



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-387

Appeal M-9400271

Town of Whitchurch-Stouffville



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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 requester asked the Town of Whitchurch-Stouffville (the Town) to provide him with copies of records relating to the flooding of certain property belonging to his clients in 1991 and 1993, including a report prepared by an engineering consulting firm for the Town's insurer. The Town located a number of records responsive to the request and provided them to the requester. The Town informed the requester, however, that the engineering report was not in its custody or control. The requester appealed the decision of the Town pertaining to the engineering report.

A Notice of Inquiry was provided to the parties in the appeal. The parties were the appellant, the Town, its insurance broker, its insurer, and the claims adjuster retained by the insurer. Representations were received from all parties.

The only issue to be determined in this appeal is whether the Town has custody or control of the engineering report to which the appellant seeks access under section 4(1) of the Act.

DISCUSSION:

CUSTODY OR CONTROL

Section 4(1) of the Act introduces the concept of custody and control. This provision states that:

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 stated that the concepts of custody and control should be given a broad and liberal interpretation in order to give effect to the purposes and principles of the Act. The Commissioner then proceeded to outline the following approach for 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.

This approach has been followed in many subsequent orders. In each case, the issue of custody and/or control has been decided based on the particular facts of the case, the factors outlined in Order 120 and the related considerations which have been articulated in these orders. Similarly, this appeal must be decided on the basis of its particular facts.

The position of the Town and of the affected persons may be summarized as follows:

- The claim which led to the creation of the record was received by the Town and passed over to the Town's insurance agency.
- It was the insurance adjustors, acting on behalf of the Town's insurers, who decided that the record should be created to assist the insurers in assessing the claim.
- The record was created for, and delivered to, the Town's insurers and is considered to be the property of the insurers.

- The Town's insurers act independently of the Town on its behalf in defending claims brought against it.
- The Town has no authority to control, retain or dispose of records created for, and at the request of, its insurer.
- The record has never been in the physical possession of the Town or any of its officials, and has never been seen by any officer of the Town.

The first question for me to determine is whether the Town currently has **custody** of the engineering report sought by the appellant. I am satisfied, following my review of the representations of the parties, that the Town does not have, nor has it ever had, custody of the record within the meaning of section 4(1) of the Act.

Given that the Town does not have custody of the record, I must now determine if the Town exercises the requisite degree of **control** over this document as defined in section 4(1) of the Act. I find that the record at issue was not created for or on behalf of the Town, but rather, was created independently by the Town's insurers. In addition, the Town does not have the right to either obtain, retain or dispose of the engineering report.

Having reviewed the representations of the parties, and bearing in mind the indicia of control identified by former Commissioner Linden in Order 120, I find that the Town does not exercise control over the record and it is not, therefore, accessible under the Act.

ORDER:

I uphold the decision of the Town.

Original signed by: _____
Donald Hale
Inquiry Officer

September 12, 1994