



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2589

Appeal PA-050218-1

Hydro One



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NATURE OF THE APPEAL:

Hydro One received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records related to an identified program:

Records of electric deals approved for processing by [a named body] and gas deals approved by [two named companies]. Also, long distance accounts switched to the OHE [Ontario Hydro Electric] program.

Hydro One issued a decision stating that it no longer had custody or control of the records relating to the electric or gas deals, nor the long distance accounts, as these records were transferred to two other companies in 2002.

The requester, now the appellant, appealed the decision. In his appeal letter, the appellant identified that Hydro One ought to know “the results up to the transfer and number of deals transferred.”

Mediation was not possible, and the file was moved to the adjudication stage of the process. I decided to send a Notice of Inquiry identifying the issues in this appeal to Hydro One, initially, and Hydro One provided representations in response. Following the receipt of Hydro One’s representations, and with the concurrence of the parties, this file was placed “on hold” for a period of time. It was subsequently re-activated, and I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of Hydro One’s representations, to the appellant. The appellant has not provided representations in this appeal.

DISCUSSION:

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 it no longer had custody or control of the records relating to the electric deals and the long distance accounts, as these records were transferred to two other companies in 2002.

In its representations, Hydro One reviews the request and then provides background information relating to the requested records. Hydro One begins by stating that Ontario Hydro Energy Inc. (OHE) was incorporated in 1999 as a subsidiary of Hydro One, for the purpose of offering competitive retail products and services to home owners and others for a profit. It provides additional information relating to OHE's activities, and then states that OHE's operations were kept separate from any other part of Hydro One's operations, including its staff, facilities, finances and records. It then states:

In 2002, ... the decision was made to ... sell or otherwise transfer retail contracts to other companies. Along with the sale or transfer to other companies, any records which documented the contracts or the interactions with customers or documented the products/services provided to customers under their contracts, were transferred to the new owner(s) of these contracts.

Hydro One then indicates that by the fall of 2002, the former offices of OHE were closed, that any remaining non-customer administrative records were placed in storage, and that all but two former staff left to join other companies. Hydro One also states that the sale or transfer of retail service contracts from one company to another is a fairly common practice.

In addition, Hydro One identifies that any customer still bound by one of the original OHE contracts today, would have had their contracts sold yet again, since neither of the two companies that acquired the contracts from OHE remain active in the retail business areas acquired from OHE. Hydro One also provides further information about those two companies.

Hydro One then addresses the appellant's position that Hydro One "ought to know" the number of deals transferred. It identifies that it was not advised in the course of this appeal that a "simple count of the contracts/deals/accounts sold or transferred would satisfy the request", and that it did not consider the number to form part of the request. Hydro One then addresses the "number of deals" issue, reviews the circumstances and factors considered in the sale of the retail gas and electricity contracts, and states that the main factors in the determination of the sale price were:

- the number and value of electric water heater rental agreements;
- the trademark value for the OHE brand name; and
- the number and value of retail gas and electricity contracts.

Hydro One then states that the appellant is correct in his view that Hydro One ought to know how many contracts were sold/transferred. Hydro One also provides an attached spreadsheet which indicates the final count of both electricity and gas contracts sold. Hydro One identifies that this document was created to address the appellant's statements in his appeal letter, and this document was provided to the appellant.

Hydro One then states as follows regarding the retail long distance contracts:

In the case of retail long distance contracts, OHE successfully negotiated with an affiliate of [an identified company] who agreed to assume responsibility for these contracts. OHE previously had a commercial arrangement [with this named affiliate], in which it provided a number of services to OHE, including agent-based sales and sales support, training services, as well as customer billing and account administration services. The number of long distance contracts and the value of these contracts was NOT a factor in the determination of the sale price ... because of the previous relationship between the two entities, which they described as a "joint operation". OHE's long distance contracts were transferred to [the named company] for the nominal fee of \$1.00.

[Hydro One] do not have a final count of retail long distance contracts transferred.

Hydro One also notes that the purchasers of the retail long distance contracts and the retail gas and electricity contracts are not institutions for the purposes of the *Act*.

With respect to the issues of whether Hydro One has custody or control of the requested records, Hydro One acknowledges that it did have custody and control of responsive records prior to May of 2002, but that it no longer has custody or control of those records.

With respect to whether Hydro One has "custody" of the retail long distance contracts, Hydro One refers to the relevant portion of the agreement to sell those contracts (which it attaches to the representations as an appendix) and notes that the agreement addressed only the ownership rights to these contracts, and not the books and records, as the purchaser already had physical custody of these records as a result of the work it had been doing with OHE.

Concerning the custody of the retail gas and electricity contracts, Hydro One also provides a copy of the relevant portions of the agreement transferring those contracts, and identifies that this agreement addressed both the ownership rights to the retail gas and electric contracts, and the transfer of books and records associated therewith. It states that although the purchaser did not have possession of the books and records prior to the closing date of the sale, these books and records were transferred on the identified closing date.

Hydro One then states that, in conclusion:

... the excerpts from the ... agreements confirm the fact that after May 1, 2002, OHE was not in physical possession of any records relating to retail gas, electricity or long distance customer contracts.

Hydro One then addresses the issue of whether it has control of the records relating to the retail long distance contracts or the gas and electricity contracts. It again refers to the agreements

entered into with the purchasers of these contracts, and states that its position that it does not have control of the records is supported by the following details:

- the contracts and records associated therewith were purchased by arm's length third parties, and are no longer owned by Hydro One;
- the purchasers are not "institutions" for the purposes of the *Act*;
- the purchasers have subsequently sold or otherwise divested these assets and records to other arms-length third parties;
- Hydro One has no ability or authority to access, use, disseminate or direct the use, retention, dissemination or disposition of these records;
- Hydro One has no jurisdiction over the maintenance or management of these records;
- Hydro One is not responsible for the care and protection of these records; and
- Hydro One no longer conducts the type of business, function or mandate to which these records relate.

On this basis, Hydro One takes the position that the responsive records are neither in its custody nor under its control.

The appellant did not provide representations in this appeal.

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.

Based on the submissions received from Hydro One with respect to custody and control of the two categories of records for which this issue was raised, I am satisfied that it does not have custody or control of the records requested by the appellant. Although it is clear that Hydro One (or its subsidiary) did have custody or control of the records in the past (that is – prior to May, 2002), Hydro One has provided detailed evidence regarding the sale of the retail long distance contracts, as well as the gas and electricity contracts, to other entities. It has also provided specific evidence confirming that both custody and control of the records responsive to the request were transferred to other entities in May of 2002. Based on the information provided by Hydro One, I am satisfied that it did not retain custody or control of those records after that date.

Accordingly, I find that Hydro One does not have custody or control of the requested records.

ORDER:

I uphold the decision of Hydro One that the records are not in its custody or control, and I dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

June 7, 2007