



Information and Privacy
Commissioner/Ontario

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

ORDER P-863

Appeals P-9400586, P-9400587, P-9400588,
P-9400589, P-9400590, P-9400591, P-9400592,
P-9400593 and P-9400594

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NATURE OF THE APPEALS:

These are nine appeals under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Housing (the Ministry) received a request for access to the following information which relates to an appeal involving the requester before the Rent Review Hearings Board (the Board):

- (1) The Hearing Registry and Observer Attendance sheet
- (2) Determination and Scheduling Form (RRHB 230 "Weighting Form")
- (3) Record of all inquiries
- (4) Hearing Status Report (RRHB 196)
- (5) Board Member's hearing (trial) notes
- (6) Board Member's Weekly Attendance Log
- (7) Board Member's Monthly Attendance Log Summary List & Time Sheet (RRHB 232 & RRHB 179)
- (8) Audio tape (copy) of hearing (trial)
- (9) Any other information concerning the hearing and case file such as: inter-office memos, record of phone contacts (RRHB 219), record of any and all formal or informal meetings or discussions in regard to the hearing.

The Ministry issued its decisions in respect of each part of the request as follows:

1. Access was granted to the one-page "Hearing Attendance Register" dated April 2, 1993. (Appeal Number P-9400586)
2. The form to which the requester was seeking access was discontinued prior to the appeal he had filed with the Board and, therefore, the record does not exist. (Appeal Number P-9400587)
3. Access was granted in full to the requested records which are included in the Board's record file. The requester attended the Board to view the records. The Ministry further informed the requester that should he require copies of any of the information contained in the file it would be made available to him at a cost of \$0.20 per page to a total of \$26 for the entire file. (Appeal Number P-9400588)

4. Access was granted to the one-page "Hearing Status Report" dated June 14, 1993. (Appeal Number P-9400589)
5. The Residential Rent Regulation Act does not require Board members to take notes. The Ministry indicates that the appeal record file and the member's working file were searched and no notes were found. In addition, if the Board member made notes during the hearing, they are not in the custody or control of the Ministry. (Appeal Number P-9400590)
6. Use of the log to which the requester was seeking access was discontinued prior to the appeal he had filed with the Board and, therefore, the record does not exist. (Appeal Number P-9400591)
7. Neither of the forms were in use by the Board at the time the requester filed his appeal before the Board. However, the Board member's monthly attendance is recorded on the "Personal Attendance Form" to which access was denied pursuant to section 21 of the Act. (Appeal Number P-9400592)
8. The hearing was not recorded and, therefore, the tape does not exist. (Appeal Number P-9400593)
9. Access was granted to a one-page handwritten internal memorandum, dated June 21, 1993. (Appeal Number P-9400594)

The requester appealed these decisions, claiming that further records exist in response to Parts 1, 3, 4 and 9 of his request and that the records requested in Parts 2, 6 and 8 of his request do, in fact, exist. In addition, the requester appealed the denial of access to the records responsive to Part 7 of his request and claimed that records responsive to Part 5 of the request are in the custody or control of the Ministry. Finally, the appellant submits that he should not be required to pay a fee for the records as they contain his personal information.

During the mediation stage of the appeal, the appellant narrowed the scope of Part 7 of the request to include only the attendance records which pertain to the time that his appeal was before the Board (December 1992 to July 1993, inclusive).

Notices of Inquiry setting out the issues in each appeal were sent to the Ministry and the appellant. Representations were received from both parties. In his representations, the appellant indicates that he also wishes to rely on an earlier letter to the Commissioner's office which was received on November 29, 1994.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records to which he is seeking access and the Ministry indicates that no further, responsive records can be located, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. In my view, the Act does not require that the Ministry prove to the degree of absolute certainty that such records do not exist. However, in order to properly discharge its obligations under the Act, the Ministry must provide the Commissioner's office with sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate records responsive to the request.

