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

ORDER PO-2648

Appeal PA-050241-1

Health Professions Appeal and Review Board

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester, through his representative, sought access to all information from a Health Professions Appeal and Review Board (HPARB) file, identified by file number. The HPARB file arises from that organization's review of a complaint decision rendered by the Ontario College and Physicians and Surgeons. The complaint related to care the requester had received from two physicians.

In response to the request, the Ministry issued a decision on behalf of the HPARB, advising that a search had been conducted and the result was that "the records requested do not exist." The Ministry also stated that a further search had been conducted in the Health Boards Secretariat and no responsive records were found.

Through his representative, the requester (now the appellant) appealed the Ministry's decision to this office.

During mediation, the Mediator obtained additional information from the appellant's representative, who explained that he seeks access to:

1. the written notes the appellant's representative observed taken at a meeting on February 3, 2005,

2. any minutes or transcripts from the notes the representative observed taken at the meeting,

3. the identity and background of the College of Physician and Surgeons' independent medical assessor, and

4. all information which contributed to the decision of the HPARB as a result of the February 3, 2005 meeting.

The Mediator passed this information on to the Ministry. A further search was undertaken based on this additional information. The Ministry issued a further decision in which it confirmed that it could not locate records that are responsive to the appellant's request. The Ministry explained that no minutes are taken, and as the review was not a hearing, no transcript was made. The Ministry also advised that the "identity and qualifications regarding independent medical assessors is retained in the course of the investigation, is not disclosed to the [HPARB]" and was not in the custody and control of the HPARB.

During mediation, the appellant also referred to a judicial review application respecting the HPARB's decision, brought by the appellant's representative, which resulted in the HPARB filing a 300 page record of proceedings. It emerged that the appellant had advised the Ministry, at the request stage, that he does not seek access to this record of proceedings.

Further mediation was not possible, and the file has moved to the adjudication stage of the process, in which an adjudicator conducts an inquiry under the *Act*. At this stage, this office obtained written confirmation from the appellant that the representative had authority to represent him in this appeal.

This office began the inquiry by sending the HPARB a Notice of Inquiry outlining the background and issues in the appeal, and inviting it to provide representations. The Notice of Inquiry identified the issues in this appeal as: (1) whether the responsive records are in the HPARB's custody or under its control, and (2) whether the HPARB conducted a reasonable search for records. The HPARB provided representations in response to the Notice of Inquiry.

This office then sent the Notice of Inquiry and the HPARB's representations to the appellant's representative and invited him to provide representations. At this stage, this office learned that the representative was no longer acting on the appellant's behalf, and further communications were conducted directly with the appellant. As a result, the Notice of Inquiry was re-sent directly to the appellant, who confirmed that he acts on his own behalf. The appellant did not provide representations.

The representations of the HPARB raise the further issue of whether the request was frivolous or vexatious. I will address this as a separate issue, below.

DISCUSSION:

CUSTODY OR CONTROL

Section 10(1) of the *Act* identifies that the issue of whether or not a record is in the custody or under the control of an institution (in this case, the HPARB) is the threshold for determining whether that record is subject to the access provisions in the *Act*. Section 10(1) states, 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 . . .

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] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Based on the above approach, this office has developed the following 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 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]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- 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 physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]

- 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? [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]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the record? [Orders P-120, P-239]

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

- Who owns the record? [Order M-315]

- Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- 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.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

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

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

- To what extent (if any) should the fact that the individual or organization that created the record has refused to provide the institution with a copy determine the control issue? [Order MO-1251]

In this appeal, the HPARB has maintained from the beginning that it does not have custody or control of any responsive records. In its representations, the HPARB states that the records are not now and never have been in its custody or under its control. The HPARB explains that the matter was a review of a decision by a regulatory college, rather than a full hearing. The HPARB submits further that such a review is conducted pursuant to section 33(2) of Schedule 2 to the *Regulated Health Professions Act, 1991* (the Schedule). In my view, sections 33(1) and 35 of the Schedule are also directly relevant to the issues in this appeal. These sections state:

> 33(1) In a review, the Board shall consider either or both of,
>
> (a) the adequacy of the investigation conducted; or

(b) the reasonableness of the decision.

