



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1132

Appeal P-9500677

Ontario Labour Relations Board



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NATURE OF THE APPEAL:

The Ministry of Labour (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to any records of the Chair, Registrar, Vice-Chair and two named panel members of the Ontario Labour Relations Board (the Board) in relation to “any documents, memoranda, or letters discussing, considering, referring to, or commenting on a draft decision of the Ontario Labour Relations Board dated December 1991, OLRB-File #256-89-G” covering the time period of October 1991 to February 1992. Because the Ministry considered that the Board had a greater interest in any responsive records, the request was transferred to the Board pursuant to section 25(2) of the Act.

The Board advised the requester that no records responsive to the request existed. The requester (now the appellant) appealed this decision.

During the mediation stage of the appeal, it became apparent that one of the named panel members might have possession of responsive records. Therefore, the issue of “custody or control” was raised as relevant in the circumstances of this appeal.

A Notice of Inquiry was sent to the Board, the appellant and the panel member (the affected party). Representations were received from the Board and the appellant only.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records to which she is seeking access and the Board indicates that no responsive records can be located, it is my responsibility to ensure that the Board 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 Board prove with absolute certainty that responsive records do not exist. However, in order to properly discharge its obligations under the Act, the Board must provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all responsive records.

In the appellant’s view, because the Board was aware of the possible existence of responsive records in the possession of the affected party, “it is difficult, if not impossible, to believe the Board could have conducted a reasonable search without reviewing and examining [the affected party’s] files”.

The representations of the Board include a sworn affidavit of the Board’s Solicitor, who is also the Freedom of Information and Privacy Co-ordinator. The Solicitor conducted the search and outlines the steps he took to locate responsive records.

The Solicitor’s affidavit states that he reviewed OLRB File #256-89-G and found no responsive records. He also wrote to the five Board members identified by the appellant, asking if they had responsive records in their possession. According to the Solicitor, three members advised him that they had no responsive records, and a fourth, no longer employed by the Board, did not respond. The fifth member (the affected party) advised the Solicitor that she had a file in her possession that might contain responsive records and, although she had not searched the file

herself, she offered to make it available to him. The Solicitor states that he subsequently determined that he had no obligation to review the affected party's file and made no effort to view it or discover its contents. On the basis of these steps taken by the Solicitor, he concluded that the Board had no responsive records in its custody or control.

Having carefully reviewed the representations, including the Solicitor's affidavit, I am satisfied that the Board has taken all reasonable steps to locate records which may be responsive to the appellant's request, including copies of any records physically located in the Board's files which may have been produced by a Board member and/or staff and provided to the affected party. In my view, any additional steps would only be reasonable should I determine that records in the possession of the affected party are in the custody or control of the Board, and I will now turn to that issue.

CUSTODY OR CONTROL

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 section 12 to 22.

In Order 120, former Commissioner Sidney B. Linden outlined 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 the 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 considered the issue of custody and control, including some which dealt with the proper characterization of certain records held by tribunal members (Orders P-239, P-271, P-326, P-396, P-505 and M-59). All of these cases 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.

The appellant submits that any responsive records in the possession of the affected party are in the custody or control of the Board. She argues that the scope of the request does not fall within the exemptions outlined in section 65 of the Act, and that the following indicia of custody and control outlined in previous orders of this office are present in the circumstances of this appeal:

- The affected party is an officer and employee of the Board.
- Any records provided to the affected party which would indicate a change that occurred to the decision in OLRB File #256-89-G

between a draft and final version would be relevant to and used in an appeal of that decision which is presently before the courts.

- Any records which are in the possession of the affected party were either created by individuals who were not officers or employees of the Board and voluntarily provided to the affected party, or were created by other Board officers or employees. In either case the Board should have retained possession.
- If the Board through its officers and employees has physical possession of records or copies of records which were provided to the affected party, then this would constitute custody and control.
- If the Board has obtained actual possession of records from the affected party, this would constitute strong evidence of custody, and authority to regulate their use.
- Any records in the possession of the affected party fall squarely within the mandate and functions of the Board.

In its representations, the Board makes the following points:

- Decisions are made by the panel members hearing the case. They are independent of the government, the parties, the Chair and each other.
- Decision-making is unregulated by the Board and the Board places no constraint on the ability of the adjudicators to decide cases freely.
- Board members cannot be compelled to submit to institutional processes which might impair, or be seen to impair their independence.
- Neither the Board nor the Chair can require a member to solicit or receive comments on a draft decision, nor produce them for inspection.
- Draft decisions are sometimes produced and circulated beyond the panel hearing the case and any comments regarding the draft decision would be received by the panel, not the Board.
- Any written comments on a draft decision would be for the Board member's personal use, would be stored separately from the Board's file and the Board member would be the only person with access to the comments.

- There are no guidelines regarding retention or destruction of such documents and no legal requirement, policy, procedure or employment requirement pertaining to the creation, storage, maintenance and disposal of written comments on draft decisions.
- The Board has no right to possession of the records held by the affected party nor does it have the authority to regulate such records.
- Such records are not integrated with other records held by the Board.

It is relevant to note that the affected party decided not to provide representations or to forward any records in her possession to me in response to the Notice of Inquiry, based on concerns that doing so might be in violation of her oath under Section 110(8) of the Labour Relations Act.

Having reviewed the Board's representations, it is clear to me that any responsive records in the possession of the affected party were not provided to the Board, and I find that any such records are not in the custody of the Board. I also find that responsive records, should they exist, are not under the control of the Board in the circumstances of this appeal. Any records in the possession of the affected party are located outside the Board's premises and in the affected party's personal possession. The Board does not regulate the use of these records, and has taken no steps to exert control over them.

Having reviewed all of the representations, and applying the various indicia of control identified by former Commissioner Linden in Order 120 to the particular circumstances of this appeal, I find that the records held by the affected party are not in the custody or control of the Board within the meaning of the Act and, therefore, not accessible under the Act.

However, if any such records or copies of records had been physically located in the Board's files or in any other records management 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.

ORDER:

I uphold the Board's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

February 21, 1996