

**INTERIM ORDER MO-2150-I**

**Appeal MA-060142-2**

**City of Vaughan**

## **NATURE OF THE APPEAL:**

The City of Vaughan (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a report by KPMG Forensic relating to the estate of a former mayor of the City. The requester provided the City with a copy of its news release dated November 19, 2002 which refers to this report.

The City denied access to the responsive record on the basis that it does not have custody and/or control of the record (section 10(1)). The City also advised the requester that, in the event that the record is found to be under the control of the City, the City would exempt the record under section 12 (solicitor/client privilege) of the *Act*.

The requester (now the appellant) appealed the City's decision that it does not have "control" of the responsive record. The requester is also appealing the reliance by the City on the exemption provided for under section 12 of the *Act*, in the event that I determine that the City has control of the record.

Throughout mediation, the City maintained its position that it does not have custody or control of the responsive record.

Mediation was not possible and the appeal was moved into adjudication. I decided to seek representations from the City, initially. I also decided to ask the law firm that currently has apparent custody of the record to submit representations on the issue of custody and/or control.

I advised the parties that I would first address the issue whether the City has custody or control of the record at issue. If I find that it does, I will go on to address the possible application of the exemption claimed in section 12 of the *Act*. In order to fully canvass all issues expeditiously, I set out both issues in the Notice that was sent to the City and the law firm. I asked the City to respond to both issues. The law firm was asked to respond to the custody/control issue, although it was also invited to comment on the application of solicitor/client privilege to the record.

I received representations from both parties. These representations raised additional issues and I sent out a supplementary Notice of Inquiry to them in which I asked specific questions arising from and seeking to clarify their representations. Both parties provided supplementary representations. Based on these representations taken together, I have decided to issue an Interim Order regarding the issue of custody/control of the record.

## **RECORD:**

The record at issue in this appeal is a forensic accounting report prepared by KPMG Forensic.

## **DISCUSSION:**

### **CUSTODY OR CONTROL OF RESPONSIVE RECORDS**

The City submits that the record is in the custody and control of its solicitor and is, therefore, not in the custody or under the control of the City within the meaning of section 4(1) of the *Act*. The City takes the position that it is not accessible under the *Act*. 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 the record or part falls within one of the exemptions under sections 6 to 15. (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 need only be under the custody **or** control of an institution. In the circumstances of this appeal, where the City does not have actual custody of the record held by the solicitor, the relevant question is whether this record is under the **control** of the City.

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*. He stated further:

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 an 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. In this appeal, the relevant questions from the above list will be those which relate to the issue of control. In my view, questions 5 and 10 are particularly relevant.

In its representations, the City explains how and why the record was created:

The [City] asked [the law firm] to provide a legal opinion related to the severance by-law. [The law firm] retained KPMG to conduct a forensic audit related to the severance by-law. [The law firm] provided a verbal report with recommendations in the form of a legal opinion to Council and to the Commissioner of Legal and Administrative Services in a closed session Council meeting.

The City asserts that the record was prepared for the solicitor for his own benefit or protection in order to assist him in providing his legal opinion, and was not an item that was chargeable against the client. The City takes the position that it has no right to possess the record or to dispose of it.

The law firm views this record from a different perspective. The law firm confirms that KPMG prepared the report for the exclusive use of the law firm, which it then used to assist in giving legal advice to the City. The law firm concludes, however, that:

In order to prevent [the law firm] from being placed in an impossible legal position, any Order to release the KPMG Report should be directed to the [City]. [The law firm] would, of course, deliver the report on the direction of the City.

In the supplementary Notice that was sent to the parties, this apparent discrepancy in positions was put to the parties. They were also asked to clarify the retainer for the provision of the legal advice, including whether the City was billed for the report.

In response, the law firm clearly states that the City, as the client, has the ability to direct the law firm to provide it with a copy of the KPMG Report. The law firm states further that it understood that KPMG invoiced the City directly for its services in preparing the report.

The City indicates that in light of the law firm's submissions, it has since requested a copy of the report from the law firm. Moreover, it submits that it has only recently learned that KPMG was not paid directly by the law firm and suggests that it is likely that KPMG, which has been engaged by the City for years, billed the City directly. Despite this, the City appears to continue to take the position that the report was prepared specifically for the law firm and that that *Act* does not apply to it.

Previous orders of this office have concluded that records in the custody of a solicitor which are the property of a client may be said to be under the client's control for the purposes of the *Act* (Orders M-315 and M-371). In Order M-371, Adjudicator John Higgins discussed several legal authorities, which are relevant to the issue of ownership of client records in the custody of solicitors:

For instance, 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)

In addition, this issue is addressed in a more general way in *Aggio v. Rosenberg et al.* (1981) C.P.C. 7, where the court quotes with approval from a text entitled *The Law Relating to Solicitors* (6th edition) by Corderley.

The court reproduced the following excerpts from that textbook relating to ownership of solicitors' 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)

Similar to the findings of Adjudicator Higgins in Order M-371, I find, based upon the evidence presented to me, that the principles enunciated in the *Aggio* case, above, are relevant in determining ownership of records in the solicitor's custody. In this case, I find that the report was prepared by KPMG during the course of the law firm's retainer with the City, sent directly to the law firm and paid for by the City. Consequently, I find that the record is under the control of the City for the purposes of section 4(1) of the *Act*.

It is apparent that the law firm's position is entirely consistent with the legal authorities relating to this issue and that it was prepared to provide the report to the City, upon request. Moreover, the City has now taken action to bring the record within its custody. Yet, it continues to refuse to acknowledge this record as falling within the scope of the access provisions in the *Act*. I find the City's approach to this issue in the face of clear evidence to the contrary, to be unreasonable and to have resulted in unnecessary delay in addressing the substantive issues at both the mediation and adjudication stages of this appeal.

If it has not already received a copy of the KPMG report from its solicitor, I will order it to do so and to provide a copy of the report to this office.

**ORDER:**

1. I do not uphold the City's decision regarding custody and/or control of the record at issue.
2. I order the City to obtain a copy of the record from the law firm and to provide a copy of it to this office no later than **February 14, 2007**.
3. I will defer my decision with respect to the application of section 12 to this record pending my review of the record.
4. I remain seized of this appeal in order to deal with all remaining issues.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

January 31, 2007 \_\_\_\_\_