidiaries, and that records responsive to the two requests that relate to five of these individuals would not be in the custody or under the control of Hydro One.

However, although the transcript evidence provided by the appellant was collected in a different forum, and the context of the discussion in the small portion of the transcript provided by the appellant is unclear, the portion that has been provided with his representations suggests that the cell phone records for the individual who was giving testimony may have been in the possession of Hydro One at one time. In particular, this individual's cell phone records may have been in the possession of the named employee of Hydro One at one time and, if so, would have been in the custody or under the control of Hydro One at that time. Given this evidence, I will require Hydro One to conduct a search for the responsive cell phone records of this individual.

Furthermore, with respect to the seventh named employee, whose records were only requested in Appeal PA-050116-1, it is clear that this person was at one point in time a temporary employee of OHE. Accordingly, records responsive to the request resulting in this appeal, that is, cell phone records for the period July 2000 to June 2003, would be in the custody or under the control of Hydro One. I will accordingly order Hydro One to conduct a search for records responsive to the request for this named individual.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether Hydro One 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 Hydro One will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744,

acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

... the Act does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution 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 an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

In these appeals the issues relating to the reasonableness of the searches relate to the searches for the records of the three individuals who were identified as employees of Hydro One.

In response to the request for expense reports (Appeal MA-050098-1), Hydro One stated:

Original expense reports for [two named individuals] for the period of interest (or until they left out employ, whichever came first) have not been found, despite our search efforts. Original expense reports for [the other named individual, whose expense accounts for July 2003 – December 2003 were provided] for the period July 2000 to June 2003 have not been found, despite our search efforts.

In response to the request for cell phone records (Appeal MA-050116-1), Hydro One responded:

- Cell phone records for [two named individuals] for the period of interest (or until they left our employ, whichever came first) have not been found, despite our search efforts. Cell phone records for [the other named individual] for the period July 2000 to June 2003 have not been found, despite our search efforts.
- Cell phone records are typically attached to expense reports. Original expense reports for [one named individual] for the period July 2003 to December 2003

have been found and our decision in respect of these reports is as stated above [referring to the decision resulting in appeal PA-050098-1].

Representations

Hydro One's initial representations on the nature of the searches conducted for responsive records state:

Hydro One Inc.'s financial and records retention policies require that all financial records be retained for six years plus the current year beyond the date of creation. This applies to all employee expense records. We therefore expected to locate responsive records for [the three named individuals who were Hydro One employees] for at least portions of the period of interest.

Effective May 1, 2002, the retail electricity and retail water heater business of Ontario Hydro Inc. were sold to [another named company]. Effective May 1, 2002, the retail long distance business of Ontario Hydro Energy Inc. was transferred to [a further named company]. The sale agreements and transfers did not include internal administrative documents such as past expense reports of Ontario Hydro Energy employees. Within a few months of the sale, the premises previously occupied by Ontario Hydro Energy Inc. were occupied by a new tenant, and all business records of the former Ontario Hydro Energy Inc. had either been transferred to new owners, destroyed if no longer needed, or placed in long-term warehouse storage. Contrary to expectations, no employee expense records were found in long-term storage (see reasonable search below).

Also, all former employees of Ontario Hydro Energy Inc. either left the employ of Hydro One or were transferred to new positions with other subsidiaries. Of the three individuals employed by Ontario Hydro Energy Inc., only [one named individual] continues to be employed by Hydro One Inc. or any of its subsidiaries. [The other two named individuals] left our employ shortly after the sale of the business. Consequently, no employee expense records would be in our custody or control for these two individuals for periods beyond the date of their departure.,,,

Responsive records for Ontario Hydro Energy Inc. employees were not integrated with other business records. Ontario Hydro Energy Inc. was a separate subsidiary with its own offices and administration.

Hydro One then reviews the searches it conducted for the records. It states:

Given the sale of Ontario Hydro Energy Inc. and given the departure of two of the three employees of interest, the search for responsive records began by contacting the one remaining employee still with Hydro One, [the named employee]. ...

Three meetings were held with [the employee] to discuss possible locations for the records and details of searches performed. [The employee] confirmed that 200 boxes of material were removed from the former offices of Ontario Hydro Energy Inc. and that these did not contain expense reports for any employees of that organization. She indicated that she had no knowledge of any possible alternate storage locations where the responsive records might be found.