(2) In conducting a review, the Board,

(a) shall give the party requesting the review an opportunity to comment on the matters set out in clauses (1)(a) and (b) and the other party an opportunity to respond to those comments;

(b) may require the College to send a representative;

(c) may question the parties and the representative of the College;

(d) may permit the parties to make representations with respect to issues raised by any questions asked under clause (c); and

(e) shall not allow the parties or the representative of the College to question each other.

35(1) After conducting a review of a decision, the Board may do any one or more of the following:

1. Confirm all or part of the decision.

2. Make recommendations the Board considers appropriate to the Complaints Committee.

3. Require the Complaints Committee to do anything the Committee or a panel may do under the health profession Act and this Code except to request the Registrar to conduct an investigation.

(2) The Board shall give its decision and reasons in writing to the parties and the Complaints Committee.

As well, I note that section 32(1) of the Schedule contains a mandatory requirement for the College to provide the HPARB with "a record of the investigation and the documents and things upon which the decision was based." Sections 32(2) and (3) deal with disclosure of this information to the parties. Section 34(2) applies a number of provisions of the *Statutory Powers Procedure Act* to HPARB review proceedings. These include sections dealing with written and electronic hearings, disposition without a hearing, correction of errors, and adjournments, among other things.

Thus, although the review may not be a "hearing", as the HPARB points out, it is nevertheless a significant undertaking to which a number of statutory rules apply.

On the specific issue of custody and/or control, the HPARB submits that:

- no "minutes" are taken during a board review;
- the Registrar has undertaken a rigorous search and determined that no notes taken by members exist in the HPARB's files;
- the members or former members who made notes have advised that they have been destroyed;
- members' notes, if made at all, are not integrated in "the files and documents under the possession and control" of the HPARB;
- HPARB members are not required to take notes during a review, and if they do, the notes are the personal property of the member and not in the possession, custody or control of the HPARB;
- the HPARB has no authority to require production of such notes or to regulate their use or disposal; and
- it is the practice of the HPARB to advise members to destroy their notes on the completion of a matter.

Apart from a general assertion that no responsive records exist in its custody or under its control, the HPARB's submissions directly addressing the issue of custody and control are entirely aimed at minutes of the review and any notes that members may have taken during the review. From this, I conclude that if other types of responsive records are within its possession, the HPARB does not dispute that they would be subject to the *Act*. The HPARB does not expressly concede this, however. It simply takes the position that no responsive records exist, as discussed below under "reasonableness of search".

The facts of this case appear to require that I determine whether records whose very existence is denied, which have not been located or identified, which I have had no chance to review, and whose actual location is not known to me, are within the "control" of the HPARB. Based on the information provided to me, however, I have concluded that the only responsive records that may exist outside the custody of the HPARB, and might possibly be under its control, would be notes in the possession of a member or former member. I will therefore confine my analysis of "custody or control" to such notes, whether or not they exist.

The specific question of whether members' notes are within the control of a tribunal was previously addressed in Order P-396. In that order, former Assistant Commissioner Tom Mitchinson stated:

> Having reviewed the Board's representations, in my view, it is clear that the notes are not currently in the custody of the Board. The issue of whether the notes are under the control of the Board is more complex.

> The notes which are the subject matter of this appeal are currently located outside the Board premises and are in the Board member's personal possession. The Board does not regulate the use of the notes, and has taken no steps to exert control over them. They were created by the Board member for her own personal use and, according to the Board's representations, which have been adopted by the Board member, she never allowed any other person to see, read, or use the notes for any purpose.
>
> Having reviewed the representations of all parties, and bearing in mind the indicia of control identified by former Commissioner Linden in Order 120, I find that the notes created by the Board member are not in the control of the Board, and therefore not accessible under the Act, in the circumstances of this appeal.
>
> However, if the records had been contained in the appellant's appeal file or in any other record keeping system over which the Board had administrative control, in my view, they would properly have been considered in the custody or control of the Board, and governed by the provisions of the Act.
>
> In my view, notes created by tribunal members are not, per se, excluded from the scope of the Act; to do so would require a legislative amendment. The determinative issue is whether particular notes are in the custody or under the control of an institution, based on the circumstances of a particular appeal.

