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

ORDER PO-2564

Appeal PA-050155-1

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/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

Hydro One received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to ten named individuals. The request was for the personnel records and similar information about these individuals, and was clarified to include their job descriptions, performance evaluations, promotions, raises, pay scale(s), departure/termination dates and reasons, information about the job selection process, and other similar information.

In response to the clarified request, Hydro One issued a decision stating that it did not have custody or control of responsive information relating to seven of the named individuals, as these individuals were never employees of Hydro One or any of its subsidiaries. Hydro One also identified that access could not be provided to any job competition records for the other three individuals, as "such records are retained for only one year after conclusion of all matters related to the appointment. The last appointment for any of these individuals occurred in 2003. Therefore, any such records have been destroyed, in accordance with records retention guidelines."

With respect to the responsive records which Hydro One identified it did have, Hydro One stated that the records fell outside the scope of the *Act* on the basis of section 65(6)3.

The requester, now the appellant, appealed Hydro One's decision.

During mediation, the appellant indicated that he was appealing Hydro One's decision that section 65(6) applied to the responsive records, and also its decision that it did not have the requested job competition records, thus raising the issue of whether the search conducted by Hydro One for responsive records was reasonable. In addition, the appellant stated that he was appealing Hydro One's decision that it did not have custody or control of the employment records for three of the named individuals.

Mediation did not resolve the issues in this appeal, and this appeal was transferred to the inquiry stage of the process.

After this appeal was transferred to the inquiry stage, Hydro One identified that it had located additional responsive records, and then issued a supplementary decision letter to the appellant, the relevant portion of which read:

> We have now determined that [one of the named individuals] was employed directly by Hydro One Energy Inc. as a temporary employee for a period of time, and we have now located and retrieved two additional records responsive to your request.

Hydro One then stated that these two records also fell outside the scope of the *Act* on the basis of the exclusionary provision in section 65(6)3.

Upon receipt of the supplementary decision letter, the appellant wrote to this office and asked that his appeal of the supplementary decision be added to the current appeal. In light of the similarity of the issues raised in this appeal and the issues raised in the supplementary decision letter, I decided to add his appeal of the supplementary decision letter to the current appeal.

I sent a Notice of Inquiry, identifying the facts and issues in this appeal, to Hydro One, initially. Hydro One provided representations in response to the Notice of Inquiry. The appellant also provided some information to this office at that time and, in consultation with the parties, this file was placed "on hold" for a period of time. This file was subsequently re-activated, and I sent a copy of the Notice of Inquiry, along with a copy of the representations of Hydro One (excluding the appendices), to the appellant. The appellant did not provide representations in response.

RECORDS:

The records at issue in this appeal, which Hydro One states are responsive but fall outside the scope of the *Act* on the basis of section 65(6)3, are the records contained in the personnel files of three named individuals, as well as the two additional records relating to a fourth named individual and referred to in Hydro One's supplementary decision letter.

DISCUSSION:

SECTION 65(6) – APPLICATION OF THE ACT

Hydro One takes the position that all the records at issue fall outside the scope of the *Act* by virtue of the operation of section 65(6)3, which reads:

> Subject to subsection (7), 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:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Section 65(7) reads:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

General Principles

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" (Order P-1223).

The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship (Order PO-2157).

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507).

Section 65(6)3: matters in which the institution has an interest

For section 65(6)3 to apply, Hydro One must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

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.

Representations

In support of its position that the *Act* does not apply to the responsive records, Hydro One begins by identifying that its claim for the application of section 65(6) applies to the records of the four named individuals, since they "were or are employees of Hydro One or one of its subsidiaries." Hydro One then identifies the types of records contained in the personnel files of its employees, and indicates that all of the paper copies of responsive records are contained in the specific personnel files of these four named individuals. With respect to other specific information

relating to these four named individuals, including days or hours worked, pay received, deductions made, etc., Hydro One states that this information is maintained in electronic format and kept in Hydro One's Human Resources database, accessible only to authorized staff. Hydro One then states:

> All of the records [identified] as responsive to the appellant's request originate in our personnel files and are consistent with the generally accepted standard [for the types of records contained in personnel files]. We have not included anything in our responsive records that would not normally be found in a generally accepted personnel file.

Hydro One refers to Order PO-2234 in support of its position that records contained in the personnel files of identified employees are excluded from the scope of the *Act*. On that basis, Hydro One argues that, provided that the contents of the specific personnel files have been assessed as being consistent with statutory or generally accepted standards for the contents of personnel files, such records fall outside the scope of the *Act*.

Findings

Parts 1 and 2: Were the records collected, prepared, maintained or used by Hydro One or on its behalf in relation to meetings, consultations, discussions or communications?