Hydro One also identifies the specific searches conducted by the Freedom of Information Coordinator, including the meetings and/or discussions with the following individuals:

- 1) The Chief Information Officer, who previously had been actively involved in the transfer of business information to [the two named companies]. He confirmed that previous searches for OHE employee expense records for purposes unrelated to requests under the *Act* had not been successful. He also confirmed that he had discussed the matter with [one of the former employees whose records were requested] previously and [that individual] had no knowledge of the past or current location of any responsive records.
- 2) Other former OHE employees, including financial staff, who confirmed that they had no knowledge of the past or current location of any responsive records.
- 3) The former administrative assistant to [one of the former employees whose records were requested], who confirmed that she had no knowledge of the past or current location of any responsive records.
- 4) The administrative assistant for [the current employee's] current department, who confirmed that she had no knowledge of the past or current location of any responsive records prior to July 2003. Records from July 2003 to December 2003 for [the employee] were retrieved and have been made available to the appellant.
- 5) Members of the Corporate Secretariat, who provide corporate governance support to all Hydro One subsidiaries. They confirmed that they had no knowledge of the past or current location of responsive records.
- 6) The internal auditor, who confirmed that he had no knowledge of the past or current location of any responsive records.
- 7) The Facilities Manager for records storage sites, who confirmed that only one storage location exists for any retained OHE records.

In response to some of the specific questions posed in the Notice of Inquiry, Hydro One confirmed that the responsive records for the three OHE employees did exist, but have not been found. Hydro One also stated that there is no difference in record-keeping practices prior to July 2003 and following July 2003, and states:

Each subsidiary is required to establish and maintain its financial records in accordance with corporate financial policies and procedures and record retention policies and schedules. The records of different subsidiaries are kept physically separate. The mechanisms by which a subsidiary creates and manages its records are left to the discretion of the individual subsidiary. The mechanisms and the records are subject to audit.

Hydro One also states that the unique circumstances of selling and closing this business have contributed to the inability to locate responsive records for the three named individuals.

The appellant's representations

In response to Hydro One's representations, the appellant states:

In sworn testimony on [an identified date], [the named employee] ... stated that "all my records are currently in my office at Hydro One."

While [the named employee] does not explain what records she is referring to, I want to make it clear that at another point in this trial [another individual] refers to cell phone records that she obtained from [the named employee] despite the fact that Hydro One has taken the position that they do not have these records

The appellant also states:

Expense reports would have to be made by the employee or officer working for Hydro One in the case of [two of the named individuals]. They would have to be approved by same. In all instances applied for in this request these expense reports would have to be created for basic accounting purposes and in order to reimburse the employee. Also to do Hydro One's taxes, a statutory requirement and core function of any business.

In later representations the appellant states:

In [the case of the three employees], what is the point of the process if no records are maintained or provided?

Would there not be cheques issued for these expenses (ie: a record)?

Finally, the appellant states that any evidence regarding the reasonableness of the searches conducted would require the direct involvement of an identified Hydro One employee, given her position during the time the requested records were created.

Analysis

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether Hydro One has conducted a reasonable search for the records as required by section 24 of the *Act*. In these appeals, if I am satisfied that Hydro One's searches for responsive records were reasonable in the circumstances, the decisions will be upheld. If I am not satisfied, I may order that further searches be conducted.

In the circumstances, I am satisfied that the searches by Hydro One for records responsive to the requests for the three named individuals who were employees of Hydro One or its subsidiaries, were reasonable.

With respect to the requests for responsive records, Hydro One described in detail the individuals who were consulted in order to determine whether records exist, and the searches conducted for responsive records. Hydro One located certain records responsive to the request – in particular, the records of an identified employee for a certain period of time. Hydro One also identifies the searches it conducted for the responsive records and that they had expected to locate responsive records [expense reports].

The appellant takes the position that responsive records ought to exist. Hydro One does not appear to dispute this position, but sets out the nature of the searches it conducted for responsive records, and that the results of those searches were that responsive records could not be located. As set out above, in appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether Hydro One 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 Hydro One will be upheld. If I am not satisfied, further searches may be ordered.

In the circumstances of these appeals, based on the detailed representations received from Hydro One, I am satisfied that the searches conducted by it for records responsive to the two requests relating to the three named individuals were reasonable, and I dismiss this aspect of these appeals.

ORDER:

1. I uphold the decision of Hydro One that responsive records relating to five of the six named individuals are not in the custody or control of Hydro One.
2. I find that the cell phone records relating to the named individual whose transcript was referred to by the appellant, would be in the custody or under the control of Hydro One, and I order Hydro One to conduct a search for responsive records.

3. I find that cell phone records relating to the seventh named individual, who was identified as a temporary employee, would be in the custody or under the control of Hydro One, and I order Hydro One to conduct a search for responsive records.
4. After conducting the searches identified in provisions 2 and 3, I order Hydro One to provide a decision letter to the appellant in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
5. I find that the searches conducted for Hydro One for records relating to the other three named individuals were reasonable.

Original Signed By: _____

November 9, 2006 _____

Frank DeVries
Adjudicator