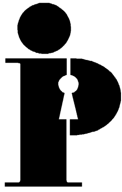

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2306

Appeal PA-030112-1

Ministry of Education

Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Sevices de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Education (the Ministry) received a six-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). Parts 1-5 were for access to records relating to contracts, invoices and supporting documentation, non-public reports, and correspondence or e-mails between a named business/individual and the Ministry, Minister and/or Deputy Minister, from June 1, 2002 to September 20, 2003. The Ministry identified nine records responsive to Parts 1-5, and provided the requester with three contracts and five invoices in their entirety, and partial access to one email. The Ministry relied on the exemption in section 21 of the *Act* (invasion of privacy) as the basis for denying access to the undisclosed portions of the email. The requester did not appeal the Ministry's decision regarding Parts 1-5.

Part 6 of the request was for access to:

> Copies of the hand-written notes of [a named individual] made during his investigations of the Toronto District School Board and the Ottawa[-Carleton] District School Board.

The Ministry did not deal with Part 6 in its decision letter, and the requester (now the appellant) appealed.

During mediation, the Ministry clarified that any hand-written notes made during the investigations could not be provided to the appellant because any such records fall outside the custody and control of the Ministry.

Mediation was not successful and the appeal was transferred to the adjudication stage of the appeal process.

I started my inquiry by sending a Notice of Inquiry to the Ministry and the named investigator (the affected party), and received written representations from both parties. I then sent the Notice to the appellant, together with the entire representations of the Ministry and the relevant portions of the affected party's representations. The appellant submitted representations, the non-confidential portions of which were in turn shared with the Ministry and the affected party, both of whom submitted further reply representations.

DISCUSSION:

CUSTODY OR CONTROL

There would appear to be agreement among the parties that the Ministry does not have *custody* of any handwritten notes prepared by the affected party during the course of his two investigations. Accordingly, the only issue in this appeal is whether any such records are under the *control* of the Ministry.

General principles

Section 10(1) provides a right of access to a record that is in the custody or under the control of an institution. Section 10(1) reads:

> 10. (1) 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 12 to 22; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

A general right of access cannot apply if the records are neither in the Ministry's custody, nor under its control. Previous orders of the Commissioner have recognized that a purposive approach must be taken to "custody or control" questions under section 10(1) [Orders MO-1237 and MO-1251].

Factors to consider generally

The following non-exhaustive list of factors may assist in determining whether the Ministry has "control" of particular records:

- Was the record created by an officer or employee of the Ministry? [P-120]

- What use did the creator intend to make of the record? [P-120, P-239]

- Does the Ministry have a statutory power or duty to carry out the activity which resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)* (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), leave to appeal granted [1997] O.J. No. 4899 (C.A.)]

- Is the activity in question a "core", "central" or "basic" function of the Ministry? [Order P-912]

- Does the content of the record relate to the Ministry's mandate and functions? [P-120, P-239]

- Does the Ministry have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [P-120, P-239]

- If the Ministry does not have possession of the record, is it being held by an officer or employee of the Ministry for the purposes of his or her duties as an officer or employee? [P-120, P-239]

- Does the Ministry have a right to possession of the record? [P-120, P-239]

- Does the Ministry have the authority to regulate the record's use and disposal? [P-120, P-239]

- To what extent has the record been relied upon by the Ministry? [P-120, P-239]

- How closely is the record integrated with other records held by the Ministry? [P-120, P-239]

- What is the customary practice of the Ministry and institutions similar to the Ministry in relation to possession or control of records of this nature, in similar circumstances? [MO-1251]

Factors to consider with records created by an affected party

The *Act* can apply to information under the control of an institution notwithstanding that it was created by a third party [Orders P-239, P-1001 and MO-1225]. The following additional factors may be relevant considerations in this context:

- If the record is not in the physical possession of the Ministry, who has possession of the record, and why?

- Who owns the record? [Order M-315]

- Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- Are there any provisions in any contracts between the Ministry and the individual who created the record in relation to the activity which resulted in the creation of the record, which expressly or by implication give the Ministry the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the Ministry, the individual who created the record or any other party that the record was not to be disclosed to the Ministry? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the Ministry?

- Was the individual who created the record an agent of the Ministry for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the Ministry to possess or otherwise control the records? [*Walmsley* v. *Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a profession in relation to possession or control of records of this nature, in similar circumstances? [MO-1251]

- To what extent, if any, should the fact that the individual who created the record has refused to provide the Ministry with a copy of the record determine the control issue?