The appellant contends that reasonable searches were not conducted by the Ministry for records responsive to Parts 1, 2, 3, 4, 6, 8 and 9 of his request. In support of this position he provides the following arguments:

1. Other individuals were in attendance at his hearing but do not appear on the "Hearing Attendance Register" (Part 1);
2. If the "Weighting Form" (RRHB 230) does not exist then the information should be available in another form (Part 2);
3. The "Record of Inquiries" is incomplete as it does not contain all the inquiries made both by himself and other individuals in relation to the Board's file (Part 3);
4. There should be more than one "Hearing Status Report" and that the status report which was provided was not completed in its entirety (Part 4);
5. The Ministry has provided insufficient information in relation to when the use of the "Weekly Attendance Log" was discontinued (Part 6);
6. The Board member "inferred that [the hearing] was being recorded and microphones were used" (Part 8); and
7. The foregoing evidence is indicative of the shortcomings of the Ministry's/Board's searches in these matters (Part 9).

The representations of the Ministry include sworn affidavits and supporting documentation from the Vice Chair of the Board, who is responsible for the general administration of the affairs of the Board, and the Board's Legal Counsel, who conducted the search for responsive records. In her affidavit, the Board's Legal Counsel outlines the steps which she took to locate records responsive to the appellant's request.

The Vice Chair states that the forms sought in Parts 2 and 6 of the request and the procedures which accompanied them were not in use at the time that the appellant filed his appeal with the Board and were not used in connection with his appeal. With regard to Part 8 of the request, no tape recording of the proceedings was made. Further, the Vice Chair submits that there is no requirement that a tape recording of Board hearings be made.

The Board's Legal Counsel states that all files, including the record file and working file relating to the appellant's appeal with the Board, were personally searched by her. In addition, she spoke to several Board staff members who were involved with the files, some of whom had dealt directly with the appellant. The Board's Legal Counsel submits that none of these individuals have any further records, nor are they aware of the existence of any further records which are responsive to the appellant's requests. To ensure that her search was complete, the Legal Counsel reviewed and discussed her findings with the Chair of the Board.

I have carefully reviewed the representations of both parties, the supporting documentation and the affidavits. I am satisfied that the Ministry has taken all reasonable steps to locate records which may be responsive to Parts 1, 2, 3, 4, 6, 8 and 9 of the appellant's request.

CUSTODY OR CONTROL

The appellant submits that any notes created by a Board member during a hearing would be in the custody or control of the Ministry. He indicates that, in his view, a Board member is an employee of the Ministry and receives direction from and is regulated by the Ministry. He further argues that the purpose of the taking of notes is to assist the Board member in preparing a decision following the hearing and that the Ministry has control over the use and regulation of these notes as they form part of the record file.

In its representations, the Ministry provides the following information regarding the creation and use of Board members' notes generally:

- there is no legal requirement or Board policy, procedure or employment requirement pertaining to the creation, storage, maintenance and disposal of personal notes by Board members;
- either the Ministry nor the Board have ever stored, maintained, disposed of or put in archives any Board member's personal notes;
- Board members always store their personal notes separately from Board files;
- it has always been in the discretion of the individual members whether or not to take personal notes, and to determine the form and style of the notes and how long to keep the notes before disposing of them;

- the Board member is the only person with access to the notes;
- neither the Board, nor the Ministry have any right, statutory or otherwise, to require possession of the member's personal notes;
- a search was done of the Board's files and no file was found to contain hearing notes made by the Board member who heard the appellant's appeal.

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.

A number of orders have dealt with the issue of custody and control (Orders P-239, P-271, P-326, P-396 and M-59), all of which turn on the particular circumstances of the appeal in relation to the principles enunciated by former Commissioner Linden in Order 120. Similarly, this appeal must be decided on the basis of its particular facts.

I will now review the factual circumstances relating to the "creation, maintenance and use" of the Board member's notes which are at issue in this appeal.

In its representations, the Board states:

... the Board member made notes during the hearing, however, those notes are not in the custody or control of the Board ...

