



Information and Privacy
Commissioner/Ontario

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

ORDER P-832

Appeal P-9400450

Ontario Hydro



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked Ontario Hydro (Hydro) for access to records from the files of 28 named individuals at Hydro. The records relate to the requester and the complaint he filed with the Ontario Human Rights Commission (OHRC) alleging discrimination and harassment while he was an employee of Hydro.

The requester has made two previous requests for similar information in which he received over 400 records from Hydro. These included documents from the files of 19 of the individuals who are also named in his current request.

Hydro identified 3 records that were responsive to this request:

- Record 1: the draft of its response to the requester's OHRC complaint;
- Record 2: file notes of a Hydro solicitor dated December 15, 1993; and
- Record 3: file notes of another Hydro solicitor dated January 26, 1993.

Hydro denied access to these records in their entirety based on the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- law enforcement - section 14(1)
- solicitor-client privilege - section 19
- discretion to refuse requester's own information - section 49(a)

All of the above exemptions were applied to Record 1, while only sections 19 and 49(a) were applied to Records 2 and 3.

In addition to appealing the denial of access, the requester also maintains that additional records should exist.

A Notice of Inquiry was provided to the parties to the appeal. Representations were received from Hydro and the appellant.

In his representations, the appellant requested that he be provided with the affidavit of search provided to the Commissioner's Office by Hydro. Hydro agreed to this request and a copy of its affidavit was provided to him. However, he still maintains that more records should exist.

Subsequent to the Notice of Inquiry being sent to Hydro, it disclosed a portion of its draft response to the OHRC to the appellant. The balance of the draft response (Record 1) and the file notes dated December

15, 1993 (Record 2) and January 26, 1993 (Record 3), therefore, remain at issue in this appeal.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Hydro submits that Records 1, 2, and 3 contain the personal information of the appellant. I agree. They do not contain the personal information of any other individuals.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a), the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including solicitor-client privilege (section 19) would otherwise apply to that information.

Hydro has claimed that section 19 applies to all three records at issue. Section 19 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Hydro submits that Record 1 was drafted by their Staff Relations Branch and provided to a Hydro lawyer for the purpose of seeking confidential legal advice on the content of Hydro's official response to the OHRC. The lawyer reviewed the document and recommended changes to it.

I have carefully reviewed Record 1. The portions which have not been disclosed to the appellant consist of changes made by the lawyer to the draft response, comments made by the lawyer in the margins of the draft and in the body of the response, and information which was not contained in Hydro's official response to the OHRC because of comments made by the lawyer. I find that Record 1 is a written communication of a confidential nature between a Hydro staff member, the client, and its solicitor, which directly relates to the seeking and giving of legal advice. Accordingly, Record 1 qualifies for exemption under Branch 1 of the section 19 exemption.

Record 2 consists of notes prepared by a Hydro lawyer regarding her meeting with two employees who were conducting a fact finding investigation on behalf of Hydro following the appellant's complaint to the OHRC. Hydro states that the record describes this meeting and sets out the information provided to the lawyer and the legal advice supplied by the lawyer on appropriate questions and course of conduct for the investigators.

Record 3 consists of the notes of another Hydro lawyer describing a conversation between herself and one of the employees conducting the investigation. Hydro submits that the notes detail the information provided to the lawyer and the legal advice sought and given with respect to the appellant's allegations of harassment and discrimination. Hydro states that the notes discuss options for potential settlement of the complaint and Hydro's strategy for defending the appellant's allegations throughout the OHRC process.

Hydro has indicated that the appellant's human rights complaint is still outstanding. Should the OHRC not resolve the complaint, the matter could proceed to a formal Board of Inquiry which is litigation before an administrative tribunal, after which recourse to the courts could occur. It is Hydro's submission that both Records 2 and 3 were used in preparing Hydro's formal response to the human rights complaint, and will be used in the course of mediation with the OHRC, the OHRC's investigation, and the Board of Inquiry hearing.

I have reviewed the records and submissions of the parties. I find that Records 2 and 3 were prepared by legal counsel employed by Hydro for use in giving legal advice or in contemplation of litigation. Accordingly, they satisfy the criteria set out in Branch 2 of section 19.

I have found that Records 1, 2 and 3 contain the personal information of the appellant. I have also found that they qualify for exemption pursuant to section 19. Therefore, they are exempt from disclosure under section 49(a) of the Act.

REASONABLENESS OF SEARCH

The appellant submits that additional records should exist. In support of this claim, he has provided documents received from Hydro which show that identical copies of records were also forwarded to other Hydro employees. Therefore, although the appellant may have received one copy of a record, he believes that he should receive duplicate copies of the record that are contained in the files of the several individuals named in his request.

Hydro has provided an affidavit from its Corporate Records and Freedom of Information Officer regarding the search for records. The affidavit describes the search conducted for the three specific records, more copies of which the appellant believes exist, which were referred to in the Notice of Inquiry.

The affidavit states that some copies of these three records were located in the files of the named individuals as a result of an additional search. These were not provided to the appellant. In some cases, Hydro staff had not originally provided copies of the documents to the Corporate Records and Freedom of Information Department because they believed duplicate copies of the documents had already been provided to this department. In other cases, Hydro staff did not believe the documents in question were relevant to the request. The affidavit also states that copies of some documents were not located in the files specifically named by the appellant. Based on these facts, Hydro takes the position that it is not required to provide more copies of the records which were located as a result of the additional search, as it had previously given the appellant a copy of these records.

Where a requester provides sufficient details about the records which he or she is seeking and an institution indicates that additional records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that an institution prove to the degree of absolute certainty that such records do not exist, the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

In relation to the specific records which were addressed in Hydro's affidavit, I am satisfied that the requester has received copies of the records in question and I will not order Hydro to provide duplicate copies of the same records. I would, however, point out to Hydro that it may be desirable for them to review their administrative practices in relation to freedom of information requests with their staff. Generally, staff members should not be deciding whether records are responsive to a request, or assuming that other parts of the organization will forward copies of records to the Corporate Records and Freedom of Information Officer, thereby relieving them of the obligation to do so. These kinds of decisions are the responsibility of the head of the institution and other employees to whom this responsibility has properly been delegated.

I would also note that it is possible that individuals may make personal notes on their copy of a document. Copies of a document may be date-stamped or contain other distinguishing notations. Accordingly, while different copies of a document may all be described in the same way, they may each contain different information and thus be considered to be different "records" for the purposes of the Act. Therefore, it is essential that the process of retrieving and identifying responsive records be co-ordinated by an individual or department familiar with all the records.

As far as the general search for records is concerned, Hydro's affidavit does not provide any information on the steps taken to search for records responsive to the request. In these circumstances, I cannot conclude that Hydro's search for responsive records was reasonable in the circumstances of this appeal. I am, therefore, ordering Hydro to conduct a further search for responsive records.

ORDER:

1. I uphold Hydro's decision to deny access to Records 1, 2 and 3.
[IPC Order P-832/January 11, 1995]

2. I order Hydro to conduct a further search for responsive records and to notify the appellant in writing as to the results of that search, within thirty (30) days of the date of this order.
3. If, as a result of the further search, Hydro identifies any additional records which are responsive to the request, I order Hydro to provide a decision letter to the appellant regarding access to these records in accordance with sections 26 and 29 of the Act, considering the date of this order as the date of the request and without recourse to a time extension.
4. In order to verify compliance with this order, I order Hydro to provide me with a copy of the letters referred to in Provisions 2 and 3 of this order within thirty-five (35) days of the date of this order. This letter should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ January 11, 1995