All of these questions reflect a purposive approach to the "control" question under section 10(1). This approach has also been adopted in other access to information regimes. In *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, the Court of Appeal for Ontario (at p.6, para 34) adopted the following passage from the Federal Court of Appeal judgment in *Canada Post Corp.* v. *Canada (Minister of Public Works) (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 at 244-245:

> The notion of control referred to in subsection 4(1) of the [federal] *Access to Information Act*…is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.
>
> …
>
> It is, in my view, as much the duty of courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the *Act* or otherwise circumventing the intention of the legislature as "[i]t is the duty of boards and courts", as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the *Canadian Human Rights Act* … "to give s. 3 a liberal and purposive construction, without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature"… It is not in the power of this court to cut down the broad meaning of the word "control" as there is nothing in the *Act* which indicates that the word should not be given its broad meaning … On the contrary, it was Parliament's

> intention to give the citizen a meaningful right of access under the *Act* to government information …

Analysis of "control" factors

Officer or employee of the institution

An important factor in the "control" analysis is whether the records at issue were created by an officer or employee of the institution.

The Ministry submits that as a chartered accountant appointed by the Ministry to be an investigator pursuant to section 257.30(2) of the *Education Act*, the affected party "was not an officer or an employee of the institution but rather an independent professional contracted on a fee-for-service basis to carry out an investigation pursuant to the *Education Act*." Section 257.30(2) reads:

> The Minister may appoint as an investigator a person licensed under the *Public Accountancy Act* or an employee in the Ministry.

The Ministry explains its position further:

> The authority to appoint an investigator pursuant to subs. 257.30(2) has been exercised very rarely. In this case, the school boards subject to investigation were large and had sizable budgets, and the issues surrounding the position taken by the boards and the Ministry were high-profile. The Ministry therefore decided to appoint a third party to conduct the investigation who was not only an accredited professional, subject to standards and obligations owed to his professional body, but independent of government. It was important that the third party be both perceived an independent and be able to carry out the investigation outside the reporting structures that would apply to a Ministry employee.

The affected party also submits that he was not acting in the capacity of an officer or employee of the Ministry in undertaking the two investigative assignments.

The appellant disagrees with the Ministry's position that the affected party was an "independent professional", and argues that "there is no basis for the assertion that the affected party was independent". The appellant submits:

> The *Education Act* does not state that the investigator is independent and the investigator was not a "commission" as defined in the *Public Inquiries Act*.

The appellant also submits:

> [T]he investigation was not carried outside the reporting structures that would apply to Ministry employees. The investigator reported to the Minister, he was appointed by the Minister, and he was paid by the government. There was no

> provision for the so-called independent investigator to release his findings publicly or to report directly to the legislature.

On reply, the Ministry further explains that not only was the affected party not hired to become a "government accountant" but his appointment was not strictly a "personal engagement". The Ministry submits that its retainer with the affected party contemplates the possibility that services might be provided by staff of his accountancy firm, specifically that "the Ministry was to be billed at the 'firm's normal billing rate.'"

I accept the Ministry's position on this issue.

Canadian courts have made it clear that there is no conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor. However, the presence of certain indicators suggests which arrangement is likely to exist [*671122 Ontario v. Sagaz Industries Canada Inc.* [2001] S.C.J. No. 61.]. In my view, there is little to indicate that the affected party in this case was acting as an officer or an employee of the Ministry in conducting his investigations. He did not enter into a contract for general employment, but rather a contract to perform a described service within a specified period of time. The affected party also did not receive a salary or hourly rate for his services, but was paid on the basis of an invoice submitted to the Ministry in accordance with the terms of his retainer.

In addition, section 257.30(2) of the *Education Act* itself contemplates that individuals other than employees can be appointed to conduct investigations, at the Minister's discretion. In my view, the approach taken by the Ministry in retaining the affected party in this case is consistent with his characterization as "a person licensed under the Public Accountancy Act", rather than "an employee of the Ministry", the two alternatives available to the Minister under section 257.30(2).

For all of these reasons, I find that the affected party was not acting in the role of an officer or employee of the Ministry. This finding weighs in favour of a conclusion that the Ministry does not have control over any handwritten notes.

Statutory power

As established in Order P-912, upheld in *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)*, (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), leave to appeal granted [1997] O.U. No. 4899 (C.A.), the statutory framework is a factor to be considered in any "control" analysis.