In my view, the facts of this case are similar, and I have reached the same conclusion regarding notes that may be in the possession of members. I find that any notes held by a member or former member are not within the control of the HPARB in the circumstances of this appeal. In reaching this conclusion, I have considered the possible impact of the decision of the Ontario Court of Appeal in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (1999), 47 O.R. (3d) 201 (also reported at [1999] O.J. No. 4072)). In that case, the Court found that an independent court reporter's backup notes *were* part of the tribunal's statutorily mandated record of proceedings, and were therefore under the tribunal's control. In my view, that case is distinguishable because, unlike the backup tapes, the notes of a tribunal member are clearly *not* part of the tribunal's record of proceedings.

It has not been suggested by any party that responsive records other than members' notes may exist outside the custody of the HPARB. The finding I have just made is therefore determinative of the control issue in relation to all responsive records which, based on the evidence provided to me, may be held by members or former members. Because they are not in the Board's actual custody or under its control, the *Act* does not apply to such records, and I will not discuss them further in this order.

The HPARB goes on to make a number of other submissions that relate in a more general way to the issues of whether its members' notes should be subject to the *Act*. Because I have already dealt with records in the custody of members or former members, above, I only need to address these submissions to the extent that they apply to hypothetical records that may exist in the HPARB's own custody.

The HPARB refers to the non-compellability protection provided to members of the HPARB by section 36(2) of the *Regulated Health Professions Act, 1991*, arguing that the request is "an improper collateral attempt to breach the statutory prohibition" provided by this section. Section 36(2) provides for non-compellability of HPARB members in other proceedings. It states that "No person or member described in subsection (1) shall be compelled to give testimony in a civil proceeding with regard to matters that come to his or her knowledge in the course of his or her duties."

I disagree that the request is inconsistent with this section, both on the facts and as a matter of law. On the facts, section 36(2) of the *Regulated Health Professions Act, 1991* is inapplicable here because a request under the *Act* is not in any way comparable to a subpoena or summons to testify at trial. Even if members' notes were being ordered disclosed in this decision (which they are not), this is in no way comparable to the compulsion of testimony in a civil proceeding.

I also find that section 36(2) of the *Regulated Health Professions Act, 1991* is inapplicable based on the wording of that statute and the *Act*. Section 67(1) of the *Act* states that "[t]his Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act provides otherwise." Section 67(2) provides a list of confidentiality provisions that prevail over the *Act*, and no provision of the *Regulated Health Professions Act, 1991* is listed. Nor does section 36(2) of the *Regulated Health Professions Act, 1991* state that it prevails over the *Act*. Based on the wording of the two statutes, I conclude that section 36(2) of the *Regulated Health Professions Act, 1991* does not override the appellant's right of access under the *Act*.

The HPARB argues further that the following legislative authorities indicate that members' notes should not be disclosed: the exemption at section 14(1)(f) of the *Act*, section 11 of the *Canadian Charter of Rights and Freedoms*; and section 2 of the *Canadian Bill of Rights*; all of which relate to the right to a fair trial. It also argues that the information would be exempt from disclosure under the personal privacy exemption at section 21(1). But the issue of disclosure is not before me here. Even if the HPARB is eventually found to have such records in its custody, which it vehemently denies, the fact remains that this appeal does not pertain to whether records should be disclosed, but rather, whether the HPARB conducted a reasonable search for them, whether they are in its custody or under its control and/or whether the request is frivolous or vexatious. These submissions are therefore irrelevant.

As well, however, I note in passing that the HPARB offers no further explanation as to how disclosure could interfere with a fair trial, and appears to view this interference as self-evident. In my view, whether under the *Charter* or the *Bill of Rights*, or in the context of section 14(1)(f), such a claim would require evidence to support it, which has not been provided here. But because disclosure is not at issue in this appeal, as I have just outlined, it would be premature to assess this claim, or the section 21(1) exemption claim, at the present time. An appeal addressing the issue of disclosure, or even the production of the records to this office, could only arise following the discovery of records and a decision under the *Act* denying access to them, in whole or in part. That has not happened in this case. Accordingly, I will not address these arguments further in this order.

