Information and Privacy
Commissioner/Ontario

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

ORDER M-506

Appeal M-9400606

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Thunder Bay Hydro (Hydro) received a request from an employee for all information, legal briefs, notes, letters and paperwork related to an investigation concerning herself and a named former Hydro employee (the respondent). The requester also sought communications between Hydro and a named lawyer who investigated the matter (the lawyer) as well as all statements made by persons interviewed by the lawyer. Finally, the requester wanted access to her personal file.

Hydro issued a decision letter in which it indicated that the requester could make arrangements with Hydro to view her personnel file and to make an appointment with the Freedom of Information and Privacy Co-ordinator to view Hydro Commission meeting minutes. The decision letter denied access to all other material relating to Hydro's solicitors, or to the investigation by the lawyer, pursuant to section 12 of the Act (solicitor-client privilege). The decision letter also stated that the investigation included information about other employees and a former employee, which "would violate other provisions of the act". The requester appealed the denial of access.

During mediation, Hydro agreed to provide the appellant with copies of her personnel file and responsive Hydro Commission meeting minutes. Hydro also identified further records in its possession which it felt were responsive to the request. Hydro then appeared to change its position concerning those records pertaining to the lawyer's investigation. It now claims that it does not have custody or control of these records pursuant to section 4(1) of the Act.

The appellant then agreed to narrow the scope of the appeal to (1) information which would explain why the results of the investigation had concluded that she was partly at fault, and (2) records containing comments made about her by the persons interviewed during the investigation. The appellant has confirmed that she does **not** want to know the names of the other individuals.

An interim Notice of Inquiry, limited to the issue of whether Hydro has custody or control over the investigation records was provided to the lawyer, Hydro, the appellant and the respondent to the complaint. The parties were advised that an interim order would be issued to decide the issue of custody or control, following which, the appeal would proceed to inquiry if one or more of the records were found to be within Hydro's custody or control. In this scenario, a final order would then be issued. Representations were received from all of the parties.

Subsequent to the issuance of the interim Notice of Inquiry, Hydro provided a revised decision letter, in which it formally claimed that it did not have custody or control of the investigation records which contained comments made about the appellant. Hydro also identified six records as being responsive to the narrowed request and disclosed portions of these documents. The appellant, after reviewing the revised decision letter and the additional disclosures, indicated that she would not continue to seek access to those parts of the six records which had been withheld in the revised decision letter.

For this reason, the only records remaining at issue in this appeal are the lawyer's investigation records.

DISCUSSION:

CUSTODY OR CONTROL OF RESPONSIVE RECORDS

The sole issue to be determined at this time is whether or not records responsive to the request in the possession of the lawyer, are in the custody or control of Hydro pursuant to section 4(1) of the Act.

Section 4(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 part falls within one of the exemptions under sections 6 to 15.

Both Hydro and the lawyer submit that the investigation records in the possession of the lawyer are not in the custody or under the control of Hydro within the meaning of section 4(1) of the Act and that, as a result, they are not subject to an access request under the Act.

It may be helpful at this point, to provide some background information about the investigation which resulted in the creation of the records at issue.

Hydro launched the investigation because of the appellant's complaint against the respondent. At the time, both individuals were employees of Hydro. Hydro, through its solicitors, and with the agreement of the appellant and the respondent, retained the lawyer to investigate. Hydro advises that it paid for the investigation and may have provided some input into the persons to be interviewed and the questions which might be asked during interviews of Hydro employees.
After interviewing a number of Hydro employees, the lawyer orally presented his recommendations to one of Hydro's solicitors and a senior level Hydro employee. These individuals then communicated them verbally, along with the Hydro solicitor's recommendations, to a meeting of the Hydro Commission. Hydro was not provided with any written records of the investigation or the lawyer's findings. The investigation records are in the possession of the lawyer. After the completion of the investigation, both the appellant and the respondent were disciplined.

It is clear from the wording of section 4(1) that, in order to be subject to an access request under the Act, a record need only be under the custody **or** the control of an institution. In the circumstances of this appeal, I find that Hydro does not have actual custody of the records held by the lawyer. Therefore, the relevant question is whether any responsive records in the custody of the lawyer are under the **control** of Hydro.

