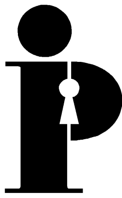

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1242

Appeal MA-980226-1

City of Kitchener

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NATURE OF THE APPEAL:

The City of Kitchener (the City) decided to build a new fire department headquarters. For this purpose, the City retained the services of an architect (the architect). One of the architect's duties was to conduct a pre-qualification process, a process by which potential bidders/construction firms are screened to prevent those who clearly are unqualified from bidding.

After the pre-qualification process was completed, the City received a request for access to information under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from a firm that had not been permitted to bid. The request was for records concerning the pre-qualification of bidders for the construction of the new headquarters, and was broken down into three parts:

> 1. Any notes, letters, memos, messages or other records referring in any way to [the requester] received by the City from anyone other than [the requester].
>
> 2. Any notes, letters, memos, messages, reports or other records in any way referring to [the requester] prepared by the City for [its] own use, or for the use of others, other than [the requester].
>
> 3. All record[s] and documents used to include or exclude each applicant from bidding for the project through the pre-qualification process, including all submissions and evaluations performed by or on behalf of the City.

The requester subsequently expanded the request to include copies of any purchasing by-laws or policies relating to the pre-qualification or bidding process. Still later the requester indicated that it was not interested in bidder pre-qualification forms submitted by other construction firms.

The City identified three records responsive to the request and granted access to them in their entirety. The first is a letter from the architect to the City listing the construction firms the architect recommends as qualified to bid. The second is a list of potential bidders. Thirdly, in response to the expanded request, the City provided the appellant with a copy of its purchasing by-law referred to as "Chapter 170 (Purchasing and Materials Management) of the City of Kitchener Municipal Code." The City advised the requester that it had no other records relating to the project, other than the pre-qualification forms submitted by the other bidders.

The requester responded that it believed further records existed, including:

> …Evaluations performed on each respondent by your agent (the professional Architect in this case). Kindly provide copies of all evaluations performed on each respondent applying for pre-qualification, complete with explanatory notes and comparative evaluations to justify selections of one contractor over another. Copies of explanations or reports on each proponent outlining the rational and reasons for disqualification of each proponent who was not allowed to bid for the work.

The City answered that it was again enclosing a copy of the by-law referred to in its initial decision and stated:

> You have also requested copies of evaluation documents compiled and used by the Architect in arriving at his pre-qualification recommendation. [The City's initial decision] stated that the City neither receives nor requires the assessment records as part of its agreement with the Architect. Staff involvement in the process is limited to discussing with the Architect how the review will be conducted, after which the research and assessment is entirely in his/her hands. The Architect is paid to provide a professional opinion, and under normal circumstances it is not the City's practice to review the basis for that opinion, hence we have no need for the information used in arriving at this opinion.
>
> Section 4(1) of the [Act] indicates that every person has a right of access to a record that is in the City's custody or under its control. The assessment records are not in the City's custody and it is our position that they are the property of the Architect and consequently not under our control. You may wish to approach the Architect directly and request this documentation.

The requester replied that records in the custody of the architect are under the control of the City because the architect is "… an agent of the institution in this instance". The requester asked the City to reconsider its position.

The City said it would not reconsider its position because "these records are kept separately by [the architect] for [its] own use and there is no agreement requiring that these be provided to the City upon request."

The requester (now the appellant) appealed the City's decision to this office. An initial Notice of Inquiry setting out the issues in the appeal was provided to the City and the appellant. Representations were received from the City only. I decided to seek further representations from the parties on the issues in the appeal, and sent a supplementary Notice of Inquiry to the City, the appellant and the architect. I received no representations in response to this supplementary document.

DISCUSSION:

CUSTODY OR CONTROL

Section 4(1) of the Act provides a right of access to records "in the custody or under the control of an institution" (emphasis added). The issue for me to decide is whether or not records responsive to the request in the custody of the architect are under the control of the City within the meaning of section 4(1). If so, the right of access under section 4(1) applies.