The HPARB also argues that section 64(2) of the *Act*, which preserves the right of courts and tribunals to compel testimony or the production of a document, would be contravened by granting access to members' notes under the *Act*. In my view, section 64(2) does not speak to that question, or to whether access should be granted under the *Act*; rather, it is directed at the powers of courts and tribunals generally and clarifies that the *Act* does not prevent them from compelling testimony or production. The text and legislative purpose of section 64(2) do not support the submission that disclosing members' notes would contravene the section. I reject this argument.

To conclude, I accept that the notes of a member or former member of the HPARB that may exist outside the custody of the HPARB are not within its control, and are therefore not subject to the *Act*. On the other hand, I have not been offered any persuasive evidence or argument that would form a basis for concluding that records within the possession of the HPARB (if they exist) are outside the custody and/or control of the HPARB. Having considered the arguments and evidence, I find that such records, if they exist, would be within the HPARB's custody and control.

As part of its representations on custody and control, the HPARB also argues that the request is frivolous or vexatious. I now turn to that issue.

FRIVOLOUS OR VEXATIOUS REQUEST

In its representations, the HPARB argues for the first time that "the records sought are exempt from disclosure as the head is of the opinion, on reasonable grounds, that the request for access is frivolous or vexatious." Although the section number is not mentioned, this is a direct quote from section 10(1)(b) of the *Act*. This section states:

> 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 head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

This section is amplified by section 5.1 of Regulation 460, which states:

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

As noted, the HPARB's representations do not mention section 10(1)(b) of the *Act*, despite directly quoting the language of that section. Nor do they refer to section 5.1 of Regulation 460. Instead, the HPARB refers to *Re Lang Michener at al. and Fabian et al.*, [1987] O.J. No. 355 (H.C.J.) and the factors it identifies as evidence that an application is frivolous or vexatious. Section 5.1 of Regulation 460 spells out the circumstances under which a request is to be considered "frivolous or vexatious" under the *Act* and it will therefore be my primary reference in assessing the HPARB's arguments.

The HPARB submits that:

- the request is a collateral attempt to attack the Board's decision;
- the records are sought in order to assist with the appellant's application for judicial review, and therefore "… an improper and abusive attempt to enlist the assistance of the Information and Privacy Commissioner/Ontario in a civil proceeding;"
- the request is a "fishing expedition" that could not assist the appellant in any way, and is an attempt to harass the HPARB and the Commissioner;
- the application for judicial review is improperly constituted because certain necessary parties were not named and the applicant's former representative has no standing as applicant;
- the appellant's former representative has not amended the application for judicial review to correct these deficiencies;
- the appellant's former representative's perseverance upon being advised that no records exist proves that the request is frivolous, vexatious and abusive;
- the appellant's former representative's attacks on the doctors concerned, in multiple fora (the College, the HPARB, the Divisional Court and the Information and Privacy Commissioner/Ontario) demonstrate that the request is frivolous or vexatious;
- the appellant's former representative's repeated description of himself as "legal counsel" when he is not a lawyer.

I will address each of these points in turn.

Collateral attack

The issue of collateral attack on decisions of other adjudicative bodies is dealt with in *Garland v. Consumers' Gas Co.* [2004] 1 S.C.R. 629 (SCC). That case involved a court challenge to the practice of the Consumers Gas Company to charge flat rate late fees that were alleged to contravene the provisions of the *Criminal Code* in relation to permissible interest charges. The charges had been approved by order of the Ontario Energy Board (OEB). With respect to the doctrine of collateral attack on the OEB order, the Court stated:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally it is invoked where the

party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 5594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked [page 662] collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

In Order PO-2490, I found that this doctrine did not apply on the facts of that case:

