



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

ORDER MO-1289

Appeal MA-990222-1

Township of Edwardsburgh



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NATURE OF THE APPEAL:

The Township of Edwardsburgh (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the “Township of Edwardsburgh Waste Disposal Site 1998 Monitoring Report”, dated May 1999, prepared by a named environmental consultant.

The Township identified a June 1999 version of the report, which it agreed to provide to the requester upon payment of a fee. The requester made it clear that she was interested in receiving access to the May 1999 version of the report, and appealed the Township’s decision on the basis that the May 1999 version was in the Township’s custody or under its control.

During mediation, it was clarified that the May 1999 version of the report exists, but it is in the possession of the consultant and not the Township. The Township takes the position that the report is not under its control.

I sent a Notice of Inquiry to the Township and the consultant on the custody and control issue. Representations were received from both parties. After reviewing these representations, I decided to issue a supplementary Notice to these two parties, seeking further representations on this issue. Both the Township and the consultant provided supplementary representations. I have sufficient information before me to dispose of the issues in this appeal without the need to obtain representations from the appellant.

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”. The only issue in this appeal is whether the May 1999 version of the report, which is in the possession of the consultant, is in the custody or under the control of the Township within the meaning of section 4(1). If so, the right of access under section 4(1) applies.

I asked the Township and the consultant to provide representations in response to a series of questions regarding the “custody or control” issue under section 4(1). I also referred to pertinent authorities under each question, where appropriate. These questions reflect a purposive approach to the “custody or control” question under section 4(1) (see Orders MO-1237 and MO-1251).

The Township provided general representations in response, and the consultant’s representations addressed the specific questions. The following is a list of the various questions together with the consultant’s response:

1. Does the Township 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 City) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), affirmed [1999] O.J. No. 4072 (C.A.)]

The activity by the Township is an annual requirement of its Certificate of Approval for the operation of the landfill site.

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

No comment.

3. Are there any provisions in any contracts between the Township and the consultant, in relation to the activity which resulted in the creation of the record, which expressly or by implication give the Township 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.)]

The [June 1999 Report] was produced in accordance with a fixed-price contract, which [the consultant] also supplied the previous year. The contract was fulfilled by [the consultant] by production and delivery of a report in order to satisfy the Township’s Certificate of Approval for its landfill. The Township has no contractual rights explicit or implied to assess [the consultant]’s working files, preliminary assessments, or rejected documents and is not in possession of any of the above.

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

No.

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

The Township of Edwardsburgh paid for the completion of the updated document dated June 1999.

6. What use did the creator intend to make of the record?

[The consultant] prepared the document to present the results of the 1998 environmental monitoring program at the Edwardsburgh landfill to the Township. The completion of the environmental monitoring program and submission of the summary report to the MOE [Ministry of the Environment] is a requirement of the Township’s Certificate of Approval for their landfill site.

7. Was the consultant an agent of the Township 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 Township to possess or otherwise control the records? [Walmsley v. Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.)]

[The consultant] is an independent contractor to the Township. In accordance with a fixed price contract, [the consultant] supplied the report in order that the Township could comply with the conditions of Certificate of Approval. [The consultant] is not an agent of the Township.

8. What is the customary practice of the Township and institutions similar to the Township in relation to possession or control of records of this nature, in similar circumstances? To what extent has the record been relied upon by the Township?

It would be customary practice for a client to return (or destroy) all copies of a document that were not final and/or approved by the client. These draft's and/or superceded documents would normally be discarded by the consultant. Therefore, the Township can not have relied on the May 1999 version of the document.

9. Does the Township have the authority to regulate the record's use?

No. See question 3.

10. Does the Township have the authority to dispose of the record?

No. See question 3.

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

It is not our normal practice to retain draft or revised copies of a technical report. However, [the consultant] has retained one copy of the May 1999 report as it had been submitted to the MOE and subsequently returned.

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

The Township could not have relied on the May 1999 record.

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

The Township owns the updated (June 1999) document. [The consultant] owns the earlier (May 1999) version of the report.

14. Has the consultant refused to provide the Township with a copy of the record and, if so, to what extent, if any, should this determine the control issue?

No, however, [the consultant]'s policy is that any document that is not final or acceptable to the client remains [the consultant]'s and in our custody.

