



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

ORDER M-152

Appeal M-9200372

Halton Board of Education



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ORDER

The Halton Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all auditor's working papers (the papers) concerning an audit of certain courses offered by the Board. The Board responded to the request by denying access on the basis that no responsive records exist. The requester appealed the Board's decision.

During mediation of the appeal, the appellant advised the Appeals Officer that it was her position that, if the papers were in possession of the auditor for the Board, they were to be considered to be records that are under the control of the Board for the purposes of the Act. Accordingly, she stated that the Board must issue an access decision on the records. She maintained that the Board could not deny access to the records on the basis that no records exist.

The Board subsequently confirmed that the sole issue in this appeal is whether the papers are records which are in the custody or under the control of the Board. The appellant agreed.

Settlement of the appeal was not successful, and notice that an inquiry was being conducted to review the Board's decision was sent to the appellant, the Board, and the auditors who prepared the papers. Because the issue of the custody and control of these papers has implications beyond the scope of this particular appeal, the Institute of Chartered Accountants of Ontario (the ICAO) was added as an affected party and given the opportunity to submit representations. Representations were received from all of the parties. Included in the representations is a sworn affidavit from one of the partners of the accounting firm that conducted the audit.

In their representations, all the parties, with the exception of the appellant, submitted that the papers are **not** records which are in the custody or under the control of the Board within the meaning of section 4(1) of the Act.

The appellant has taken the position that although the auditor's working papers may be in the custody of the auditor, they are under the control of the Board. She also submits that, as a taxpayer and as the person who ultimately pays for the audit, she should be entitled to a decision regarding access to these records in accordance with 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.

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.

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.

A number of orders have dealt with the issue of custody and control by examining the particular circumstances of an appeal in relation to the types of factors set out in Order 120 (Orders P-239, P-271, P-326, P-396, and M-59). I will review the issue of the custody or control of the papers based on the particular facts of this case and the type of records at issue.

The papers at issue in this appeal were created by an auditor who conducted an external audit of the Board's financial records pursuant to the provisions of section 234(2) of the Education Act. This section requires every board to appoint an auditor and ensures the independence of the auditor. The auditor was a member of the staff of a firm of chartered accountants who performed the audit under contract to the Board.

The ICAO indicates that such papers generally provide the documented evidence of the work performed and the conclusions reached in forming the auditor's opinion on the financial statements. They provide support for the auditor's opinion regarding the fairness of those statements and the evidence that the audit was performed in accordance with Generally Accepted Auditing Standards.

The primary source of Generally Accepted Auditing Standards is the Handbook of the Canadian Institute of Chartered Accountants (the CICA). Section 5145 of the CICA Handbook contains the recommendations relating to the standards applicable to documentation for audit engagement. Paragraphs 5145.06 and 5145.07 state:

The auditor should document matters which in his or her professional opinion are important in providing evidence to support the content of his or her report.

Audit working papers are the property of the auditor.

The Board, the ICAO, and the auditors have provided submissions on the status of the papers according to legal principles. Appellate courts in Canada and in the United Kingdom have held that working papers and other papers brought into existence by chartered accountants in the preparation of a final audit of a client's books are the property of the accountants and not of the client.

The auditors have indicated that the papers are in their physical possession and the Board confirms that it never had possession of the papers; nor does it have any right to possession of the papers. The ICAO indicates that there is no mandatory statutory or employment requirement which

would allow the Board to have possession of the papers. As far as the voluntary provision of the papers from the auditor to the Board is concerned, the ICAO submits:

Not only would the auditor be restricted from disclosing information contained in the working papers to third parties, he or she is also responsible for ensuring that the client or the client's staff are prevented from obtaining access to these files. The working papers may contain information about auditing procedures, payroll records and independent confirmations that should not be made available to the client or members of the client's staff.

The Board, ICAO and the auditors all indicate that the papers are not relied upon by the Board in carrying out its mandate. While the Board may rely upon the auditor's professional opinion as contained in the audit report, there is no reliance on the papers which the auditor prepared in support of the opinion. Furthermore, the papers have no relationship to any other records held by the Board.

The Board itself has indicated that it has no authority to regulate the use, content, retention or disposition of the papers. Only the auditor has this authority.

Having reviewed the representations of all the parties, and having regard to the indicia of control identified by former Commissioner Linden in Order 120, I find that the auditor's papers are neither in the custody nor under the control of the Board. Accordingly, the papers are not accessible under the Act in the circumstances of this appeal.

ORDER:

I uphold the Board's decision that the papers are not records which are in the custody or under the control of the Board.

Original signed by: _____ June 25, 1993
Anita Fineberg

Inquiry Officer