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

ORDER P-505

Appeal P-9300153

Ministry of the Attorney General

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ORDER

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of any notes and records made at an Ontario Municipal Board (the Board) hearing by a Board member who presided at the hearing. The Board is an agency of the Ministry. The hearing involved the requester's property.

In its initial decision letter, the Ministry stated that no records existed in response to the request. The Ministry subsequently issued a second decision letter. In this letter, the Ministry denied access to the records, claiming that the notes did not form part of the Board's files and, accordingly, were not in the custody or under the control of the Board. The Ministry stated that a tribunal member's notes about a hearing would be considered to be the member's personal notes. The requester appealed the Ministry's decision.

During mediation of the appeal, the Ministry advised the Appeals Officer that the Board member's notes had been destroyed prior to the Ministry receiving the request for access to them. The appellant was advised that the notes no longer existed.

The appellant was not satisfied with this response. It is his position that the Board member was obliged to keep notes and maintain them "for a certain period of time". Further mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Representations were received from both parties.

The sole issue in this appeal is whether the notes of the Board member were in the custody or under the control of the Board.

Section 10(1) of the Act 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 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 made the following comments regarding the issue of custody and control: "I feel it is important that [custody and control] be given broad and liberal interpretation in order to give effect to [the] purposes and principles [of the Act]." I agree. He went on to outline what he felt was the proper approach to determining whether specific records fell within the custody or control of an institution:

> In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether

"custody" or "control" has been established in the circumstances of a particular fact situation.

In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

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

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

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. 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?

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

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

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

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

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

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of an institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

A number of orders have dealt with the issue of custody and control (Orders P-239, P-271, P-326, M-59, M-152), all of which turn on the particular circumstances of the appeal in relation to the types of factors listed by former Commissioner Linden in Order 120. Similarly, this appeal must be decided on the basis of its particular facts.

In his representations, the appellant states that during the hearing, the Board member took notes in a hard bound legal size diary type notebook. He submits that:

> [The Board member's] position as a tribunal, obliges him to keep accurate notes and keep them for the records. Any suggestion that the board does not require a tribunal to keep notes during a hearing is utter nonsense in cases where hearings last for days over a period of time and then the decision is arrived at some nine months after the last day of the hearing.

In its representations, the Ministry relies on the decision of former Assistant Commissioner Tom Mitchinson in Order P-396. Based on the facts of that case, the former Assistant Commissioner determined that the notes made by a member of the Rent Review Hearings Board (an agency of the Ministry of Housing) at a pre-hearing conference were not in the custody of or under the control of the Ministry of Housing. He made the following general comments with respect to notes taken by members of administrative tribunals:

> 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.
> ...
>
> ... 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.

I agree with these comments and adopt them for the purpose of this appeal. Accordingly, I must consider the factual circumstances relating to the "creation, maintenance, and use" of the Board member's notes.

The Ministry submits that:

> Board members are independent adjudicators ... They do not take instruction from the Chair of the Ontario Municipal Board or anyone else to take notes. Many of the members take notes during the course of a hearing in order to assist their memories as the hearings are often long and/or complex and hearings are rarely recorded. It is the position of the Board that any such notes are the personal notes

of the member and not under the custody or control of the Board. Members are not required to keep any notes on file.

Because such notes are personal notes of the member who may make them, there are no Board policies or practices with respect to maintenance of such notes. The prevailing practice among the members is that they keep any such notes at their own homes.

As part of its representations, the Ministry provided an Affidavit from the Manager of Finance and Administration at the Board, who is responsible for handling Freedom of Information requests for the Board. In her Affidavit, the Manager of Finance and Administration outlined the steps she had initially taken in searching for records responsive to the request:

4. I searched for any notes or records as requested by doing the following:

   i. I reviewed the Board's file,
   ii. I spoke to [the Board member] and inquired if there were any such notes or records.

5. I found no notes or records of [the Board member] in the Board file. This did not seem extraordinary as I am aware from my long experience with the Board that members are not required to make or file any notes as a function of holding hearings. If there are any such notes they are always kept in the personal possession of the member who made them and usually at that member's home.

6. [The Board member] responded to my inquiry by advising me that there were no notes of his in existence relating to this hearing as they had been destroyed. He further advised me that it is his practise to keep any notes at his home for a brief period of time only after issue of the final order and then destroy them.

In her Affidavit, the Manager indicated that the above information was confirmed again with the Board member during mediation of this appeal.

Having reviewed the Ministry's representations, in my view, it is clear that the notes were never in the custody of the Board. It is also my opinion, that the notes were never under the control of the Board.

The notes were located outside the Board's premises in the Board member's personal possession in his home. The Board does not require that its members take notes at hearings; nor does it regulate the use of the notes or exert any control over them. They were created by the Board member for his own personal use. As per the member's practice, he destroyed the notes shortly after he issued his final order in the hearing.

Having reviewed the representations of the parties, and bearing in mind the indicia of control identified by former Commissioner Linden in Order 120, I find that the notes that were created by the Board member were not in the custody or under the control of the Board and therefore, not accessible under the Act, in the circumstances of this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: July 23, 1993
Anita Fineberg
Inquiry Officer