



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

ORDER PO-1730

Appeal PA-990156-1

Ontario Hydro



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BACKGROUND:

The Electricity Act, 1998 implemented a restructuring of Ontario Hydro, effective April 1, 1999. At the same time, Ontario Hydro ceased to be an institution covered by the Freedom of Information and Protection of Privacy Act (the Act). Some, but not all, of the new corporate bodies created as part of the restructuring exercise were added by regulation to the list of institutions covered by the Act. Ontario Hydro Services Company (OHSC) was not one of the new organizations designated as an institution. However, by means of a Transfer Order made by the Lieutenant Governor in Council under the Electricity Act, 1998, OHSC assumed responsibility for certain requests made under the Act that were received by Ontario Hydro prior to April 1, 1999 and unresolved as of that date.

NATURE OF THE APPEAL:

On February 23, 1999, Ontario Hydro received a request from a reporter for access to all records pertaining to Ontario Hydro's exclusion from the Act. On March 31, 1999, Ontario Hydro advised the requester that "Ontario Hydro continues to be covered by the Act therefore no records exist that respond to your request. Accordingly access is denied."

The requester (now the appellant) appealed this decision.

During mediation, the appellant clarified that his request included records relating to both Ontario Hydro and its successor companies. Ontario Hydro, as represented by OHSC, disagreed. It took the position that the original request was clear and was restricted to Ontario Hydro. OHSC also maintained that there was no need to seek clarification from the appellant regarding the scope of his request.

I sent a Notice of Inquiry to the OHSC (on behalf of Ontario Hydro) and the appellant, and received representations from both parties.

DISCUSSION:

SCOPE OF THE REQUEST

The appellant's request reads as follows:

all records pertaining to Ontario Hydro's exemption from the Freedom of Information and Protection of Privacy Act.

In his representations, the appellant explains:

At the time I made my request, I did not know that Ontario Hydro would cease to exist and that successor companies would take over its operations; as far as I was aware, Ontario Hydro itself was to become exempt from the Act starting April 1, 1999.

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...

... The functions once performed by Ontario Hydro are now being carried out by its four successor corporations. In fact, one of those entities, Ontario Hydro Services Company, has stepped into Ontario Hydro's shoes to respond to this appeal. In the circumstances, it is my view that all records which relate to the exemption from the Act of two of Ontario Hydro's successor companies ("the Records in Issue") are responsive to my request.

The appellant also points out that if there was any uncertainty regarding the scope of his request,

... Ontario Hydro was under an obligation, pursuant to section 24 of the Act to seek clarification if the scope of my request, and having failed to do so, it cannot now rely on a narrow interpretation of the scope of my request.

OHSC takes the position that on February 23, 1999, when the appellant submitted his request, Ontario Hydro "continued as a company and continued to be subject to [the Act]." On this basis, OHSC supports the decision made by Ontario Hydro at that time that no responsive records existed.

OHSC goes on to state that:

The appellant is a professional writer, employed by the media and has written about and commented on the activities of Ontario Hydro over a span of many years. In that capacity, he clearly was aware of the upcoming Energy Competition Act and the implications for Ontario Hydro.

His request was very specific. It related clearly to Ontario Hydro.

Given the source of the request, and the specific wording of the request, there was no reason to seek "clarification."

OHSC also submits that the clarification provided by the appellant during mediation represents a new request and, because OHSC is not an institution covered by the Act, it has no legal obligation to respond to any access requests received after April 1, 1999.

I agree that the appellant would be precluded from submitting a new request, but I do not accept any of the other positions taken by OHSC.

In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any
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doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the Act to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

Section 24 of the Act imposes obligations on both requesters and institutions when submitting and responding to requests for access to general records. This section states, in part:

- (1) A person seeking access to a record shall,
...
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

At the time of making his request, the appellant was not in a position to know any of the details regarding the corporate structure that would be taking over Ontario Hydro's operations, and more specifically that two of the successor companies, rather than Ontario Hydro itself, would be removed from the jurisdiction of the Act. These decisions were made over the course of discussions leading up to the restructuring of Ontario Hydro, effective April 1, 1999. Given the circumstances that existed at the time of his request, it is my view that the appellant more than satisfactorily discharged his responsibilities under section 24(1)(b).

Ontario Hydro, on the other hand, clearly had more detailed knowledge of its restructuring activities at the time it received the appellant's request, including intentions regarding ongoing coverage of any successor companies under the Act. In my view, it was reasonable for Ontario Hydro to conclude, without further discussions with the appellant, that his request covered both Ontario Hydro and its successor companies. It was not reasonable, however, to narrowly interpret the request to exclude any successor companies without first raising this issue with the appellant. Ontario Hydro had an obligation to seek clarification under section 24(2) if it had any doubts, and I find that it failed to discharge this responsibility in its dealings with the appellant.

In one of the early orders of this Office (Order 134), former Commissioner Sidney B. Linden commented on the proper interpretation of section 24(2). I feel that some of his comments are worth repeating in the present circumstances. In that case, a requester had sought access to a number of records relating to dealings between the Ministry of Finance and various Automobile Associations. Commissioner Linden

found that the request was both broad and somewhat vague, but went on to find that the Ministry had a statutory obligation to assist in clarifying the scope of the request. In that context he stated:

Due to the way in which the request was worded, I can appreciate the difficulty experienced by the institution in assisting the appellant to clarify the request, as required under subsection 24(2). Nonetheless, the Act imposes an obligation on the institution to offer assistance, and, based on the information supplied to me during the course of this appeal, it is difficult for me to conclude that this obligation has been adequately discharged. ... In my view, given the circumstances that existed at the time the request was made, it was at least possible that the appellant intended his request to include access to the legal files. This possibility was not specifically identified or addressed by the institution at that time. In its representations on this point, the institution points out that the legal files are not routinely kept in the division of the institution which received the request. Since the appellant was not in a position to know this, I do not think this submission advances the institution's argument.

At the September 6, 1989 meeting between the appellant, the Appeals Officer and representatives of the institution, it was clear to all parties that the appellant wanted access to the legal files. However, the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the Act compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

Similarly, Ontario Hydro had an obligation to seek clarification before narrowly interpreting the scope of the appellant's request. Having unilaterally limited the scope of the request without seeking any clarification from the appellant, it cannot rely on this narrow interpretation on appeal. What is of greater consequence, as OHSC acknowledges, is that the appellant is denied the opportunity to simply submit a new request for records relating to the OHSC and other successor companies, given the changes in coverage for these organizations under the Act, effective April 1, 1999. He would simply be precluded from requesting access to any information whatsoever.

I find that the records relating to the exclusion of Ontario Hydro's successor companies from the jurisdiction of the Act are reasonably related to the appellant's request. Accordingly, they fall within the scope of the request and should have been addressed by Ontario Hydro in its original decision letter.

ORDER:

1. I order OHSC, on behalf of Ontario Hydro, to provide the appellant with a revised written decision respecting access to the records responsive to the request, as clarified, in accordance with sections 26 and 29 of the Act. This revised decision must be provided to the appellant no later than **December 3, 1999**.
2. I further order OHSC to provide me with a copy of the decision letter referred to in provision 1 by forwarding a copy to my attention c/o the Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____
Ann Cavoukian, Ph.D.
Commissioner

November 17, 1999