In Order 120, former Commissioner Sidney B. Linden made the following comments regarding section 10(1) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 4(1) of the Act:

> 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 a 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.

I agree with the above comments made by former Commissioner Linden. I will now consider these factors as applied to the particular circumstances of this case.

The lawyer indicates that he was retained, with the consent of all parties (including the appellant and the respondent), to conduct an independent inquiry for Hydro, concerning these two employees. The representations reveal that the inquiry consisted of interviews of a number of Hydro employees at a local hotel, conducted by the lawyer, in private, and that assurances of confidentiality were given to the persons interviewed.

The lawyer states that the only written records of his investigation consist of 97 handwritten pages of interview notes and notes which he made to himself during the investigation. He submits that these notes were made for his own benefit, to prepare his report to Hydro. He contends that these records have been sealed in an envelope and have not been disclosed to anyone. He also states that Hydro has no right to possession of the records and did not rely on them as it never had access to them. Furthermore, the lawyer maintains that Hydro has no say in the use or disposition of the notes.

In its representations, Hydro states that its main concern about conducting the investigation was confidentiality. Accordingly, in deciding who should carry out the investigation, Hydro felt that a lawyer would be the best choice, because a s\he would be "bound by rules of confidentiality". Hydro states that another concern was impartiality, which was why it did not retain its own solicitors. Hydro took no part in the investigation except to arrange for potential witnesses and the times at which they were to meet with the lawyer. Hydro confirms that it did not receive any written records of the investigation from the lawyer. The lawyer made a verbal report which was in turn verbally conveyed to the Hydro Commission meeting along with recommendations on what action to take, made by Hydro's solicitors.

Hydro's representations also state that it has no right to possession of the lawyer's investigation records, nor does it have any authority over their use or disposition. Hydro submits that the records do not relate to its mandate, which is to provide power services to the public, except indirectly and that it did not rely upon the records.

Thus, the submissions of both Hydro and the lawyer confirm the circumstances and terms under which the investigation notes were created and were to be maintained.

Because Hydro's own solicitors retained the lawyer on Hydro's behalf, the parties were asked in the Notice of Inquiry to consider the relevance, if any, of Order M-371 of the Commissioner's office. In Order M-371, dealing with the Village of Wellington's custody or control of records in the possession of its solicitor, it was determined that control over records in the context of a solicitor-client relationship, flowed from the "ownership" of the records in question. Inquiry Officer John Higgins commented upon the ownership of solicitor's records as follows:

> In my view, records in the custody of a solicitor which are the property of a client may be said to be under the client's control for the purposes of the Act (Order M-315). Several legal authorities are relevant to the issue of ownership of client records in the custody of solicitors.

For instance, section 6(6) of the Solicitors' Act, R.S.O. 1990, c. S15, indicates that, in proceedings relating to solicitors' accounts, documents which belong to the client must be dealt with as the client instructs, upon payment of all outstanding fees. That section states as follows:

> Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, **shall** deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power **belonging** to the client. (emphasis added)

In addition, this issue is addressed in a more general way in Aggio v. Rosenberg et al. (1981) C.P.C. 7, where the court quotes with approval from a text entitled The Law Relating to Solicitors (6th edition) by Corderley.

The court reproduced the following excerpts from that textbook relating to ownership of solicitors' records:

> Documents in existence before the retainer commences and sent to the solicitor by the client or by a third party during the currency of the retainer present no difficulty since their ownership must be readily apparent. The solicitor holds them as agent for and on behalf of the client or third party, and on the termination of the retainer must dispose of them (subject to any lien he may have for unpaid costs ...) as the client or third party may direct.
>
> Documents which only come into existence during the currency of the retainer and for the purpose of business transacted by the solicitor pursuant to the retainer, fall into four broad categories:
>
> (i) Documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for [by] the client, **belong to the client**.
>
> (ii) Documents prepared by the solicitor for his own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to the solicitor.
>
> (iii) Documents sent by the client to the solicitor during the course of the retainer, the property in which was intended at the date of despatch to pass from the client to the solicitor, e.g., letters, belong to the solicitor.