The Ministry submits that the Minister has the statutory discretion to appoint an investigator to review the financial affairs of a school board, which indirectly led to the creation by the affected party of the records in question. The affected party was appointed to conduct investigations into the Toronto District School Board and the Ottawa-Carleton District School Board pursuant to section 257.30 of the *Education Act*. That section reads:

> (1) The Minister may direct an investigation of the financial affairs of a board if,

(a) the financial statements of the board for a fiscal year, or the auditor's report on the statements, required to be submitted to the Ministry under section 252, indicate that the board had a deficit for that year;

(b) the board has failed to pay any of its debentures or instruments prescribed under clause 247 (3) (f) or interest on them, after payment of the debenture, instrument or interest is due and has been demanded;

(c) the board has failed to pay any of its other debts or liabilities when due and default in payment is occasioned from financial difficulties affecting the board; or

(d) the Minister has concerns about the board's ability to meet its financial obligations.

(2) The Minister may appoint as an investigator a person licensed under the *Public Accountancy Act* or an employee in the Ministry.

(3) An investigator may,

…

(c) require any officer of the board or any other person to appear before him or her and give evidence, on oath or affirmation, relating to the financial affairs of the board.

…

(4) On completion of an investigation, an investigator shall report in writing to the Minister, who shall promptly transmit a copy of the report to the secretary of the board.

The affected party did not make submissions on this factor.

The appellant submits:

> [T]he Ministry had a statutory power to carry out the activity which resulted in the creation of the record. These hand written notes were not "doodle" put together by a volunteer. **They were the source documents for an investigation that was commissioned and carried out by the government.** (appellant's emphasis)

It is clear that that the Minister has a statutory discretion, pursuant to section 257.30 of the *Education Act*, to appoint an investigator who is either a person licensed under the *Public*

Accountancy Act or an employee in the Ministry, to review the financial affairs of a school board and prepare a report of the investigation. The wording of the *Education Act* gives the Ministry authority to initiate an investigation and to have it conducted either internally by a Ministry employee or externally by an independent investigator. Section 257.30(4) requires the investigator to report in writing to the Minister after completing the investigation, and for the Minister to forward a copy of the report to the relevant school board.

In my view, the Ministry has a clear statutory power or duty to carry out the activity which resulted in the creation of any handwritten notes used to produce the reports required by section 257.30(4). This finding weighs in favour of a conclusion that the Ministry does have control over any handwritten notes.

Core, central or basic function of the Ministry/Ministry's mandate and functions

The Ministry submits that conducting investigations into the financial affairs of school boards is not a "core", "central" or "basic" function of the Ministry, and that any personal notes made by the affected party only relate in a "remote fashion" to the Ministry's mandate and functions. The Ministry explains that conducting such investigations is not included in the Ministry's "Core Business" as described in its 2002-2003 Business Plan and submits:

> There is no statutory requirement that the Ministry conduct investigations into the financial affairs of school boards. In fact, the exercise of the discretion to do so under subs. 257.30 of the *Education Act* has occurred very rarely, and it is due to the exceptional nature and magnitude of the activity in question that the Ministry retained an independent professional (a chartered accountant) to carry out the investigation.

The affected party did not make submissions on this factor.

The appellant disagrees with the Ministry's position:

> Despite the protestations of the Ministry in paragraph 13 of its representations, one of the mandates of the Ministry, as outlined in the *Education Act*, is to ensure compliance with Board obligations (PART VIII) and to supervise Board's financial affairs (Division D of the Education Act). If the Ministry asserts that supervising school boards and ensuring compliance with the funding formula is not part of its "core", "central" or "basic" function, then the entire funding regime for public education in Ontario will unravel. The fact that the Minister appointed an investigator and also recommended that a vesting order be issued underscores the fact that this is a core, central or basic function of the Ministry.

I accept the appellant's position on this factor.

Under section 257.30(1) of the *Education Act*, the Ministry has the authority to oversee a board's financial affairs in specified circumstances. The fact that the Ministry rarely decides to conduct investigations into the financial affairs of a school board under this authority is not determinative

of whether it is properly considered as a core, central or basic function of the Ministry's mandate. In my view, the discretion provided to the Minister under section 257.30 is part of the Ministry's basic role in ensuring that the financial affairs of school boards are in order and that provincial funds are not being mismanaged. This finding weighs in favour of a conclusion that the Ministry does have control over any handwritten notes.

Possession of the records

The Ministry and the affected party both submit that the Ministry does not have physical possession of any handwritten notes, nor the right to physical possession of them.

The affected party submits:

> My working papers are not in the custody or control of the Ministry of Education, nor have they ever been made available to the Ministry.
>
> The Ministry of Education does not possess the ability to dictate the use, distribution or disposal of my working papers.
>
> …
>
> There is no right of possession by the Ministry of Education of my work product contemplated in my appointment as an independent investigator.
>
> My working papers are in no way integrated with, or linked to, records of the Ministry of Education.

