



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

ORDER M-1049

Appeal M-9700243

City of Elliot Lake



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:

The City of Elliot Lake (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The requester, a local resident, sought access to a copy of the audited financial statements for the year ending December 31, 1996 of a corporation called the “Non-Profit Retirement Residences of Elliot Lake Inc., also known as Elliot Lake Retirement Living” (the Corporation). The City undertook a search for the relevant record and advised the requester that it did not have custody or control over this document.

The requester, now the appellant, appealed the City’s decision on the basis that the City should have a copy of the financial statements of the Corporation. The appellant indicates that the Letters Patent of the Corporation provide that the City Council approves the names of two out of 12 members/directors of the Corporation. The appellant believes that because the Mayor and a Councillor served as members/directors of the Corporation in 1996, the City exercises the requisite degree of control over the Corporation’s records for that year, including its financial statements.

A Notice of Inquiry was provided by this office to the appellant and the City. Representations were received from both parties.

DISCUSSION:

CUSTODY OR CONTROL

Section 4(1)(a) of the Act states as follow:

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 the part of the record falls within one of the exemptions under sections 6 to 15. (emphasis added)

The issue which I must decide is whether the City has custody or exercises a sufficient degree of control over the Corporation’s records, including its financial statements, within the meaning of section 4(1).

In Order P-239, former Commissioner Tom Wright considered the issue of “control” and he stated:

In my view, the fact that there may be limits on the institution’s ability to govern the use of the records is relevant to the issue of whether the institution has control of the records, but does not preclude an institution from having custody.

In Order 120, former Commissioner Sidney B. Linden stated that the terms “custody” and “control” should be given a broad interpretation in order to give effect to the purposes and principles of the Act. I agree with the approach articulated by former Commissioners Linden and Wright and adopt it for the purposes of this appeal.

In these orders, a number of criteria were established to assist in the determination of whether an institution has either custody or control over certain records. The factors listed in those orders are not

exhaustive but, rather, they reflect the kinds of considerations which should be applied in determining questions of custody or control in individual cases.

The City describes the Corporation as a not for profit corporation created by Letters Patent under the Ontario Business Corporations Act in 1991. The City submits that the Corporation is a completely separate legal entity from the City and that the relationship between them is entirely arms-length. The City further submits that the Corporation receives no funding from the City. Finally, the City acknowledges that the Corporation's Letters Patent grant to it the right to nominate two individuals as members/directors of the Corporation. One of these positions is presently held by the Mayor, while the other is currently vacant.

With respect to the issue of custody or control over the requested records, the City points out that the Corporation's directors are required to sign a confidentiality agreement prior to assuming their position as member/director with the Corporation. The City has no right of access to the requested information, nor was the information created by a City official or employee. The City states that it has no right either to dispose of or possess the requested document, nor has the City been provided with a copy of this record, either formally or informally. In addition, the City indicates that while the Mayor and Councillor were given a copy of the financial statements of the Corporation at its Board meeting on February 22, 1997, they and the other members/directors of the Corporation were required to return these documents at the end of the meeting. Finally, the City submits that the duties of a City-nominated member/director of the Corporation are not part of the duties of any officer or employee of the City.

The appellant submits that the City has the right to name two members to serve as members/directors of the Corporation. Accordingly, he argues that any documents, such as financial statements, which are circulated to those members/directors at meetings of the Corporation, fall within the custody or control of the City nominees, and thereby, the City.

In addition, the appellant submits that, by virtue of the participation of City officials in meetings of the Corporation's Board of Directors, the City has in its custody the document requested. In support of this contention, the appellant relies on Order P-1291 in which I found that records provided to Ministry of Health officials through their participation in a national blood products program were properly considered to be in the custody or under the control of the Ministry of Health for the purposes of section 10(1) of the Freedom of Information and Protection of Privacy Act, which is the equivalent provision to section 4(1) in the municipal Act.

In my view, the facts of that case may be distinguished from those in the present appeal. In Order P-1291, Ministry of Health officials participated, along with representatives of other provincial health ministries and their federal counterparts, in meetings with respect to the implementation of a national blood products program. Issues surrounding the management of a national blood products program clearly fall within the mandate of these agencies. The written materials created as a result of the meetings and circulated to the participants were designed to facilitate the discussions and to brief other officials at their respective provincial ministries on the progress and substance of the discussions.

In the present case, the requested record was not created for the purpose of informing the City of Elliot Lake of the financial or other status of the Corporation. Rather, the record was created as part of the Corporation's mandate to properly manage its finances on behalf of its members and funding agencies. Accordingly, I cannot agree that the principles established in Order P-1291 have any application to the present appeal.

It must also be noted that in the present appeal the members/directors of the Corporation were required to return the circulated copies of the Corporation's financial statements at the end of the February 22, 1997 meeting. These documents did not, therefore, continue in the possession of either the Mayor or the Councillor who were present at the meeting.

Based upon my review of the submissions of the parties and being mindful of the criteria described in Orders 120 and P-239, I make the following findings:

1. I accept the City's evidence that neither it nor the Mayor or Councillor have the requested record in their possession. The City does not, therefore, have custody of the 1996 financial statements of the Corporation.
2. As only two out of twelve members/directors of the Corporation are "approved" by the City, the Corporation cannot be deemed to be part of the Municipality under section 2(3) of the Act. Accordingly, the Corporation itself is not subject to the access provisions of the Act.
3. I accept the evidence of the City that it does not exercise the requisite degree of control over the Corporation or its records to bring the requested document under the control of the City for the purposes of section 4(1).
4. Accordingly, I find that the requested information is not within the custody or control of the City within the meaning of the Act.

ORDER:

I uphold the City's decision and dismiss the appeal.

Original signed by: _____
 Donald Hale
 Inquiry Officer

December 18, 1997