In the supplementary Notice of Inquiry, I asked the parties to provide representations in response to the following questions regarding the "control" issue under section 4(1). I also referred to pertinent authorities under each question, where appropriate:

1. Does the City have a statutory power or duty to carry out the activity which resulted in the creation of the records? [Order P-912, upheld in Ontario (Criminal Code Review City) 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.)]

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

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

4. Was there an understanding or agreement between the City and the architect, or any other party, that the record was not to be disclosed to the City? [Order M-165]

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

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

7. What is the customary practice of the City and institutions similar to the City in relation to possession or control of records of this nature, in similar circumstances?

8. What is the customary practice of the architect and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?

9. To what extent did the City rely or intend to rely on the record? [Order P-120]

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

These questions reflect a purposive approach to the "control" question under section 4(1). A similar approach has been adopted in other access to information regimes. For example, in a recent decision under the federal Access to Information Act, the Federal Court of Appeal said:

> The notion of control referred to in subsection 4(1) of the 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 … [Canada Post Corp. v. Canada (Minister of Public Works) (1995), 30 Admin. L.R. (2d) 242 at 244-245]

I will address each of the above-listed questions below.

Analysis of "control" factors

1. Statutory powers

Based on 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.), the statutory framework is the starting point for any "control" analysis.

Section 210(31) of the Municipal Act grants a power to the City Council to pass by-laws for providing fire-fighting and fire protection services. The City's fire department is established by by-law enacted pursuant to this power [Consolidated By-Law Number 359]. This statutory framework gives the City the power to build a headquarters for its fire department. Encompassed within the scope of this authority is the power to do all things necessary to discharge this function, which would include setting up and administering a bidding process. In this case, the bidding process involved pre-qualification of bidders. As a result, pre-qualification is an integral component of the City's statutory power [Order MO-1237].

2. Core function

The City submits:

> …the contents of the records do not relate to the City's mandate and functions, as the City's role in the project is to evaluate the bids received and oversee the construction of the project. The role of the architect in regard to pre-qualification is to provide a list of the

> contractors who should receive bid documents. The City views the creation of a pre-qualification list and the evaluation of bidders [as] two separate processes.

For the reasons given above, the overall function of building a fire department headquarters is a core function of the City. The pre-qualification of bidders was directly related to this statutory function. This process was an important initial step towards the broader goal of building the headquarters. The pre-qualification and evaluation of bidders are not discrete processes but are closely integrated and directly connected to the statutory function. In carrying out the pre-qualification process, the architect clearly was acting on the City's behalf.

3. Contract

The provisions of any contract setting out the relationship between the parties in question 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.)], although not determinative when in conflict with the statutory framework [Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.)].

The City submits that it does not have a "right of access" to the records because the architect was "hired by resolution of City Council" and there is no contract or agreement with the architect providing the City with this right. This resolution contains no detailed provisions which shed light on the nature of the agreement and its impact on the issue of control of the records.

4. Agreement not to disclose

The City submits that its "…only expectation was that it would receive the names of the contractors after stipulating how many it wished to have pre-qualified."

This evidence does not establish that an agreement existed between the City and the architect that the records should not be disclosed to the City.

5. Payment for the record

The City submits:

> A representative of the architectural firm has advised that he views the pre-qualification process as an undertaking outside of the scope of project duties, and it is performed as a value added service to the City.
>
> . . . . .
>
> [The architect believes that] the pre-qualification work is not considered to be within the scope of duties relative to this project, but is an extra service provided at the architect's discretion and at no cost.

I have difficulty accepting that pre-qualification work is not performed at the expense of the client. A service of this nature accrues to the benefit of the client and is normally paid for by the client and not simply absorbed by the architect as part of its overhead [Order MO-1237]. In my view, there is nothing before me to persuade me to depart from this conclusion.

6. Agency

In approaching the "control" analysis, it is useful to ascertain whether or not elements of agency are present and, if so, whether the agency relationship carries with it the right to possess or control the records in question. Although this may assist in the control issue, a finding one way or another 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., above]. 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 City submits:

> City staff have no direct involvement in the evaluation process per se. They do advise the architect, in accordance with Council direction, as to the number of contractors to be pre-qualified. They also develop, with the architect, the process to be followed in regard to pre-qualification. The evaluation process itself is entirely the responsibility of the architect with no staff involvement.