15. To what extent, if any, should the fact that the consultant provided the record originally to the Township but the Township returned it to the consultant for "administrative revisions", determine the control issue?

Any document produced by the consultant, which is not accepted by the client and is returned to the consultant remains the property of the consultant as described above, question 3.

16. What were the precise undertakings of confidentiality given by the consultant, if any, to whom were they given, when and in what form?

The Township under the terms of its contract with [the consultant], does not control documents in [the consultant]'s possession. It is [the consultant]'s standard practice not to disclose to any party other than the client unless specifically directed by the client. This has been our policy with the Township of Edwardsburgh for approximately thirteen years.

17. Who has physical possession of the record? Does the Township have possession of the record, either because it has been voluntarily provided by the consultant or pursuant to a mandatory statutory or employment requirement? Does the Township have a right to possess of the record?

[The consultant] is in possession of the May 1999 document. No. See question 3.

The consultant also states in its representations that all copies of the May 1999 Report were returned by the Township. The report was then revised and superceded by the June 1999 version. According to the consultant:

All but three of the revisions were the result of:

- Typographical errors
 - The incorrect transposition of data within the report from the laboratory reports to the data tables or from the tables to the graphic figures.

There were three instances where the descriptions of the data, or the comparison of data to historical results or provincial standards, were revised. Such revisions enhanced the report and provided greater clarity in that readers could now better compare the results in the

1999 report to historical data. The actual data itself was not revised and the revisions did not lead to any amendment of the final conclusions of the report.

The consultant adds that if the May 1999 version is to be disclosed, this should only be done on condition that it be appropriately stamped as superceded and that a copy of the final June 1999 report be attached to it and reviewed concurrently.

In its representations the Township submits:

The report in question was received by the Township, but upon careful review was found to contain errors. The report was deemed unacceptable, we declined to accept it, and all copies were returned to [the consultant]. The rejected report is not the property of the Township and we do not want it. A new report bearing the same title but dated June 1999 was received and accepted by the Township. This latter report was submitted to the Ministry of the Environment for the Province of Ontario in compliance with Provisional Certificate of Approval No. A440404 dated September 24, 1997. This report has been accepted and vetted by the Ministry of the Environment.

In my supplementary Notice of Inquiry, I asked for a copy of the June 1999 version of the report, and for additional information and clarification on the following:

Please describe how the application for certificate of approval and certification process works in the Township and indicate who is responsible for certifying approval and filing any certificate with the Ministry of the Environment (the Ministry). In particular,

- (i) Is it the responsibility of the Township to perform this function on its own behalf, but the Township may, as an alternative method of delivering this service, hire a consultant, such as [the consultant] to perform this function on the Township's behalf?

or,

- (ii) Is the Township required to retain an independent certifier to certify approval and/or prepare the application for submission to the Ministry?

The Township submitted:

The Township of Edwardsburgh applied to the Ministry of the Environment and Energy, in 1995 for the Interim Expansion of the Township of Edwardsburgh Waste Disposal Site. Public hearings were held under the Environmental Assessment Act in July 1997 to review the application. A Provisional Certificate of Approval under the Environmental Assessment Act was issued August 27, 1997.

Article 33 of the Certificate of Approval states the following:

“An annual report on the development and operation of the Site including the monitoring programs, shall be submitted to the Regional Director and the PLC by May 31st of the year following the calendar year covered by the report. The report shall be consistent with the requirements as outlined in Schedule C, attached.”

The Township is responsible for performing this function. The Township of Edwardsburgh engaged [the consultant] to prepare an annual report for 1998.

The consultant submitted:

[The consultant] is retained by the Township to undertake environmental monitoring and reporting. These activities are stipulated as conditions on the Certificate of Approval © of A) issued to the Township by the Ministry of the Environment (MOE) to operate their landfill site. The MOE regulates the operation of solid waste management facilities (landfills) in Ontario. The current C of A for the Edwardsburgh site, representing a 5-year interim expansion of the site, was granted to the municipality by the MOE in August 1997. [The consultant] was retained by the Township of Edwardsburgh to prepare the actual C of A application and supporting technical documents required with the application. An extensive public consultation program was also completed by the Township, with [the consultant]’s assistance, as part of the application process. The C of A was issued by the MOE following a hearing conducted under the Ontario Environmental Assessment Act.

