



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-371**

**Appeal M-9300386**

**Village of Wellington**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant has submitted a six-part request to the Village of Wellington (the Village). In part one of the request (which is the only part at issue in this appeal) the appellant sought access to the following records in the possession of a named solicitor for the Village (the solicitor):

- all files, letters, notes and information relating to the passing of By-law #1234, and
- any correspondence to and from a named corporation (the corporation), its solicitors or engineers up to December 31, 1992.

The Village initially denied access to the responsive records on the basis that they are subject to the solicitor-client privilege exemption provided by section 12 of the Act. During mediation of the appeal, the Village amended its position. It no longer relies on the exemption in section 12. Instead, it takes the position that, for the purposes of section 4(1) of the Act, it does not have custody or control of records in the possession of the solicitor.

A Notice of Inquiry was sent to the appellant, the Village, the solicitor and the corporation. In addition, as the appeal raises issues of a general nature relating to records in the possession of a solicitor, a copy of the Notice of Inquiry was also sent to the Law Society of Upper Canada. Representations were received from the appellant, the Village and the solicitor.

## **DISCUSSION:**

### **CUSTODY OR CONTROL OF RESPONSIVE RECORDS**

Both the Village and the solicitor submit that records in the custody of the solicitor are not in the custody or under the control of the Village 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. Section 4(1) 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. (emphasis added)

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** control of an institution. In the circumstances of this appeal, where the Village does not have actual custody of the records held by the solicitor, the relevant question is whether any responsive records in the custody of the solicitor are under the **control** of the Village.

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. In this appeal, the relevant questions from the above list will be those which relate to the issue of control. In my view, questions 5 and 10 are particularly relevant.

The solicitor's representations on this issue state as follows:

Such records are definitely not under the control or custody of the Village nor does the Village have the right to possession of my records.

It is a strict policy of this firm, and has been for over twenty years, that any and all records belong to us and constitute our property. As our matter of policy, our records are culled and/or destroyed at regular intervals for storage purposes.

The Village's representations on this issue consist of cursory answers to questions raised in the Notice of Inquiry (which closely parallel those quoted above from Order 120).

Neither the Village's representations nor those submitted by the solicitor contain any further evidence or authority to substantiate the position that the records in the solicitor's custody are not under the Village's control.

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)

Based upon the evidence presented to me, I find that, in the circumstances of this appeal, it is the principles enunciated in the Aggio case, above, rather than the "policy" formulated by the solicitor's firm, which determines ownership of records in the solicitor's custody. Accordingly, it will be necessary to assess the responsive records in the solicitor's custody to determine whether, in view of the foregoing criteria, they belong to the Village. Records which belong to the Village are under its control for the purposes of section 4(1) of the Act.

If I had been provided with copies of the responsive records in the custody of the solicitor, or even an adequate description of the records, I would be in a position to assess which ones are under the control of the Village. However, the Village did not provide the Commissioner's office with copies of the records as requested in the Confirmation of Appeal. And, despite being asked to do so in the Notice of Inquiry, the solicitor did not provide a description of the responsive records in his custody.

Under these circumstances, I will order the Village to arrange for a review of the responsive records in the solicitor's custody to determine which records are under its control, based on the criteria set out in this order. In making the determination as to which records are under its control, the Village should have regard to the criteria set out in the Aggio case, as quoted above. Once this determination has been made, the Village will be required to make an access decision regarding the responsive records which are under its control.

**ORDER:**

[IPC Order M-371/August 10,1994]

1. I order the Village to arrange for a review of responsive records in the custody of the solicitor to determine which of these records are under its control, and to provide an access decision to the appellant with respect to any responsive records under its control, in the form contemplated by sections 19, 22 and 23 of the Act, within thirty (30) days after the date of this order, without recourse to a time extension.
  
2. In order to verify compliance with Provision 1 of this order, I order the Village to provide me with a copy of the correspondence referred to in Provision 1 within thirty-five (35) days after the date of this order. This should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_  
John Higgins  
Inquiry Officer

\_\_\_\_\_ August 10, 1994