

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER MO-3434-I

Appeal MA13-344-2

North Bay Hydro Services

April 28, 2017

Summary: This appeal arises from a finding in Order MO-3170 that North Bay Hydro Services is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*. In Order MO-3170, North Bay Hydro Services was ordered to issue an access decision in response to the appellant's request for financial statements. North Bay Hydro Services denied the appellant access to the financial statements on the basis that disclosure would prejudice its economic interests or result in financial injury (sections 11(c) and (d)).

The appellant appealed the access decision to this office and raised a question as to whether the individual making the decision was properly designated or delegated as the institution's head. The adjudicator finds that the delegation was not valid and orders North Bay Hydro Services' head to issue a new decision or confirm its previous decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 3 and 49(1).

Orders and Investigation Reports Considered: P-333, MO-1221, MO-2663-I and MO-3220.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to North Bay Hydro Holdings for financial statements for:

- North Bay Hydro Holdings (Holdings or HoldCo) – December 31, 2011 to December 31, 2012

- North Bay Hydro Distribution Ltd (Distribution) – December 31, 2012
- North Bay Hydro Services Ltd (Services, ServeCo or NBHS) – December 31, 2009 to December 31, 2012

[2] In response, the appellant was provided with access to the available financial statements for HoldCo and Distribution. North Bay Hydro Services denied the appellant's request on the basis that it was a private corporation and not subject to the *Act*.

[3] In Order MO-3170, I found that Services was an institution and ordered it to issue a decision letter to the appellant.

[4] Services subsequently sent third party notifications under section 21(1) to several affected parties and issued an access decision. In its decision letter to the appellant, Services advised that one of the financial institutions notified by Services objected to the release of information contained in the records that relate to it. Services went on to explain that it was denying the appellant access to the requested financial statements on the basis that they qualify for exemption under section 10(1) (third party information) and 11 (economic and other interest).

[5] The appellant appealed Services' decision to this office and a mediator was assigned to the appeal.

[6] During mediation, the mediator had discussions with Services and the appellant but the appeal could not be resolved. Also during mediation, the appellant raised the possible application of the public interest override in section 16.

[7] This appeal was then transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. The parties were invited to provide representations in support of their position. In response, the financial institution which had objected to release of information notified this office that it no longer objects. Accordingly, the possible application of the mandatory third party information exemption at section 10(1) has been removed from this appeal. Services continues to claim that the withheld information qualifies for exemption under sections 11(c) and (d). The appellant's representations also questioned the authority of the individual who made the access decision. Accordingly, the issue of the proper designation or delegation of the head was added as an issue to this appeal.

[8] In this order, I find that at the time Services issued its decision letter to the appellant, the delegation of head was not valid.

DISCUSSION:

[10] As previously mentioned, upon its receipt of the appellant's request for records under the *Act*, Services took the position that it was not an institution. In Order MO-3170, I found that Services was an institution and ordered it to issue an access decision to the appellant which is the subject of this appeal.

[11] Services issued an access decision denying the appellant access to the requested financial statements. The decision letter contains a statement indicating that the President and Chief Operating Officer of Services made the access decision under the *Act*. The date of Services' decision letter to the appellant is June 5, 2015 and it was signed by Services' legal counsel.

[12] The appellant appealed Services' decision to this office and raised an issue as to whether the decision was made by a properly designated or delegated head for the purpose of making decisions under the *Act*. In his appeal letter, the appellant states:

If this refusal is not being made [by] the head of the institution, I suggest that it is null and void at the outset.

[13] Section 19 of the *Act* stipulates that it is the head of an institution who gives notice as to whether or not access is given in response to a request.

[14] Section 2(1) defines an "institution" for the purposes of the *Act* to include a municipality. Section 2(1) also provides that the "head" of an institution is the individual or body determined to be the head under section 3. Section 3(2) states:

The members elected or appointed to the board, commission or other body that is an institution other than a municipality may designate in writing from among themselves an individual or a committee of the body to act as head of the institution for the purposes of this *Act*.

