



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-452

Appeal M-9400551

The Corporation of the Town of Whitby



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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 Corporation of the Town of Whitby (the Town) received a request for records detailing the cost of the cellular phone used by the Town Administrator for the years 1992 and 1993. Included in this request was the detailed listing of the chargeable calls which is provided with each invoice. The Town provided access to the part of the invoice which shows the total amount billed for the month (the account summary), with the exception of the account summary issued in September 1992. The Town indicated that it did not have custody or control of the account summary for September and the listings of chargeable calls. The requester appealed this decision.

A Notice of Inquiry was provided to the Town, the appellant and the Town Administrator. Representations were received from the Town and the appellant.

DISCUSSION:

CUSTODY OR CONTROL OF RECORDS

The sole issue in this appeal is whether the Town has custody and control of the records at issue 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.

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 an approach for determining whether specific records fell within the custody or control of an institution, which involved a consideration of 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. I agree with Commissioner Linden's approach, and have used it to examine the facts of this particular appeal.

The records are part of the invoices which were created by the company from which the cellular phone was leased. The Town submits that the intent of the company was presumably to enhance its ability to collect its account from the Town and I agree, as providing the Town with details of the usage for which charges were incurred enables the Town to verify the legitimacy of the charges prior to payment.

The Town submits that it never had possession of the records, as it was agreed between the Town and the Administrator that the Administrator was not required to provide the Town with the detailed breakdown of the chargeable calls as part of the invoice approval process. The Town argues that while the records were held briefly by the Administrator, it was not as part of his official capacity and the records were, therefore, never in the possession of an employee.

The account summaries which were disclosed to the appellant show that the phone was leased in the Town's name, that the monthly invoices were sent to the Municipal Building to the attention of the Administrator by name. The Administrator himself, in his official capacity, approved payment of the amount indicated in each account summary, and forwarded the account summary portion of the invoices to the Town's Treasury Department, which remitted payment in full.

The Town indicated to the appellant that the account summary issued in September 1992 was discarded by the Administrator because an overpayment on the account during the previous month covered the amount due for September. As no money was owed, the account summary was not turned over to the Treasury Department and was discarded with the rest of the bill.

The Town asserts that it never had a right to possess the records prior to their disposal. The Town submits that it considers the detailed listing of chargeable calls to be the personal information of the Administrator and, as such, the Town passed a resolution which states that the Administrator is not required to submit this information to the Town.

The resolution passed by the Town Council is not something the Town Council was legally required to do, nor is it sufficient to bring information within the definition of personal information for the purposes of the Act, nor is it dispositive of the issue of whether the Town has custody or control of the requested records. The Town Council is able, at any time, to pass another resolution altering or replacing its previous resolution, and is in complete control of whether it chooses to exercise its right to possess the records. Further, I have confirmed that, as the account is in the name of the Town, the cellular company would, at the request of the Town, provide the Town with copies of all invoices previously issued, including the detailed list of chargeable calls. Accordingly, the Town's claims that it had no right to possess the records and that the records do not exist are, in my view, without basis in fact.

By agreeing that the calls made and received were the personal information of the Administrator, the Town states that, by inference, he could do with them what he wished. The Town submits that the records do not relate to the Town's mandate or function, that it never relied on the records, and that the records were never integrated with other records kept by the Town.

The responsible administration of public funds is central to the mandate and function of every public institution and the Town has an obligation to properly manage its record holdings in accordance with the intent of the Act. The only limits on the Town's custody or control of the requested records have been imposed by the Town itself and, accordingly, I find the Town does have the requisite degree of control over the records within the meaning of section 4 of the Act.

Having considering all the relevant circumstances of this appeal, I believe it is appropriate for me to adopt an approach set out in earlier orders (Orders P-193 and M-439) and order the Town to respond to the request without recourse to any fee.

ORDER:

1. I order the Town to request copies of the part of the invoices which lists the chargeable calls for the years 1992 and 1993 and the account summary portion of the invoice issued in September 1992 from the cellular phone company within ten (10) days of the date of this order.
2. I order the Town to issue a decision letter to the appellant regarding access to the records which it obtains from the cellular phone company pursuant to Provision 1 within ten (10) days of the date of receipt of the records from the cellular phone company.
3. Should the decision made by the Town as a result of Provision 2 be to disclose the records or parts thereof to the appellant, I order it to do so without recourse to any fee.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the Town to provide me with a copy of the decision letter which is provided to the appellant pursuant to Provision 2.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ January 30, 1995

POSTSCRIPT:

Choosing not to exercise a right to control these records fails to recognize that there is a legitimate expectation on the part of the public that the expense claim verification policies and procedures in place in public institutions are being properly administered. Whatever the reason for doing so, such action is likely to fuel public suspicions of impropriety and this is not in the public interest.