



Information and Privacy
Commissioner/Ontario

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

INTERIM ORDER M-1078

Appeal M-9700253

Town of Fort Erie



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Town of Fort Erie (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of an audit report regarding allegations of fraud or credit card misuse by a senior municipal official. The Town identified a draft audit report as the only responsive record, and denied access in full based on the following exemptions contained in the Act:

- advice or recommendations - section 7(1)
- solicitor client privilege - section 12

In its decision letter, the Town also advised the appellant that the draft audit report had not been completed and that it does not have possession of the final report. The appellant appealed the denial of access.

During mediation, the Town clarified that a final report had not been completed, and that the draft audit report remains in the possession of its Toronto-based counsel (Counsel). The Town issued a subsequent decision to the appellant, claiming that it does not have custody and/or control of the record pursuant to section 4(1) of the Act. The Town also advised that it would not be providing a copy of the record to this office.

Because the Town has not provided a copy of the record, it is not possible to determine whether the exemptions claimed by the Town properly apply. Therefore, the sole issue in this inquiry is whether the Town has custody and/or control of the record pursuant to section 4(1) of the Act. The parties have agreed that consideration of the exemptions claimed by the Town would be deferred pending the outcome of this inquiry.

A Notice of Inquiry was sent to the appellant and the Town. Representations in response to the Notice were received from the Town only.

DISCUSSION:

CUSTODY OR CONTROL

According to the Town, it retained Counsel for the purposes of litigation with the senior official. Counsel, in turn, retained a chartered accounting firm to assist with certain issues relevant to the litigation. Although the retainer was between Counsel and the accounting firm, it is clear from the terms of the retainer and other related correspondence between the Town, Counsel and the accounting firm, that the Town is responsible for all payments made to the accounting firm for services rendered under the retainer.

The accounting firm prepared the draft audit report which, according to the Town, was approximately 90% complete. The accounting firm provided copies of the draft report to Counsel and to the Town's

local solicitor. The record was marked “for discussion purposes only” and the accounting firm instructed the Town's local solicitor not to make copies and to return the record back to the firm.

The Town further submits that the draft report was not distributed to any member of the Town Council. Counsel attended a Town Council meeting to provide a status report on the audit, and to obtain instructions as to whether the accounting firm should proceed to finalize the audit report. Counsel was instructed by the Town to advise the accounting firm not to undertake further work to finalize the report, and not to incur any further expenses. As a result, no final report was prepared.

The Town submits that the draft audit report is not within its custody or under its control within the meaning of section 4(1) of the Act.

Although I do not have a copy of the record before me, the representations provided by the Town describe it in some detail.

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 record which is in the custody of Counsel is under the **control** of the Town.

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.

The issue of whether the draft audit report is under the control of the Town turns on a determination of whether this record belongs to the Town, Counsel, or the accounting firm.

As far as Counsel is concerned, section 6(6) of the Solicitors' Act, R.S.O. 1990, c. S15, states 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 reads 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, if the record belongs to the Town, as client, this constitutes "control" for the purposes of section 4(1) of the Act.

The status 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).

In Aggio, the court quotes with approval and reproduced the following excerpts from a text entitled The Law Relating to Solicitors (6th edition) by Corderley, relating to the status of solicitor's 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 the draft audit report held by Counsel falls within category (iv), and any copies of this record held by Counsel and/or the Town's local solicitor and paid for by the Town would also belong to the Town. The Town confirms in its representations that expenses associated with the preparation of the draft audit report were paid by the Town. As stated earlier, I find that any record belonging to the Town is within the control of the Town, for the purposes of section 4(1) of the Act.

Turning now to the accounting firm, the Town argues that working papers and draft reports produced by accountants in the course of performing work on behalf of a client belong to the accountants. The Town cites two reported cases in support of this argument: Chantrey Martin v. Martin (1953), [1953] 2 Q.B. 286 at head note, 291-293 (Eng. C.A.) and Tersigni v. Circosta (1997), [1991], O.J. No. 1860 at 4-6 (Ont. Gen. Div.). The Town further submits that, in distributing the record to the Town's local solicitor, the accounting firm manifested a clear intention not to cede custody or control of the record to the Town by stipulating that the record should be returned to the accounting firm and no copies be retained. Therefore, the Town submits that custody and control of the record rests with the accounting firm and not the Town.

In my view, the Tersigni case does not support the proposition for which it has been put forward. The issue in that case was whether a plaintiff, during the course of an action, could require a third party, the defendant's accounting firm, to produce its working papers to assist the plaintiff's accountants in conducting a forensic investigation. While the nature of the "working papers" is not further described, it is clear from the judgement that this term is meant to describe **internal** working documents of the accounting firm, prepared for its own assistance and not intended to be used or shared outside that context.

That is not the case in this appeal. The record was made available to both Counsel and the Town's local solicitor, and it seems clear that while it may not have been shared with any members of the Town's Council, its contents were relied on in making a decision regarding the dispute involving the senior municipal official.

Chantrey Martin v. Martin is a decision in which an accounting firm was itself a party to litigation with a former employee, relating to its work on behalf of a particular client. In the course of litigation, the former employee sought production of the accounting firm's "working papers" concerning the client file. On appeal from the reversal of a Master's order for production, the court held that the accounting firm not only had possession of the documents in question, but that they were its property. Unlike the relationship of principal and agent, not everything held by a professional firm, be it accounting or law

firm, was automatically the property of the principal. The analogy was made concerning a solicitor's ownership of "memoranda, notes, etc. made by him for his own information in the course of business ... in connexion with work done for clients." In making this analogy, the court agreed that a client has ownership in drafts and copies of deeds prepared by the solicitor by virtue of the way in which the solicitor is paid.

In my view, the findings in Chantrey Martin are entirely consistent with a finding that ownership of the record, or at the very least the right to control what is done with the record, rests with the Town and not the accounting firm. The record is not a document prepared by the accounting firm for its own information or assistance in carrying out its professional responsibilities. It was prepared for the Town's use and benefit, whether or not the Town actually took possession of a copy or merely relied on the advice of Counsel regarding its content and usefulness in the ongoing litigation. It is also important to note that the terms of the retainer between Counsel and the accounting firm clearly indicate that the Town is responsible for payment of fees incurred by the accounting firm. Therefore, in my view, the record cannot accurately be considered as something done for the accounting firm's own assistance or information in performing its other duties for the Town.

Having carefully reviewed the Town's representations and the circumstances of this appeal, I am satisfied that the record belongs to the Town, and is therefore under the Town's control for the purposes of the Act.

ORDER:

1. I do not uphold the Town's decision that the draft audit report is not within its custody or control. Therefore, this appeal will now proceed on the basis of the exemptions claimed by the Town in its decision letter dated August 11, 1997.
2. I order the Town to provide this office with a copy of the draft audit report by **March 6, 1998**.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

February 24, 1998