[15] An appeal file was opened and the parties discussed the issues with a mediator. The Mediator's Report indicates that at the end of mediation the appellant advised that he no longer wished to pursue the issue of whether or not the access decision was made by a properly designated or delegated head.

[16] However, the issue was revisited in the appellant's representations. In making his submissions, the appellant states:

Since [Services] does not have a head it is unclear how [it] can avail itself of the exemptions allowed under section 11 which are clearly decisions available to the head.

[17] In response, Services argues that the appellant should not be permitted to raise questions about its delegation at this stage of the appeal process and states:

It is respectfully submitted that since this position was abandoned prior to ServeCo's submissions, the Commission should not permit the Appellant to raise the issue again at this late stage of the process. The late raising of this issue, without any submissions with respect to why the issue was abandoned and what change in circumstances justifies the late raising of it, is not appropriate and defies procedural fairness.

[18] Despite its position, Services submits that the individual who made the access decision:

...is a delegated authority pursuant to subsection 49(1) of the *Act*. Thus, [this individual] is the head of [Services] for the purposes of the *Act*.

[19] Section 49(1) concerns the delegations of the head's powers. It reads:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

[20] Services also provided a copy of the written delegation signed by the Board of Directors signed June 10, 2015. The delegation provides:

BE IT RESOLVED THAT the Board of Directors, pursuant to Section 3 of the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*"), hereby designates the President and Chief Operating Officer to act as "Head" of the Corporation for the purpose of administrating the *Municipal Freedom of Information and Protection of Privacy Act*.

[21] I note that previous decisions from this office have held that it is not necessary that delegations set out in detail all the activities the delegation would entail.¹ Accordingly, "broad wording" set out in delegations is sufficient to properly authorize individuals to handle access requests. What is relevant is whether or not the delegation limits the authority given to the delegate.

[22] It appears that in this case, the President and Chief Operating Officer was delegated to deal with all aspects of administrating requests under the *Act* without any limitations.

Decision and Analysis

[23] The issue as to whether the access decision was made by a properly designated or delegated head for the purpose of making decisions under the *Act* raises a number of questions in the context of this appeal.

¹ MO-2663-I.

Should the appellant be prevented from raising the delegation/designation of the head as an issue?

[24] Services argues that the appellant should not be permitted to raise this issue during the inquiry stage as it was resolved in mediation.

[25] The *Act* requires that access decisions are to be made by properly designated or delegated individuals. In Order MO-1221, Adjudicator Laurel Cropley found that issues relating to the authority of an institution to issue a decision "is a crucial first step in a valid decision" and one that must be canvassed regardless when the issue is raised. I agree with this approach and thus will go on to determine whether the decision in question was made in accordance with sections 3 and/or 49(1).

Was the delegation valid at the time the access decision was made?

[26] The date on the decision letter sent to the appellant is June 5, 2015. The date of the delegation is June 10, 2015.

[27] Based on the evidence provided by Services, it appears that the President and Chief Operating Officer was delegated as the head five days after Services wrote to the appellant to advise him that his request for financial statements was denied.

[28] Previous decisions from this office have found that "quickly enacting" delegations after a decision under the *Act* was made cannot not save a decision which was invalid at the time it was made.²

[29] Given the timing between the date of the decision and the delegation, I find that at the time the President/CAO made the decision, he was not properly delegated as "head" of Services in accordance with sections 3 and/or 49(1). Accordingly, the decision issued to the appellant on June 5, 2015 is invalid.

What is the appropriate remedy if the decision is found invalid?

[30] The appellant takes the position that if the decision was not made by a properly designated "head" then the decision is "null and void" and Services cannot rely on the discretionary exemption under section 11 to withhold the records. It is not clear whether the appellant also takes the position that the records should be disclosed to him on this basis.