The Ministry submits that any handwritten notes have always remained in the possession of the affected party who prepared them for his own use in connection with preparing reports for the Ministry, and that the Ministry has never had physical possession of any such records:

> [The records] have neither been provided voluntarily by the affected party, nor are they accessible to the Ministry pursuant to any mandatory statutory or employment requirement. Subsection 257.30(5) of the *Education Act*, set out above, required only that the investigator prepare a written report. The [affected party] was not an employee of the Ministry, and his written retainer also did not provide for the provision of his handwritten notes.

The Ministry also submits that it does not have the right to possess the records in question:

> When an accountant is retained to prepare a report, the working papers made by the accountant customarily remain the property of the accountant and the report is the product that is given to the client. Inquiries made of the Institute of Chartered Accountants of Ontario, which is the qualifying body for the professions, confirm this.

The Ministry points to previous decisions from this office dealing with working papers, to support its position that it does not have the right to possess the affected party's handwritten notes:

> In addition to Orders M-165, M-676, P-1532 and P-1574 (referred to in the Notice of Inquiry), which hold that handwritten and rough notes similar to the records in question were not in the custody or control of an institution, there are decisions that deal specifically with the disclosure of professionals' working papers.
>
> In Order M-152 Re: Halton Board of Education, access was requested to all of an auditor's working papers concerning an audit of the Board's financial records relating to certain courses offered by it (pursuant to subs. 234(2) of the *Education Act*). The auditor was a member of a firm of chartered accountants who performed the audit under contract to the Board. In this case, it was recognized that the issue of the custody and control of such working papers had implications beyond this particular appeal and, as a result, the Institute of Chartered Accountants of Ontario (hereinafter ICAO) was added as an affected party and given the opportunity to submit representations. Inquiry Officer Anita Fineberg held:
>
>> The Board, the ICAO and the auditors have provided submission on the status of the papers according to legal principles. Appellate courts in Canada and the United Kingdom have held that working papers and other papers brought into existence by chartered accountants in the preparation of a final audit of the client's books are the property of the accountants and not of the client.
>>
>> The auditors have indicated that the papers are in their physical possession and the Board confirms that it never had possession of the papers; nor does it have any right to possession of the papers. The ICAO indicates that there is no mandatory statutory or employment requirement which would allow the Board to have possession of the papers…
>>
>> The Board, ICAO and the auditors all indicate that the papers are not relied upon by the Board in carrying out its mandate. While the Board may rely upon the auditor's professional opinion as contained in the audit report, there is no reliance on the papers which the auditor prepared in support of the opinion. Furthermore, the papers have no relationship to any other records held by the Board.
>>
>> The board itself has indicated that it has no authority to regulate the use, content, retention or disposition of the papers. Only the auditor has this authority.

> Accordingly, Inquiry Officer Fineberg concluded that the Board did not have custody or control of the auditor's papers, which were therefore not accessible under the *Act*.
>
> Access to working papers and draft reports produced by accountants was also considered in Order M-1078 Re: Town of Fort Erie. In that case, the Town hired a lawyer for the purpose of litigation against a senior town official, and the lawyer retained a chartered accounting firm to prepare an audit report concerning allegations of fraud or credit card misuse by the official. A draft report submitted to the lawyer as well as to the Town's local solicitor was found to belong to the client (the Town) and therefore within the control of the Town. In reaching this conclusion, Assistant Commissioner Tom Mitchinson expressly distinguished the draft report from working papers (internal working documents, not intended to be used or shared outside that concept) produced by accountants in the course of performing work on behalf of a client, which belong to the accountants.
>
> Order M-506 re: Thunder Bay Hydro dealt with the issue of access to the investigation records created by a lawyer who was retained by Hydro to conduct an independent inquiry into an incident that occurred between the requestor and a former Hydro employee. The records in question comprised the lawyer's handwritten notes from interviews conducted by him during the investigation. The lawyer presented his recommendations orally to one of Hydro's solicitors and a senior employee. Hydro was not provided with any written records of the investigation or the lawyer's findings, which remained in the lawyer's possession and were not disclosed to anyone.
>
> The lawyer submitted that the notes were made for his own benefit, as an aide memoire, and that Hydro was not charged for the preparation of the notes which remain his property. While Inquiry Officer Anita Fineberg had concerns over the impact of "contracting out" on an institution's ability and responsibility to disclose records, she nonetheless held that the lawyer's notes were not in the custody or control of Hydro.