As I have stated, the pre-qualification process forms part of the general bidding process which is directly connected to the statutory function of building the headquarters. I find that in carrying out the pre-qualification process, the architect was acting on behalf of the City.

This conclusion is supported by The Canadian Law of Architecture and Engineering, 2nd ed. (Toronto: Butterworths, 1994) by B.M. McLachlin et al. (at pp. 126, 195):

> Architects and engineers are employed primarily as the agent of the owner, to design, supervise and administer the project …
>
> The architect or engineer acts as the agent of the owner in preparing and issuing tender documents and supervising the tender process.

[See also Pielak v. Granville Custom Homes and Renovations Ltd., [1994] B.C.J. No. 565 (S.C.), at p. 15; D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General), [1999] N.S.J. No. 163 (S.C.), at p. 32), in which these passages are quoted with approval].

The next question is whether or not this agency relationship carries with it the right of the City, as principal, to possess or control the records. The general principle is that an agent has the duty to produce to the principal all documents in the agent's hands relating to the principal's affairs. This point is elaborated upon in Bowstead (at pp.192-193):

> The principal is entitled to have delivered up to him at the termination of the agency all documents concerning his affairs which have been prepared by the agent for him. In each case it is necessary to decide whether the document in question came into existence for the purpose of the agency relationship or for some other purpose, e.g., in pursuance of a duty to give professional advice.

The Canadian Law of Architecture and Engineering also states (at p. 266):

> … a client who decides to proceed with a project for which an architect or engineer has prepared designs, expressly or by implication appoints the architect or engineer as his or her agent for various purposes … The documents the architect or engineer receives or creates in his or her role as agent for the client are owned by the client.

In contrast to the facts in Walmsley, there is a strong basis for a finding that the agency relationship between the City and the architect carries with it, at a minimum, the City's ownership of records relating to the pre-qualification process, as ancillary to the tender process. This ownership carries with it the right to possess and control the records.

7. Customary practice of the City

I have insufficient evidence on which to base a finding on this point.

8. Customary practice of the architect

I also have insufficient evidence on which to base a finding on this point.

9. Reliance on the records

The City states that "the record has not been relied upon by the City, as the City only relies upon the list of contractors which results from the architect's analysis."

In my view, since the City relies on the architect's interpretation of the information gathered in the records for its benefit, it relies on the records.

10. Ownership

The City submits that the architect advised the City that it did not view the records as "the City's property."

As found at point 6, documents which the architect receives or creates in his or her role as agent for the client are "owned" by the client. Since the architect acts as the City's agent in the pre-qualification process, the City owns the records and has the requisite control over them on this basis alone.

Conclusion

The legal framework and factual circumstances lead me to conclude that the City has control of documents relating to the pre-qualification process in the possession of the architect. This finding is dictated by the relevant statutory framework (points 1 and 2), as well as the nature of the agency relationship between the City and the architect (point 6), and is supported by the City's reliance on the record (point 9). This agency relationship carries with it a right of ownership (point 10) and possession (point 6) of the records. As a result, I find that the relevant records are in the "control" of the City for the purpose of section 4(1) of the Act.

ORDER:

1. I order the City to send a written direction to the architect to provide the City with records responsive to the appellant's request. The City's written direction should be issued no later than **November 23, 1999**, but no earlier than **November 18, 1999**, and should require delivery of the records no later than **December 7, 1999**.

2. Upon receipt of the records from the architect, I order the City to issue an access decision to the appellant in accordance with Part I of the Act, treating the date of receipt of the records as the date of the request.

3. I order the City to provide me with a copy of the written direction referred to in provision 1 above, and a copy of the City's access decision referred to in provision 2 above.

4. I remain seized of this appeal with respect to any compliance issues arising from this order.

Original signed by: ____________________ October 19, 1999

David Goodis
Senior Adjudicator