> I have decided that the appellant's assertion of a collateral attack cannot be sustained because of the extremely different and separate processes involved. It is simply not tenable to claim that a request under the *Act* can be considered a collateral attack on a motion for production in a civil action.
>
> Using the language of the court in the *Garland* case, the object of this request for access is "not to invalidate or render inoperative" the order of the court. The object of this request is to gain access to a record through the totally independent mechanism of an access request under the *Act*. This same request could have been made by *all* members of the public, not just this requester.
>
> In this regard, I note that one of the bases relied on for rejecting the collateral attack argument in *Garland* was that the party bound by the OEB order was not the same as the party bringing the court challenge. In the present case, the requester is the moving party seeking production in the civil action, but as I have just noted, this party is making a request under the *Act* that could be made by any member of the public. There is no principled basis for differentiating the requester from other members of the public, and disenfranchising the requester under the *Act* because it is also involved in litigation.
>
> If the fundamental purpose of the rule against collateral attack, as described by the Court in the *Garland* decision, is to "maintain the rule of law" and preserve the "repute of the administration of justice", the request in this case does not conflict with that purpose. This office has no authority to make an order that would affect the litigation process. Nor is the requester in the wrong forum in any sense of that word when making this request. The requester is asserting a right under the *Act* that was clearly intended to co-exist with any rights that the requester may have to production of records in the context of litigation.

> This is confirmed by the order of Justice Lane [in *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Ct. Gen. Div.)]. In *Doe*, Justice Lane issued an order prohibiting publication of information obtained in the civil discovery process, including publication by third parties. An application was made by a party to the civil litigation in that case under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to the contents of police files that were to be produced in the discovery process. Justice Lane stated that his order in the civil proceeding was not intended to interfere with the operation of *MFIPPA*, and would not bar the publication of records obtained under *MFIPPA*. I have previously reproduced the relevant comments of Justice Lane, but they bear repeating here:
>
> > In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.
>
> Although the context of a publication ban in civil proceedings, as compared to a request under the *Act*, is not an exact analogy to an order refusing production as compared to a request under the *Act*, it is very close, and I find Justice Lane's analysis, which speaks directly to the relationship between civil actions and requests under the *Act*, to be persuasive.
>
> I therefore conclude that even if there were an order in the civil proceeding that dealt specifically with the production of the records at issue, the request could not be considered a "collateral attack", and the requester is not prohibited from making an application under the *Act* for that reason.

On the facts of the appeal before me, I have concluded that making a request under the *Act* cannot reasonably be construed as an attack (collateral or otherwise) on the HPARB's finding on the review of the appellant's College of Physicians and Surgeons complaint. I am at a loss to understand how making an access request such as the one in this case, even if access were granted, can be seen as a process that, in and of itself, has the slightest impact on the HPARB's ruling.

Even in Order PO-2490, where the affected party argued that a request under the *Act* was a collateral attack on a court order refusing production, I concluded that the processes were separate and the argument could not be sustained. Similarly, in *Doe*, the existence of a publication ban in a civil trial was not sufficient to override the right of access under the *Act*. As

well, in the present case (as in Order PO-2490), this request could have been made by any member of the public, and there is no principled basis for differentiating this requester from others who may make requests.

In my view, therefore, the request is not a collateral attack on the HPARB's decision.

Use in the Judicial Review

The HPARB argues that intended use in the application for judicial review is "an improper and abusive attempt to enlist the assistance of the Information and Privacy Commissioner/Ontario in a civil proceeding." In this regard, the HPARB refers again to its argument that section 36(2) of the *Regulated Health Professions Act, 1991* precludes the request because board members are not "compellable witnesses". I have dealt with that aspect of the argument under the custody/control analysis, above.

In essence, the HPARB is arguing that the request is frivolous or vexatious because the appellant intends to use the records in another proceeding. In my view, this is not established as a factual proposition, given that the judicial review does not name the appellant as applicant; rather, it was filed by the former legal representative, apparently as applicant. The representative is no longer involved in this appeal.

In any event, this argument is not sustainable. I considered an argument that intended use in litigation was "for a purpose other than to obtain access" in Order MO-1924. In that appeal, the institution denied an access request on the basis that the requester was attempting to "expand" the discovery process in the pending civil litigation by requesting access under the *Act*. The institution claimed that this amounted to an improper purpose and was frivolous or vexatious. The following comments from Order MO-1924 are applicable here:

> The [institution] also suggests that the objective of obtaining information for use in litigation with the [institution] or to further the dispute between the appellant and the [institution] was not a legitimate exercise of the right of access.
>
> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information [section 47(1))] and a right to request correction of inaccurate personal information [section 47(2)] indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. *Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.* [Emphasis added.]

> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

Order MO-1924 also includes a review of previous orders of this office and the courts on this issue:

> I note that records protected by litigation privilege are subject to the solicitor-client privilege exemption at section 12. In addition, section 51 expressly addresses the relationship between the *Act* and the litigation process. This section states:
>
> 1. This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> 2. This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.
>
> The Legislature clearly considered the relationship between the *Act* and the litigation process, and could have chosen to go beyond the section 12 exemption to limit the application of the *Act* where the requester is engaged in litigation with an institution. It did not do so. In my view, the [institution]'s argument on this point is entirely without merit.

In my view, this analysis is equally applicable here. I find that, even if such a purpose for the request were established, an intention to use the requested records in the judicial review proceeding would not constitute a "purpose other than to obtain access" as those words are used in section 5.1(b) of Regulation 460.

The request is a "fishing expedition" and an attempt to harass the HPARB and the Commissioner

The *Act* exists as a mechanism of public access and transparency. While focussed requests are desirable, particularly from an institution's standpoint, it is inappropriate to use arguments similar to those aimed at reining in overbroad cross-examination (as suggested by the use of the term "fishing expedition") in order to try to place limits on the broad scope of access under the *Act*. A request is in no way comparable to a cross-examination. Some broad requests may appear to be "fishing expeditions". I have yet to encounter a section of the *Act* that says such requests may not be made.

If the HPARB considered that the request did not "sufficiently describe the record sought", section 24(2) directs it to contact the requester in an attempt to remedy this problem. I have no information suggesting this was done in this case.

As part of this argument, the HPARB also questions what value the information would be to the appellant if disclosed. The *Act* is neutral in terms of requiring a specific purpose for a request. It does not stipulate that there must be some practical reason for asking, nor does it require that requesters indicate their reasons for seeking access (see Order MO-1477). In some instances, the purpose of a request may be relevant to whether access is granted – for instance section 21(2)(d), which applies if the requested information is "relevant to a fair determination of rights affecting the person who made the request" – but otherwise, it is not necessary to have a particular, identified purpose.

Accordingly, I have concluded that these arguments provide no basis for finding that the request is an attempt to harass the HPARB or the Commissioner or is frivolous or vexatious.

The application for judicial review is improperly constituted and has not been amended

These arguments (listed under two separate bullet points above) also provide no basis for finding that the request is frivolous or vexatious. Whether the judicial review application filed by the appellant's representative is or is not improperly constituted is irrelevant to the appellant's request under the *Act*. As explained above, in the context of this appeal the request process is totally separate from litigation undertaken by the appellant's representative. I also note that the appellant's representative, who launched the judicial review application, is no longer involved in this appeal, though I would have reached this conclusion even if that were not the case.

The appellant's former representative's perseverance upon being advised that no records exist proves that the request is frivolous, vexatious and abusive

Again, I disagree that this is an indication that the request is frivolous or vexatious or abusive. Sometimes requesters need to be persistent in dealing with institutions in relation to access requests. If persistence or perseverance provided a basis for a finding that a request is frivolous or vexatious, the right and ability of requesters/appellants to disagree with the approach taken by institutions in responding to requests would be seriously eroded.

Moreover, the existence of additional records and the question of what records were under the HPARB's custody or control were live issues in this case, and were serious enough to merit treatment in this decision. In that circumstance, it would be inconceivable to find that the request was frivolous or vexatious on these grounds.

As well, and significantly, I have reviewed the adequacy of the HPARB's search for records, as outlined below, and I will be ordering an additional search for two categories of records because of my finding (below) on the evidence presented to me, that the search for those particular items was not reasonable. This finding undermines this entire argument, which rests on HPARB's view that it was unreasonable of the appellant to believe further records may exist.

For all these reasons, I reject this argument.

The appellant's former representative's attacks on the doctors concerned, in multiple fora (the College, the HPARB, the Divisional Court and the Information and Privacy Commissioner/Ontario) demonstrate that the request is frivolous or vexatious

The HPARB provides no explanation in support of this argument, but again seems to view it as self-evident. The HPARB does not tie this argument to any aspect of the regulatory definition of "frivolous or vexatious" quoted above. I assume that it is linked to "a purpose other than to obtain access." As stated by the HPARB, this argument provides no basis for a frivolous or vexatious finding in this case. The collateral exercise of rights in a variety of fora is not, in and of itself, proof of an illegitimate purpose for making the request, and no further proof has been offered. I reject this argument.