In its submissions, the Ministry also points to case law that supports its position that when an accountant is retained to prepare a report, the working papers created by the accountant customarily remain the property of the accountant, and only the report is given to the client [*Tersigni v. Circosta,* [1997] O.J. No. 1860 (Gen. Div.), *Chantrey Martin Co.* v. *Martin*, [1953] 2 All ER 691 (CA), *Leicestershire County Council v. Michael Faraday & Partners Lrd.,* [1941] 2 All ER 483 (CA)].

Significantly, the appellant makes no specific submissions on this factor.

It is clear that the Ministry does not have physical possession of any handwritten notes prepared by the affected party.

I also find that the Ministry does not have a right of possession of these notes. Following Order M-152 and M-1078 and the case law put forward by the Ministry, I accept the well established principle that the internal working papers of an accountant prepared for use as a tool to perform a work assignment remain the property of the accountant, and the Ministry does not have a right of possession of these records.

In the *Tersigni* case, the issue 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. The Court found that the plaintiff was not entitled to the requested disclosure, stating that: "Absent the consent of [the named accounting firm], these working papers are, in law, for their eyes only." Although the nature of the "working papers" in that case is not further described, it is clear from the judgment 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.

Chantrey Martin Co. 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 an accounting or law firm, was automatically the property of the client.

Finally, the *Leicestershire County Council* case dealt with an action by the Council against a company, which it had previously retained to prepare reports on the value of certain properties, for the wrongful detention of supporting documents. The Court found that the documents prepared by the company hired to produce the reports were prepared for that company's own assistance in carrying out their expert work and could not be said to be the property of the Council.

Applying the relevant case law and past jurisprudence of this office, I find that any handwritten notes prepared by the affected party were clearly internal working documents that the affected party intended to rely upon as an aide mémoire in the creation of his reports. There is no indication that records of this nature were intended to be shared with or used outside that context and, in my view, the Ministry has no right of possession to them. This finding weighs in favour of a conclusion that the Ministry does not have control over any handwritten notes.

Intended use/reliance on the records by the Ministry

The Ministry takes the position that any handwritten notes are the affected party's working papers, prepared for his own use and benefit as an aide mémoire used to assist in drafting the reports. The Ministry also states that it does not have the authority to regulate the record's use and disposal, and submits:

> The [affected party] was retained by the Ministry to prepared reports based on his investigation of the Toronto District School Board and the Ottawa District School Board. The Ministry has been advised by the [affected party] that the handwritten

> notes are "rough" in nature and that they may or may not have been incorporated in the final report prepared by the [affected party].

The Ministry submits that, although the handwritten notes may have been relied upon by the affected party to prepare the reports that the Ministry relied on, it did not rely on the handwritten notes, which were never provided to the Ministry. The Ministry points to several previous orders involving similar fact situations in support of its position [Order M-165, M-152 and M-506].

The Ministry also submits that the handwritten notes have been retained by the affected party at all times and have not been integrated with any other records held by the Ministry.

The affected party also describes the type of information contained in the handwritten notes and the way they were used:

> The handwritten notes are "rough" in nature. The contents may or may not have been incorporated into my final opinion. Any information that was derived from my interviews would have been subject to further probing. Hence, the notes are not necessarily determinative or indicative of any particular issue.

The affected party also suggests that the Ministry did not rely on his handwritten notes. He submits:

> Each of my reports on the Toronto and Ottawa-Carleton District School Boards were expressly written to be self-standing. The evidence that we relied upon in forming our conclusions is specified in each of the reports. Any quantitative analysis is also explained in the reports. Data sources are duly referenced. Hence, further documentation is not necessary to understand the reports.

The appellant disagrees, and submits:

> The Ministry relied on the records of the investigator, based on the investigator's interpretation of the information gathered in the records, to enable the Ministry to make a decision to vest control of the school boards.

I accept the affected party's submission that his handwritten notes were created as an aide mémoire and were relied upon him to create the reports of his investigations. I also accept his position that the reports were written to be self-standing and that the handwritten notes are not required to understand or support them. It is clear that the affected party is the only one who used and relied upon the handwritten notes; the Ministry did not rely on these notes in making any decisions, nor does it have any current or ongoing need to obtain them. Accordingly, I find that the Ministry did not use or rely on any handwritten notes prepared by the affected party. This finding weighs in favour of a conclusion that the Ministry does not have control over any handwritten notes.

Payment for the creation of the record

The Ministry submits that the affected party was "retained by the Ministry on a fee-for-service basis" to prepare a report pursuant to s. 257.30 of the *Education Act*. The Ministry points out that it did not receive a copy of any handwritten notes upon completion of the contract.