[31] Services argues that a finding that its delegation of authority is invalid has no impact in the circumstances of this appeal. Services goes on to state:

...if it is determined that [the President and Chief Operating Officer] was not the head and that his decision was consequently invalid, the head will have been deemed to have refused access to the responsive records. Given that [the President and Chief Operating Officer] initially refused to

² Order MO-1221

grant access to the responsive records this would have no practical impact on these proceedings.

[32] Services also submits that if its delegation of authority is found invalid then its claim that the discretionary exemption under section 11 applies to the records should be considered in the same manner the adjudicator proceeded with the inquiry in Order P-333.

[33] In Order P-333, Former Assistant Commissioner Tom Mitchinson found that the head's decision was not in accordance with the institution's delegation of authority.³ Accordingly, he found that the institution failed to give proper notice under the *Act* and deemed the institution to have refused access to the records at issue. Despite this finding, the former Commissioner went on to consider whether the mandatory personal privacy exemption under section 21(1) applied to the records and stated:

Notwithstanding the fact that the institution has not issued a decision as required under the *Act*, after receiving representations from the parties during the course of this inquiry, I have the authority to proceed to make an order disposing of the issues raised by this appeal.

It should be noted that the head has now issued a revised delegation of authority under [the provincial equivalent of section 49(1)] of the *Act*.

[34] However, I note that recent decisions from this office ordered institutions to issue a new decision to remedy an invalid decision. In Order MO-1221, Adjudicator Cropley ordered an institution to issue a new decision despite having received submissions from the parties on whether or not the institution's transfer of the request was in accordance with the *Act*. In that appeal, the institution tried to rectify the invalidity of a decision by enacting a by-law shortly after the decision was made. Adjudicator Cropley stated:

...at the time the Mayor issued his decision transferring the appellant's request to the Police, he was not properly delegated as "head" of the town council and his decision is invalid.

Consequently, any decisions flowing from that initial decision cannot stand, and I find that they are null and void.

As a result of this decision, the Town is now in a deemed refusal situation pursuant 22(4) of the *Act*. In order to avoid any further delay in the processing of the appellant's access request, I will order the Town to issue a new decision.

[35] In Order MO-3320, Adjudicator Jenny Ryu ordered an institution to issue a new access decision after finding that the delegation of authority made by a city officer to an

³ The issue in Order P-333 was whether the head's decision exceeded his authority in denying access to responsive records as the delegation permitted the delegates to "grant access".

outside individual was invalid. In that appeal, the affected parties appealed the institution's decision to grant access to responsive records. They also submitted representations during the inquiry in support of their claim that the records qualified for the mandatory third party information exemption under section 10(1).

[36] Having regard to the circumstances in this appeal, I have decided to adopt the approaches taken in Orders MO-1221 and MO-3220. In my view, the fact that a valid delegation of authority under section 49(1) was made five days after the date of Services' decision can not validate a decision made pursuant to an invalid delegation. Given the fact that the exemption relied upon Services to withhold the records is a discretionary as opposed to a mandatory exemption, I find that the circumstances in this appeal differ from those in Order P-333.

[37] Accordingly, I will order Services' head to issue a new access decision in accordance with the *Act*. In the alternative, within 10 days of its receipt of this order Services may send a letter to my attention confirming that the head maintains the position set out in the June 5, 2015 decision letter and I will proceed to make a decision on whether the withheld portions of the records qualify for exemption under sections 11(c) and (d).

ORDER:

1. North Bay Hydro Services' decision, dated June 5, 2015 is void.
2. I order North Bay Hydro Services to issue a decision on access in accordance with the *Act*, treating the date of this order as the date of the request *or* within 10 days of its receipt of this order send a letter to my attention confirming that the head maintains the position that the withheld portions of the records qualify for exemption under sections 11(c) and (d).
3. In order to verify compliance with order provision 2, I order Services to provide me with a copy of the new decision letter on the same date it is sent to the appellant.

Original Signed by: _____
Jennifer James
Adjudicator

_____ April 28, 2017