The appellant's former representative's repeated description of himself as "legal counsel" when he is not a lawyer

As noted previously, the appellant's former representative is no longer involved in this matter. In my view, that is sufficient to dispose of this argument. But even if he were still involved, I would not consider this to be a basis for finding that the appellant's request is frivolous or vexatious. The HPARB advances no basis for holding the representative's conduct against the appellant. In my view, holding the representative's conduct against the client in the circumstances of this appeal would be manifestly unfair and inappropriate. As well, I note that this office is not the proper forum for complaints on the subject of who may be described as legal counsel or a "legal representative" – that responsibility rests with the Law Society of Upper Canada.

Conclusion

To conclude, I am not satisfied that the request is "frivolous or vexatious" within the meaning of the *Act* or Regulation 460.

REASONABLENESS OF SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In this case, the scope of the request and the statutory context for the HPARB's review are both important factors in assessing whether a reasonable search has been conducted. As originally filed, the request indicated that access was sought to "… *all* information from the identified HPARB file." As noted previously, the appellant indicated during mediation that he seeks access to:

1. the written notes he observed taken at a meeting on February 3, 2005,

2. any minutes or transcripts from the notes he observed taken at the meeting,

3. the identity and background of the College of Physician and Surgeons' independent medical assessor. This information had been severed from the HPARB's Record of Proceedings for the February 3, 2005 meeting, and

4. all information which contributed to the decision of the Board as a result of the February 3, 2005 meeting.

This remains a broadly worded request, particularly item 4.

As noted in the request, the appellant's former representative brought a judicial review application against the Board. The appellant has clarified that he does not seek access to the 300-page record of proceedings filed in the judicial review by the HPARB.

Regarding item 3 of the request, the HPARB's decision letter issued during mediation advised that the "identity and qualifications regarding independent medical assessors is retained in the course of the investigation, is not disclosed to the [HPARB] and was not in the custody and control of the HPARB."

The HPARB conducted a review in this matter under the *Regulated Health Professions Act, 1991*. As noted above, although this was not a hearing, the review is nevertheless a significant undertaking to which a number of statutory rules apply. Those rules are set out in considerable detail in the discussion of custody and control, above. In view of this context, and in general, it is inconceivable that such a review could have been conducted without generating any "record of information, however recorded, whether in printed form, … by electronic means or otherwise …" which constitutes a "record" as defined under section 2 of the *Act*. It is, in fact, apparent that a significant number of records were generated, since the HPARB's record of proceedings for the judicial review of the matter runs to 300 pages. The question here is whether a reasonable search was conducted for records or information not included in the record of proceedings.

As noted previously, the HPARB made the following arguments in its representations on custody or control that are perhaps even more relevant to the reasonable search issue:

- the Registrar has undertaken a rigorous search and determined that no notes taken by members exist in the HPARB's files;

- the members or former members who made notes have advised that they have been destroyed.

The HPARB divides its representations specifically directed at the reasonable search issue by category of records, with reference to the request as reformulated during mediation. The HPARB states:

> **The notes**
>
> … the [HPARB] does not make "minutes" of complaint reviews, nor is a transcript taken. Notes are not taken by the [HPARB], but may be made by individual members of the panel adjudicating. The Appellant and the Notice of Inquiry both refer to the February 3, 2005 "meeting" of the [HPARB]. The [HPARB] held no "meeting" on that date relevant to the matter at herein. A panel of the [HPARB] conducted a quasi-judicial and adjudicative statutory review of a decision of the complaints committee of the College of Physicians and Surgeons of Ontario. It is inaccurate to refer to this review as a "meeting".
>
> The Registrar searched through the [HPARB]'s files and made requests of the members of the panel adjudicating the matter. The Registrar determined, on the advice of the members that the notes no longer exist and were never contained in the files in the possession of the [HPARB].
>
> **The identity of the medical assessor**
>
> The identity of the medical assessor was not disclosed to the [HPARB] in the record of proceeding provided to the [HPARB] by the College. The panel of the [HPARB] conducting the review is in any event now *functus officio* and has no custody of or control over such identity. It is not now and has never been in the [HPARB] files. The College's record of investigation was disclosed by the [HPARB] to [the appellant's representative] in its entirety and the fact that the identity of the assessor is not there demonstrates that the [HPARB] does not have such information.
>
> **Information contributing to the decision of the panel**
>
> The College's record of investigation was disclosed by the [HPARB] to [the appellant's representative] in its entirety. [The appellant's representative] is in receipt of all of the information in the file that the panel relied on in making its decision. No documents which "contributed to the decision" exist in the file except for the documents already disclosed to and in the possession of [the appellant's representative].