The affected party does not address this factor in his submissions.

The appellant submits that the Ministry paid for the creation of the records.

While the Ministry retained the affected party to prepare the reports, I have reviewed the retainer and the section 257.30 of the *Education Act* and can find no evidence to indicate that the Ministry's arrangements with the affected party extended to any records other than the reports themselves. The affected party was under no obligation to create handwritten notes in return for the fee charged for his services. This finding weighs in favour of a conclusion that the Ministry does not have control over any handwritten notes.

Contracts

The provisions of any contract setting out the relationship between the parties may be a relevant factor on the issue of control [*Greater Vancouver Mental Health Service* Society v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. NO. 198 (S.C.)]. Any such contract may expressly or by implication give the Ministry the right to possess or otherwise control a record, and may provide evidence of an understanding or agreement between the Ministry and the affected party as to whether the record was or was not to be disclosed or provided to the Ministry.

The Ministry outlined the affected party's duties as investigator under section 257.30 of the *Education Act* in a written retainer in letter format with an attached document entitled "Terms of Reference". These documents constitute a "contract", and have been disclosed to the appellant.

The Ministry submits that the contract does not contain any express or implied provision giving the Ministry the right to possess or otherwise control any handwritten notes prepared by the affected party. The contract provides that the third party is appointed as an investigator, and requires that he prepare and submit a report, pursuant to s.257.30 of the *Education Act*. Section 257.30 similarly provides for the completion and production of a report only.

The Ministry also submits that it is clear from the contract and the legislative provisions that any handwritten notes would not be transferred or disclosed to the Ministry:

> The reports prepared by [the affected party] were lengthy and detailed. It is disclosed in the reports that [the affected party] held discussions with staff and trustees of the school boards. In light of the detailed nature of the reports, it appears that the withholding of the names of any other identifying information of the individuals interviewed by [the affected party] was deliberate. If undertakings of confidentiality were given to such persons by [the affected party], it will be

> necessary for him to make representations as to the circumstances and particulars surrounding same.

The affected party also points to the contract:

> Further, the terms of my appointment by the Ministry of Education do not contemplate any transfer of ownership, custody or control of my working papers. It has never been my understanding or intention that my working papers would be made available to the public.

The affected party explains further:

> I would also like to point out that throughout both of my appointments, all aspects of my investigations were considered to be highly confidential. I sought frank and forthright discussions with various stakeholders, including employees of each school board. Information was provided to us with an explicit understanding of privacy and confidence. Public disclosure of our working papers, which contain detailed accounts of our investigations, may unfairly and unduly jeopardize the welfare of individuals who were willing to co-operate in our investigation.

The appellant makes no specific submissions on this factor.

I have reviewed a copy of the affected party's contract documents. They contain no express provisions giving the Ministry a right to possess or otherwise control records created by the affected party during the course of the investigation and, based on the evidence and circumstances of this appeal, I am not prepared to infer such a right in this case. This finding weighs in favour of a conclusion that the Ministry does not have control over any handwritten notes.

Agency

In approaching the "control" analysis, it is useful to ascertain whether or not elements of agency are present and, if so, whether any existing agency relationship carries with it the right of possession of any records in question. A finding one way or another, however, is not necessarily determinative [*Walmsley* v. *Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)].

"Agency" is the relationship between one party (the principal) and another (the agent) whereby the latter is empowered to act on behalf of and represent the former. Agency can emerge from the express or implied consent of principal and agent [*Royal Securities Corp. v. Montreal Trust Co.*, [1967] 1 O.R. 137 (H.C.), affirmed [1967] 2 O.R. 200 (C.A.)]. Anyone doing something for another person can be an agent for that limited purpose [*Penderville Apartments Development Partnership v. Cressey Developments Corp.* (1990), 43 B.C.L.R. (2d) 57 (C.A.)]. An agent, though bound to exercise authority in accordance with all lawful instructions that may be given from time to time by the principal, is not subject in its exercise to the direct control or supervision of the principal. However, there must be some degree of control or direction of the agent by the principal [*Royal Securities Corp.*]. Among other things, an agent has a general duty

to produce to the principal all documents in the agent's hands relating to the principal's affairs [F.M.B. Reynolds, *Bowstead on Agency*, 15th ed., (London: Sweet and Maxwell, 1985), Article 51 at p. 191; *Tim v. Lai*, [1986] B.C.J. No. 3171 at pp. 10-11 (S.C.)].