> (iv) Documents prepared by a third party during the course of the retainer and sent to the solicitor (other than at the solicitor's expense), e.g., letters, **belong to the client.** (emphases added)

The lawyer, in his representations, submits that his notes are not the property of Hydro. Hydro would not be entitled to delivery of the notes upon payment of his account, nor would any client be entitled to delivery of notes which he had prepared for himself. The lawyer contends that the records in this appeal were prepared for his own benefit as an aide-memoire and that the preparation of the notes was not charged against his client. Accordingly, he submits that the records do not fall within any of the categories set out above which indicate ownership by the client.

Similarly, Hydro's representations state that the records were prepared by the lawyer for his own benefit and not at the request of Hydro. Hydro submits that it does not have ownership of the notes, rather these belong to the lawyer and, therefore, Hydro has no control over the records.

Having considered the representations of the parties and all of the circumstances of this appeal, I make the following findings:

1. Based on Hydro's representations, I find that the lawyer was hired as an **investigator**, to provide an impartial and independent inquiry into the complaint and was not retained in his capacity as a **solicitor** to act on Hydro's behalf in a true solicitor-client relationship. If the lawyer was not retained as a solicitor for Hydro, then Order M-371 does not apply and the issue of "ownership" of the investigation records is not applicable to this appeal.

2. Applying the factors set out in Order 120 to the evidence before me with respect to the terms of the agreement between Hydro and the lawyer setting out the conditions of his employment and the maintenance of the records, I find that there are no indicia of "control" over the investigation records by Hydro.

3. I further find that, even if the lawyer was acting in the capacity of a solicitor for Hydro, the investigation records which he created are not the property of Hydro (the client). The records were created by the lawyer for his own benefit. They were not an item chargeable against Hydro. Applying the criteria in Order M-371, the records are the property of the lawyer and for this reason, Hydro does not have control over them.

4. For these reasons, I find that Hydro does not have custody or control over the investigation records within the meaning of section 4(1) of the Act and, accordingly, the records cannot be subject to an access request under the Act.

As I have previously noted, the investigation records are the only ones remaining at issue in this

appeal. As I have found that they are not subject to an access request under the Act, this order will dispose of the appellant's appeal in its entirety.

ORDER:

I uphold Hydro's decision that it does not have custody or control of the responsive records in the possession of the lawyer pursuant to section 4(1) of the Act.

Original signed by: April 12, 1995
Anita Fineberg
Inquiry Officer

POSTSCRIPT:

In an environment of increasing fiscal constraints, there is a trend towards government institutions privatizing or "contracting out" government services in order to save costs. This raises the issue of the public's right to know about these services and to have access to the records created by such private contractors. This issue is particulary acute in harassment investigations when the individual requesting the information is usually one of the parties to the investigation and the records, therefore, contain his or her personal information.

Where an institution contracts out a harassment investigation, public funds are being expended to resolve the rights of employees in the workplace. In these situations, government employees would ordinarily have the right to access information about the investigation according to the provisions of the Act. To remove this entitlement by "contracting out" both diminishes accountability of the institution and confers unequal rights on government employees depending upon where they work.

In my view, where, because of its size or other considerations, an institution decides to contract out such investigations, the terms of the agreement should ideally provide that the investigator should turn over all of his or her written materials to the institution once the inquiry is completed. In the alternative, the agreement should stipulate that the institution retains control over the documentation for the purposes of the Act.

I would emphasize that an approach which ensures that institutions maintain custody and/or control of harassment investigations records for the purposes of the Act, does not automatically mean that such documents will be disclosed in response to an access request. An institution is free to avail itself of the exemptions set out in the Act in determining whether or not it is prepared to release the

relevant documents.

In this case, the investigation into the appellant's allegations of sexual harassment was conducted by the lawyer in July 1993. Hydro has since developed a Workplace Harassment and Discrimination Policy which became effective in November 1994. Pursuant to the policy, complaints are now investigated internally and assurances of confidentiality are subject to the Act. On this basis, records of the type sought by the appellant in this case are now in the custody and control of Hydro pursuant to section 4(1) of the Act and would thus be subject to an access request.