As noted, the appellant did not provide representations.

Similar to the approach taken by the HPARB in its representations, I will analyze this issue with respect to each of the four parts of the reformulated request.

The written "notes" taken by members at the meeting of Feb. 3, 2005

The appellant's representative claims, in his notice of appeal, to have seen notes being taken. Three searches have now been made for these records, and the panel members have been contacted. The searches determined that the notes either do not exist within the custody of the HPARB, or they have been destroyed. I found, above, that any notes that were in the possession of members, not the HPARB, would not be in the custody or control of the HPRAB. I am satisfied that the HPARB conducted a reasonable search for the notes, whether in its custody or in the possession of members or former members.

However, I note that part 2 of the reformulated request also refers to "minutes" and "transcripts from the notes." Apart from stating that no minutes or transcripts of a review are taken, the HPARB does not provide further submissions on this aspect of the request. In particular, I note the appellant's reference in the reformulated request to "transcripts *from the notes*." [Emphasis added.] In my view, the appellant is referring here to typewritten versions of members' notes, or transcripts of extracts.

I have accepted, above, that the HPARB has conducted a reasonable search for members' notes. I also accept its evidence that minutes are not taken. In reaching this conclusion I have considered the appellant's statement that he saw notes being taken. In my view, that is not evidence that *minutes* were taken. I would interpret "minutes" as a more formal record and, in that regard, different than mere notes. However, the HPRAB has not provided any explanation of how it searched for transcripts that may have been taken from the members' notes. I will therefore order the HPARB to search for records of this nature that are in its custody or control, but this search need not include records in the possession of members or former members that exist outside the HPARB's custody, which (like the original notes) would not be under its control.

Identity of the medical assessor

As noted above by the appellant, this aspect of the request pertains to the identity of the College of Physician and Surgeons' independent medical assessor. There is no evidence before me to establish that HPARB ever received this information. The HPARB's statement that this information was not included in the disclosure it received from the College is consistent with the appellant's statement that this information was severed from the HPARB's own record of proceedings. I am therefore satisfied that the HPARB conducted a reasonable search for this information.

Information contributing to the decision of the panel

The appellant has not identified any records other than members' notes and minutes that may be responsive to this part of the request. I have already concluded that reasonable searches were conducted for these items, although I will order a further search for transcripts and partial transcripts of members' notes. I also note that the HPARB's record of proceedings has already been provided to the appellant's representative.

Nevertheless, this category arises from item 4 of the request as explained during mediation, and this aspect of the request is very broadly worded. The HPARB's statutory mandate in relation to reviews is a significant one. The HPARB's representations contain no information about what searches were conducted to look for responsive information. In that situation, I am unable to conclude that the search was reasonable. I will order the HPARB to conduct a further search for records responsive to part 4.

ORDER:

1. I find that the appellant's request is not frivolous, vexatious or an abuse of process.

2. I find that any members' notes that may exist in the possession of members, and not in the custody of the HPARB, are not in the control of the HPARB.

3. I find that the HPARB conducted a reasonable search for records, except with respect to the following records: (1) transcripts taken from members' notes that may be in HPARB's custody; (2) part 4 of the request as formulated during mediation.

4. I order the HPARB to conduct further searches for the items identified in order provision 3, to advise the appellant and myself of the outcome of these searches, and to make an access decision in relation to any such records that may be located, treating the date of this order as the date of the request, in accordance with sections 26, 28 and 29 of the *Act*, without recourse to a time extension under section 27.

Original signed by: February 29, 2008
John Higgins
Senior Adjudicator