The Ministry takes the position that the affected party "is not an agent of the Ministry, and that the Ministry cannot be viewed as having control of the record in question as a 'principal' or otherwise". The Ministry submits that there is no reason to view the relationship as one between principal and agent because the affected party "has not worked closely or on an ongoing basis with the Ministry, and could not reasonably be viewed as part of the Ministry".

The Ministry goes on to explain:

> In the present case, [the affected party] is a chartered accountant, as contemplated by subs. 257.30(2) of the *Education Act*. The records in question comprise handwritten notes that were made by him in order to assist with the preparation of the report that he was required to submit to the Ministry. The handwritten notes have been retained by [the affected party] at all times, and were not intended to be the property of or provided to the Ministry. Consequently, it is the position of the Ministry that the notes in question are the working papers of an independent professional retained by the Ministry, and that they cannot be controlled by the Ministry as a "principal," nor do they belong to the Ministry.

The Ministry distinguishes the circumstances of this appeal from previous orders:

> By contrast, Order MO-1237, Order MO-1251, and Order MO-1658, which are referred to in the Notice of Inquiry, all relate to requests for access to records created for institutions by engineers, architects, or similar kinds of consultants. In Order MO-1237 and MO-1251, authorities are cited wherein architects and engineers are described as being primarily employed as agents of owners, and that the owner (principal) is entitled to have delivered up to him/her all documents which have been prepared by the agent for him/her. In Order MO-1658, the requested records were created by consultants retained by the City of Hamilton to conduct a wide array of environmental studies. Although this case did not appear to involve architects or engineers, Senior Adjudicator Goodis found that the City had control over the records by analogy to previous orders with similar circumstances, including records prepared by architects or engineers. In these decisions, the characterization of the author of the records in question as the institution's agent is a significant factor in support of the findings that the institutions are in control of the records.

The appellant submits that the affected party was acting as an agent for the Ministry when he prepared the records at issue in this appeal:

> [The affected party] was appointed as an *investigator* by the government of Ontario under either Part VIII or Division D of the *Education Act* (I am not sure which). He was not appointed as an auditor or an arbitrator or a chair of a tribunal

> or a commissioner of an inquiry or as a fact-finding consultant. The appointment of the investigator was personal to him and was not transferable to another party; neither was the affected party's firm hired to audit the school board – the government didn't hire his accounting firm. If the government had wanted to hire an accounting firm to audit the school boards they could have done so, but they didn't, they appointed an investigator as provided in Part VIII and Division D of the *Education Act*.
>
> …
>
> It is my assertion that the investigator's terms of reference were provided by the government, he was paid by the government and he reported to the government. He was either an agent for the government or an officer of the government for the duration of his investigation. *The investigator was an emissary of the government.* [appellant's emphasis]

On reply, the affected party submits:

> Contrary to the appellant's allegations, my appointments by the government as an investigator did not result in me being an agent, emissary or employee of the government. The nature and context of my appointments were strictly that of an independent public accountant being engaged to investigate and report on the finances of certain school boards. At no time did the substance or form of my relationship with the government resemble that of an agent, etc.
>
> In my submission, a statutory appointment does not automatically result in the appointee being an agent of the designating party. In my appointments, I was retained to perform an independent financial investigation and to render my findings in a written report. My responsibilities and authority as investigator were derived from the *Education Act*, and not from the government. I was not, at any time, in a principal-agent relationship with the government.
>
> …
>
> Throughout my appointments, I did not hold myself out to be a representative of the government, to hold governmental authority or to speak on behalf of the government. I conducted myself strictly as an independent investigator, charged with collecting evidence and forming opinions on the financial condition of certain school boards.

The principal/agent relationship was considered by the Court of Appeal in *Walmsley v. Ontario (Attorney General et al).* In finding that the Ministry of the Attorney General in that case did not have "control" of the records at issue, the Court stated:

> While there may have been elements of agency in the relationship between individual committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents.

I have reached the same conclusion with respect to the affected party's handwritten notes. It could be argued that in appointing an independent individual to undertake an investigation that could have otherwise been handled internally by a Ministry employee under section 257.30(2) of the *Education Act*, the Ministry was creating a form of agency relationship with the affected party. However, in my view, there is no evidence to suggest that such an agency, if it existed, carried with it the right of the Ministry to control handwritten notes prepared by the affected party that were not covered by the terms of the arrangement entered into by these two parties. This finding weighs in favour of a conclusion that the Ministry does not have control over any handwritten notes.

Customary practice

The Ministry submits that the customary practice of chartered accountants is to retain possession of their working papers when they are retained on a consultancy basis to prepare a report.