Once a C of A is issued, it is the responsibility of the holder of the C of A (the Township of Edwardsburgh) to fulfil the conditions of the C of A. In this case the Township is required to submit an annual environmental monitoring report to the MOE. The Township may perform this function on its own behalf however, as an alternative method, they may hire a consultant such as [the consultant] to perform this function on the Township’s behalf.

Analysis of “control” factors

1. Statutory powers

As the Township and the consultant both state, the Township made an application to the MOE in 1995 for the Interim Expansion of the Township’s Waste Disposal Site, and a provisional Certificate of Approval under the Environmental Assessment Act was issued on August 27, 1997. I find that the Township has the statutory duty to apply for a Certificate of Approval from MOE as part of its responsibility for the safe and proper operation of its landfill site.

2. Core function

It is the responsibility of the holder of the Certificate of Approval, the Township, to fulfill the conditions of the Certificate and to submit an annual environmental monitoring report to MOE. The Township can perform this function itself or retain a consultant to perform the function on the Township’s behalf. I find that

the process of obtaining a Certificate for the purposes of administering waste disposal sites within its jurisdiction is a core function of the Township, whether this function is performed by the Township directly or through the services of a consultant.

3. Contract

The consultant states that the Report was produced in accordance with a fixed-price contract, and that the Township has no contractual rights explicit or implied to assess the consultant's working files, preliminary assessments, or rejected documents. The Township did not provide representations in response to this question. It would appear that a contract exists but, based on the information before me, I am unable to determine if its provisions specifically address the issue of control of the May 1999 version of the report.

Similar circumstances have been described by the Ontario Court of Appeal in a case involving a request for access to records of tribunal hearings containing a requester's personal information prepared by a private freelance court reporter: (Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner) [1999] O.J. No. 4072). The Court said:

It is reasonable to expect that the Board would ensure, by contract if necessary, that any records ... be used solely for the purposes of the Board. The Board can and should exercise control over the use of all records made by court reporters of its proceedings.

The Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements ... The Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.

In the same case the Divisional Court made the following comments regarding the institution's obligations to enter into appropriate contractual arrangements:

The Inquiry Officer and this court are entitled to assume that the Board's contractual arrangements with the reporter are appropriate to ensure compliance with its statutory obligations.

...

If in fact its contract with the reporter is inadequate to ensure that the Board is in compliance with its statutory duties under [the Act], it is not obvious to me that this would provide a basis to refuse an otherwise valid access to information request ... The Board is not entitled to "contract out" of its statutory obligations."

Although these decisions dealt with the individual right of access provisions of the Act, the same principles would require the Township to ensure, by contract if necessary, that it retains control over records where a

contractor is engaged to perform functions on its behalf, in order to be in a position to comply with the general right of access provisions of the Act. The Township cannot avoid the access provisions of the Act by entering into arrangements under which a third party holds custody of the its records that would otherwise be subject to the provisions of the Act. Accordingly, the absence of a specific contractual provision giving the Township explicit control over the May 1999 version of the report does not assist the Township and the consultant in asserting that the Township does not have the requisite control over this record. The Township is required to ensure that its contractual arrangements are in compliance with its obligations under the Act.

4. Agreement not to disclose

The facts establish that there was no agreement that the May 1999 version of the report not be disclosed to the Township, and in fact it was.

5. Payment for the record

The final report was paid for by the Township. I find that the fees paid by the Township would cover all work incurred by the consultant in preparing materials up to and including the June 1999 version of the report, including preparation of the May 1999 version.

6. Intended use of the record

The purpose of preparing the record was to assist the Township in fulfilling its requirements for a Certificate of Approval on the Township's landfill site. The consultant provided me with a copy of the May 1999 version of the report. It is not marked "draft" and, in my view, had the deficiencies in this version not been identified, it is reasonable to assume that it would have been used by the Township for the same purpose for which the June 1999 version was used.

7. Agency

In Order MO-1237, Senior Adjudicator David Goodis made the following comments regarding the issue of "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 contract contains provisions which support the finding [in Order MO-1237] that the architect, at a minimum, acts on behalf of, and thus is the agent of [the institution] for the purpose of the bidding process, of which the pre-qualification process is a component.