Based on the representations of the Hydro One and on my review of the records themselves, which consist of personnel records of identified employees, I find that Hydro One collected, prepared, maintained or used the records. I also find that this collection, preparation, maintenance or use of the records was "in relation to … meetings, consultations, discussions or communications." Accordingly, I conclude that Hydro One has satisfied the first and second parts of the three-part test.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which Hydro One has an interest?

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*

[*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

In addition, as referred to by Hydro One in its representations, Order PO-2234 determined that certain records contained in the personnel files of identified employees are excluded from the scope of the *Act* under section 65(6)3.

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

In the circumstances of this appeal, I am satisfied that the records at issue, which consist of documents properly located in the personnel files of four identified employees, satisfy the third part of the test under section 65(6)3. I accept that the records relate to a number of employment-related matters, including days and hours worked, compensation issues, employment benefits, employment responsibilities and performance and promotional issues. Accordingly, Hydro One's activities in connection with these records are about "employment-related matters."

Furthermore, based on the nature of the records and on the representations of Hydro One, I am satisfied that Hydro One has established that it has an interest in these employment-related matters. As set out above, the phrase "in which the institution has an interest" has been interpreted to mean more than a "mere curiosity or concern" and to refer to matters involving the institution's own workforce (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner), supra*). The matters giving rise to the records at issue in this appeal relate to Hydro One's management of its own workforce and, thereby, engage its interest. In addition, Hydro One's interest as an employer is clearly more than a mere curiosity or concern (see also Reconsideration Order PO-2096-R and Order PO-2106). Finally, as set out above and referred to in Hydro One's representations, if section 65(6) applied at the time the records were collected, prepared, maintained or used (which is the case here), it does not cease to apply at a later date. Thus, the fact that the identified individuals may or may not be currently employed with Hydro One does not negate Hydro One's interest in these matters.

Accordingly, subject to my examination of the exceptions to section 65(6) found in section 65(7), Hydro One has established that section 65(6)3 applies to the records at issue, and the *Act* does not apply to the records.

Exception to section 65(6) found in section 65(7)

As set out above, section 65(7) of the *Act* provides a number of exceptions to the operation of the jurisdiction-limiting provisions in section 65(6). Paragraph 3 of this section states:

> This Act applies to the following records:
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

I have carefully reviewed the records contained in the personnel files, to which Hydro One has applied section 65(6)3. In my view, two specific documents contained in the personnel file of one of the named individuals can be described as agreements between an institution (Hydro One) and its employee "resulting from negotiations about employment-related matters between the institution and the employee". Specifically, the agreement contained in Record 2 of Appendix A, and the agreement contained in Record 17 of Appendix A are, in my view, agreements which fall within the exception to the application of section 65(6), as set out in section 65(7)3. These two records are "agreements between an institution and one or more employees", and their contents reflect the fact that the information contained in them was arrived at following negotiations between the individual involved and Hydro One. In addition, I have found above that the matters which gave rise to them were "about employment-related matters between the institution and the employees". In my view, these two agreements fall within the ambit of the exception in section 65(7)3.

I find support for this view in the decision in Order M-797 where Assistant Commissioner Tom Mitchinson found as follows regarding sections 52(3) and 52(4) of the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent to sections 65(6) and 65(7) of the *Act*):

> Sections 52(3) and (4) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 52(3) falls within one of the exceptions enumerated in section 52(4), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in Part 1 of the *Act* apply.
>
> The Board's representations state:
>
> > Although this document constitutes a communication made in the course of negotiations relating to [the Superintendent's] employment, it also constitutes the final agreement between the school Board and [the Superintendent] resulting from those negotiations. The document requested by the appellant would

> appear to fall within the ambit of paragraph 52(4)3 of the *Act*, and is therefore subject to the application of the *Act*.

> Having reviewed the records and the Board's representations, I agree. In my view, the two records at issue in this appeal, considered together, constitute the agreement between the Board and the Superintendent …. This agreement resulted from negotiations about a matter which clearly relates to the Superintendent's employment with the Board. I find that the records fall within the scope of the exception to the section 52(3) exclusion found in paragraph 3 of section 52(4), and are therefore subject to the *Act*. Accordingly, I have jurisdiction to consider the issue of denial of access by the Board, and I will now determine whether these records qualify for exemption under section 14(1) as claimed by the Board.

I adopt the reasoning expressed by the Assistant Commissioner in Order M-797 for the purposes of this appeal. I find, therefore, that the agreement contained in Record 2 of Appendix A, and the agreement contained in Record 17 of Appendix A, fall within the exception in section 65(7)3 and are subject to the application of the *Act*. I will, accordingly, order Hydro One to issue a decision letter to the appellant with respect to access to these two records.