The Ministry also submits that, based on decisions previously issued by this office [Orders M-152, MO-1078 and M-506] and case law [*Tersigni* v. *Circosta; Chantrey Martin Co.* v. *Martin*, and *Leicestershire County Council* v. *Michael Faraday & Partners, Ltd.* (all cited above)], it is customary practice that working papers and personal notes remain the property of an independent professional retained by an institution for the purposes of preparing a report.

The affected party echoes the Ministry, and submits:

> Under the rules of my profession, all working papers arising from a professional engagement remain the property of the chartered accountant/accountancy firm. Clients, such as the Ministry of Education, are neither legally nor practically entitled to my working papers in the normal course of an engagement.

The appellant argues that the appointment of an investigator is not a "professional engagement" as described by the affected party, that the Ministry is not the affected party's "client", and that this was not a "normal course of an engagement".

On reply, the affected party submits:

> I re-affirm that, under the rules of my profession, the generally accepted practice of my profession and the common law jurisprudence regarding this subject matter, the working papers of a professional engagement are the sole property of the accountant.
>
> The following is an excerpt from the Handbook of the Canadian Institute of Chartered Accountants, Section 5145.07:

> "*Audit working papers are the property of the auditor…*"

> The Handbook of the Institute of Chartered Accountants in England and Wales, Section 1. 3, paragraph 8, provides greater clarity on the subject matter:

>> *"In acting as an auditor, the member is acting as a principal. The end product of his work is to give an auditor's report. Documents prepared by the member solely for the purpose of carrying out his duties as auditor belong to the member. The ownership of documents or records is decided without reference to whether the audit is conducted under statutory provisions or not …"*

> According to the terms of my retainer, the only documents to which the government is entitled are my written reports, which have been delivered and made public. There is no explicit or implicit agreement that the government control or owns my working papers, or indeed my thought processes or intellectual capacity. In the absence of such agreement to the contrary, common law and prevailing practices should prevail. The control and custody of the working papers belong to me, as the professional accountant.

I find that the affected party's explanation is the most accurate reflection of the customary practice of chartered accountants with respect to records such as handwritten notes taken in the context of investigations of this nature. The affected party's description of customary practice is also consistent with previous decisions issued by this office and case law from appellate courts in Canada and the United Kingdom. Accordingly, I find that the customary practice in situations similar to those in this appeal is that working papers such as handwritten notes remain the property of the affected party as an independent professional. This finding weighs in favour of a conclusion that the Ministry does not have control over any handwritten notes.

Conclusion

In *Walmsley* v. *Ontario (Attorney General et al)* the Court considered the issue of custody and control in the context of records created by members of the Judicial Appointments Advisory Committee:

> It is true, as the assistant commissioner said, that the documents in question were held by these individuals because of their role in the committee and that the contents of the documents related to the work of the Ministry. While these factors are of some limited relevance to the question of Ministry control, much more important are the following considerations. Individual committee members were neither employees nor officers of the Ministry. They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry. The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess. The Ministry has no statutory or contractual basis upon which to assert the right to

> possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them. While there may have been elements of agency in the relationship between individual committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents. Finally, there is nothing in the record that allows the conclusion that these documents were *in fact* controlled by the Ministry. Hence it cannot be said that the documents in the possession of individual committee members were under the control of the Ministry.

I accept the Court's reasoning and adopt it for the purposes of this appeal. Applying this reasoning, I find that the Ministry does not have control of any handwritten notes prepared by the affected party in discharging his investigative responsibilities under section 257.30 of the *Education Act*. This finding is supported by the legal framework and factual circumstances outlined in my discussion and analysis of the various "control" factors, and my specific findings that:

- The records were not created by an officer or an employee of the Ministry.
- The Ministry does not have physical possession of the records in question, nor the legal right to possess them.
- The Ministry does not have the authority to regulate the records' use and disposal.
- The records have not been integrated with other records held by the Ministry, nor has the Ministry relied on the specific records themselves for any purpose.
- There are no provisions in the contract of services between the Ministry and the affected party that expressly or by implication give the Ministry the right to possess or otherwise control the records.
- Even if the affected party could be considered an agent of the Ministry, any such agency does not carry with it the right of the Ministry to control the handwritten notes prepared by the affected party.
- The customary practice of the affected party's profession is that the working papers of chartered accountants remain the property of, and therefore in the custody and control, of the accountant that created them.

Accordingly, I find that the Ministry does not have custody or control of any handwritten notes prepared by the affected party during the course of his investigations.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 11, 2004
Tom Mitchinson
Assistant Commissioner