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

ORDER M-824

Appeal M_9600129

Township of Alberton

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NATURE OF THE APPEAL:

The Township of Alberton (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to the requester which were collected by Council, members of Council and/or their representatives concerning a particular complaint. The requester is a former employee of the Township. The Township denied access to the records pursuant to section 12 of the Act (solicitor-client privilege).

The requester appealed the Township's decision to deny access.

During the mediation stage of the appeal, the appellant narrowed the scope of her appeal to cover only the records which are in the possession of the Township's solicitor.

Within the 35_day period provided in the Confirmation of Appeal letter for raising additional discretionary exemptions, the Township issued a supplementary decision letter. In its supplementary decision, the Township stated that pursuant to section 52(3), the Act does not apply to any of the records at issue with the exception of one specific record. This record consists of the agreement between the Township, the appellant and two other individuals, a copy of which is already in the appellant's possession. In its supplementary decision letter, the Township also raised the application of sections 6(1)(b), 8(1)(b), 8(2)(a), 10, 11(c), (e) and (f), 12, 13, 14 and 38 of the Act to the records.

During the mediation stage of the appeal, the appellant took the position that additional records responsive to her request should exist.

The Township acknowledged that there are additional records which are potentially responsive to the appellant's request. However, the Township took the position that these records belong to its solicitor (the solicitor) and are neither in the custody of the Township nor under its control.

A Notice of Inquiry was sent to the appellant, the Township and the solicitor. Due to the nature of this appeal, the Notice of Inquiry addressed two preliminary issues only: (1) whether the records responsive to the request in the possession of the solicitor are in the custody or under the control of the Township and (2) whether the Township has conducted a reasonable search for the records as required by section 17 of the Act. It was agreed by the parties that the consideration of section 52(3) and the exemptions claimed by the Township to the records in its custody and control and other matters would be deferred pending the outcome of these two issues.

Representations were received from all parties.

DISCUSSION:

CUSTODY OR CONTROL

The Township submits that additional records exist which are not within its custody or under its control within the meaning of section 4(1) of the Act.

Neither the Township, nor the solicitor has provided me with a copy of these records. The solicitor's submissions, however, do describe the contents and nature of these records.

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,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.
> [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 must be **either** in the custody **or** under the control of an institution. In the circumstances of this appeal, the relevant question is whether the records which are in the custody of the solicitor are under the **control** of the Township.

In Order 120, former Commissioner Sidney B. Linden made the following comments regarding section 10(1) of the provincial Act, which is equivalent to 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. Several legal authorities are also relevant to the issue of ownership of client records in the custody of solicitors.

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]

This section indicates that records which **belong** to the client must (unless there are unpaid fees) be delivered to the client on demand, or otherwise disposed of as the client directs. Accordingly, in my view, ownership of documents constitutes "control" for the purposes of section 4(1) of the Act.

A review of the law and authorities in this area indicates that ownership of records in a lawyer's file depends on the nature of the record (Aggio v. Rosenberg et al (1981) 24 C.P.C. 7 and Spencer v. Crowe and Nova Scotia Legal Aid Commission (1986), 74 N.S.R. (2d) 9, 180 A.P.R.

9 (NSTD), "A Lawyer's Authority Over Documents On Termination of Retainer" (1981), 15 L.S.U.C. Gaz. 103).

The Township submits that the records which it claims belong to the solicitor fall into the following two categories:

(a) Documents prepared by the solicitor for his own benefit and protection, the preparation of which is not regarded as an item chargeable against the client, namely:

(i) personal notes prepared by the solicitor of telephone discussions had with various representatives of the client Township;

(ii) personal notes of telephone conversations had with the appellant's solicitor; and

(iii) personal notes of meetings had with various representatives of the Township and with the appellant's solicitor.

(b) Documents sent or provided by representatives of the Township to the Township's solicitor during the course of the discussions referenced in the appellant's letter of request, the property in which was intended at the date of dispatch to pass to the solicitor, namely, documents which can be said to be letter, authorities, and "instructions written or given" to the solicitor in the context as between a client and his or her lawyer.

The Township and its solicitor submit that the records are not under the control of the Township and that the Township has no right to these documents. The Township confirms in an affidavit that the records belong to the solicitor and that it has no control over these records, nor are these records within the Township's custody or possession.

Having carefully reviewed all the representations submitted by the appellant, the Township and the Township's solicitor, I am satisfied that all records described by the Township and its solicitor in their representations do not belong to the Township, and are therefore not under the Township's control for the purposes of the Act.

REASONABLENESS OF SEARCH

The appellant maintains that additional records beyond those already identified should exist. Subsequent to the filing of this appeal and in response to mediation efforts of this office, the Township conducted further searches. However, no additional records were located.

When a requester provides sufficient details about the records which he or she is seeking and the Township indicates that no additional records exist, it is my responsibility to ensure that the Township has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Township to prove with absolute certainty that the

requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Township must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

In its representations, the Township points out that the appellant has narrowed her scope of the appeal to records which are in the possession of the Township's solicitor only. Accordingly, the Township and its solicitor have provided details of the searches conducted for such records.

The Township's representations state that the search for potentially responsive records was carried out by the solicitor and his secretary. The places searched for potentially responsive records were in central filing cabinets, in the solicitor's private office, places within the secretary's work area, and any other place within the building where potentially responsive records may exist.

I have considered the representations of all the parties and I am satisfied that the search conducted by the Township for the responsive records was reasonable in the circumstances of this appeal.

ORDER:

1. I uphold the Township's decision regarding custody and control with respect to records in the possession of the Township's solicitor.

2. I find that the Township's search for responsive records was reasonable in the circumstances of this appeal and this aspect of the appeal is dismissed.

Original signed by: August 20, 1996
Mumtaz Jiwan
Inquiry Officer