CUSTODY OR CONTROL

As identified above, Hydro One responded to the requests by indicating that it did not have custody or control of the records relating to seven of the ten named individuals whose records were requested. During mediation, the appellant confirmed that he was appealing the issue of custody and control of the employment records for three of the seven named individuals only. However, records relating to one of these named individuals were later located, and the subsequent decision by Hydro One addressed these records. Accordingly, the issue of whether Hydro One has custody or control of responsive records relates only to two of the named individuals.

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*. 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.

Representations

In its representations, Hydro One states that the relationship it had with the two named individuals was not an employment relationship, and that these individuals were never employees of Hydro One or any of its subsidiaries. Hydro One then states:

> [One of the named individuals] was an independent contractor, who provided consulting services to [Hydro One] for the purpose of helping to develop a strategy for new acquisitions. He submitted invoices to [Hydro One] for his services and his expenses; he was not paid a salary or wage by [Hydro One]. The provision of invoices clearly indicates that [he] was performing as a person in business on his own account.
>
> [The other named individual] was an independent contractor, under contract to [another company – Company B]. [Company B] … provided support to field sales forces who were acting as agents of [Hydro One] 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 … who recruited and trained them. [Company B] submitted invoices to [Hydro One]; [the named individual] was not paid a salary or wage by [Hydro One]. The provision of invoices clearly indicates that [Company B] was a business in a commercial relationship with [Hydro One], 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 then states that, since neither of these two named individuals were its employees, there is no reasonable basis to believe that "personnel files" would have been created for them by Hydro One, and that responsive records are not in the custody or under the control of Hydro One.

Hydro One also states that it conducted a computer search to associate the names of the two named individuals with employee numbers, and that no responsive records were located.

In the circumstances of this appeal, and based on the representations provided by Hydro One, I find that I have been provided with sufficient evidence to satisfy me that the two named individuals were not employees of Hydro One or its subsidiaries. Accordingly, I find it reasonable that records responsive to the request that relate to these two individuals would not be in the custody or under the control of Hydro One.

REASONABLE SEARCH

Introduction

As identified above, the appellant is appealing the decision of Hydro One that it does not have job competition records for the named individuals who were its employees, because any such records would have been destroyed one year after the competition, and would no longer exist.

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 response to the Notice of Inquiry inviting Hydro One to provide representations on the nature of the searches conducted for job competition records for the four individuals identified as its current or former employees, Hydro One states:

> [It] is our position that job competition records for [the four named individuals], if they existed, no longer exist by virtue of our records retention schedule and practices. As noted in our original decision letter, such records are kept for one year after the conclusion of all matters related to the selection.

Hydro One then identifies the dates when the last selections or appointments occurred for the four named individuals, and states that the most recent selection or appointment was made in the year 2003. Hydro One refers to the records themselves in support of its position that the last appointment or selection for the four named individuals occurred "more than 21 months" before the appellant made his request. Hydro One also attaches to its representations a records retention schedule, and confirms that the retention for job competition records is "one year after the conclusion of all matters related to the appointment or selection." Hydro One then states:

> We have confirmed with our Human Resource Division that job competition records for positions held by the individuals of interest were purged in accordance with our retention schedule.

Finding

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*. If I am satisfied that Hydro One's search for responsive

records was reasonable in the circumstances, the decision 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 conducted by Hydro One for job competition records responsive to the request for the four named individuals who were its employees, were reasonable. Hydro One clearly identifies the records retention schedule which applies to records of this nature. It also confirms that, notwithstanding the records retention schedule, searches for these records were conducted in order to determine whether records exist, and that this search further confirmed that job competition records for positions held by the four named individuals were purged in accordance with the retention schedule.

In the circumstances, and based on the detailed representations received from Hydro One, I am satisfied that the searches conducted by it for the job competition records for the identified individuals were reasonable, and I dismiss this aspect of the appeal.

ORDER:

1. I order Hydro One to provide the appellant with a decision letter with respect to the agreement contained in Record 2 of Appendix A, and the agreement contained in Record 17 of Appendix A, in accordance with the provisions of sections 26, 28 and 29 of the *Act*.

2. I uphold Hydro One's decision that the *Act* does not apply to the other records identified as responsive to the request.

3. I find that the searches conducted for Hydro One for records relating to the identified job competitions were reasonable.

4. I uphold the decision of Hydro One that responsive records relating to two named individuals are not in the custody or control of Hydro One.

Original signed by: April 16, 2007
Frank DeVries
Adjudicator