[The Board member's] intention when taking the notes was that the notes would only ever be seen by her, as an aide memoire and would not be reviewed by any other person or persons.

At all times during the hearing and subsequent to the hearing, [the Board member] was in full custody and control of [the] notes.

The member kept [the] personal notes separate from all Board's files and at no time were the personal notes available or accessible to Board staff or other members of the Board,

nor did the Board member ever provide copies or surrender her personal notes voluntarily or otherwise, to any other person.

In her affidavit, the Board's Legal Counsel, who contacted the Board member during this inquiry, confirms these facts and adds that she was advised by the Board member that she destroyed her notes shortly after the expiration of her appointment as a Board member on September 30, 1993.

Having reviewed the Board's representations, I find that the notes are not currently in the custody or control of the Board within the meaning of the Act. Bearing in mind the indicia of control identified by former Commissioner Linden in Order 120, in the circumstances of this appeal, I find that the notes created by the Board member, even if they still existed, are not within the control of the Board within the meaning of the Act and are not, therefore, accessible under the Act.

INVASION OF PRIVACY

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.

I have reviewed the record at issue in Part 7 of the request, the Board member's attendance record covering the time period of December 1992 to July 1993, and I find that it contains only the personal information of the Board member. The record does not contain any personal information relating to the appellant.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4).

If none of the presumptions contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

The Ministry submits that the presumption contained in section 21(3)(d) (employment history) applies to the personal information contained in the record.

In his representations, the appellant submits that the Board member's attendance record does not form part of her employment history and, therefore, section 21(3)(d) does not apply. In addition, he raises the

considerations of section 21(2)(d) (the personal information is relevant to a fair determination of his rights). He argues that proper attention was not paid to the file at the hearing and several relevant items were overlooked and, therefore, his right to "due process" was affected.

Having reviewed the representations and the record, I have made the following findings:

- (1) The attendance record of the Board member relates directly to her employment history with the Board. Accordingly, the disclosure of this record would constitute a presumed unjustified invasion of personal privacy under section 21(3)(d).
- (2) None of the information contained in the record falls within the scope of section 21(4). Nor has the appellant submitted that section 23 of the Act applies to this personal information.
- (3) The submissions provided by the appellant to support disclosure of the record under section 21(2)(d) of the Act are not sufficient to rebut the presumption in section 21(3)(d) (Order M-170).
- (4) I find that the disclosure of the personal information in the record would constitute an unjustified invasion of the Board member's personal privacy and that the record qualifies for exemption from disclosure under section 21(1) of the Act.

FEES

The Ministry's decision letter states that if the appellant wishes to receive a copy of the complete file it would be made available to him at an estimated cost of \$26, at the rate of \$0.20 per page for photocopying.

The appellant contends that a fee should not be charged as the record contains his personal information.

Section 57(2) of the Act states:

Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information.

As stated above, 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.

The Ministry has provided me with a copy of the Board's entire record file in this matter. The Ministry's representations indicate that the charging of fees for copies of materials from Board files is in accordance

with the Board's internal guidelines. These guidelines direct, in part, that individuals shall not be charged for access to their own personal information but that in all other cases, a charge of \$0.20 per page for photocopying will apply.

The Board's Legal Counsel submits that the appellant was being charged a fee only for copies of records which do not contain his personal information. As a fee of \$26 was requested, the appellant is being charged for 130 pages.

I have independently reviewed the entire record file of 165 pages and find that 71 pages contain the personal information of the appellant. The Ministry is prohibited from charging a fee for these pages. The remaining 94 pages do not contain the personal information of the appellant. Accordingly, the Ministry may charge a total fee of \$18.80 for the photocopying of these 94 pages.

ORDER:

1. I allow the Ministry to charge a fee, not to exceed \$18.80, for a copy of the entire record.
2. I uphold the Ministry's decisions respecting the issues of reasonable search, custody or control and denial of access.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ February 10, 1995