I find support for this view in 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.

Further, The Canadian Law of Architecture and Engineering 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.

The services performed by the consultant, including the preparation of the two versions of the report are similar in nature to those that would be performed by an engineer. Although the consultant states in its representations that it is not an agent of the Township, in my view, the representations provided by the Township and the consultant point to the existence of an agency relationship. There is no dispute between the Township and the consultant as to who is responsible for preparing and submitting a report of this nature; it is the Township's responsibility. The consultant also states quite clearly that the Township may either perform the function of preparing a report of this nature "... on its own behalf however, as an alternative method, they may hire a consultant such as [the consultant] to perform this function on the Township's behalf". The contract entered into between the Township and the consultant was for this precise purpose. The consultant was bound by the terms of the contract to perform a service that would otherwise have been performed by the Township itself and, in my view, the Township would have had to retain the necessary degree of control or direction over the consultant in order to ensure that the consultant's work product met MOE requirements. The fact that the May 1999 version of the report was returned to the consultant for amendment in accordance with the Township's obligations to make an accurate report to MOE is the best evidence of the existence of this control.

In addition, it should be noted that the role of the consultant is not that of an impartial certifier whom the law would treat as an independent contractor entitled to retain plans, specifications and other documents created in that capacity. The consultant was retained to prepare the report on the Township's behalf in order to secure a Certificate of Approval from MOE.

For all of these reasons, I find that the consultant was acting as an agent of the Township. As outlined by Senior Adjudicator Goodis, the authorities indicate that the Township as principal owns the records and that the consultant has a general duty to produce to the Township all documents in its possession that relate to the Township's affairs. This would include the May 1999 version of the report.

8,11 & 12. Customary practice of the Township and/or the consultant

Both parties submit that the Report was not retained by the Township and was returned to the consultant. However, there is no evidence that this was normal practice in similar circumstances; nothing to suggest that it would have been inappropriate for the Township to have retained a copy of the May 1999 version of the report; and no indication that the consultant would have had any objection if the Township had done so. Also, it would appear that the Township had every intention of relying on the May 1999 version of the report had the errors and requested amendments not been identified.

9 & 10. Authority to regulate the records use and dispose of the record

The representations provided by the Township and the consultant do not assist in answering these questions.

13. Ownership

Both the Township and the consultant submit that the May 1999 version of the Report is owned by the consultant. As stated above under question 7, documents received or created by a consultant in the role as agent for the client are “owned” by the client. Because I found that the consultant was acting as the Township’s agent for the purpose of preparing the May and June 1999 reports, I conclude that the Township is the owner of the records relating to this process and has the requisite control over them on this basis alone.

14. Refusal to supply record to the Township

The consultant acknowledges in its representations that it has not refused to supply its remaining copy of the May 1999 version of the report to the Township.

15. Actions of Township in returning record to consultant

The consultant’s response to this question focuses on ownership of the record, which I have addressed under question 13.

16. Undertakings of confidentiality

The consultant points out that its longstanding standard practice with the Township is not to disclose any records it produces to third parties without being directed to do so by the client. I find that this practice supports the position that the Township, and not the consultant, has control of any records produced under the terms of any contract between the parties.

17. Physical possession of the record

It is clear that the consultant has physical possession of the record, but this is not determinative of the issue of control over this record.

Conclusion

The legal framework and factual circumstances lead me to conclude that the Township has control of the May 1999 record currently in the possession of the consultant. This finding is dictated by the relevant statutory framework (points 1 and 2), the intended use of the record (point 6), the nature of the agency relationship between the Township and the consultant (points 3 and 7), and the right of ownership of the record (points 5 and 13). My finding is consistent with the Court of Appeal decision in Ontario (Criminal Code Review Board) (referred to above), which suggests that records that on their own may be inaccurate or incomplete will be under an institution’s control if they are part of the product to be produced for the institution.

For all of these reasons, I find that the record is in the “control” of the Township for the purpose of section 4(1) of the Act.

ORDER:

1. I order the Township to send a written direction to the consultant to provide the Township with the May, 1999 version of the report. The Township's written direction should be issued no later than **April 26, 2000**, and should require delivery of the record no later than **May 5, 2000**.
2. Upon receipt of the record from the consultant, I order the Township to issue an access decision to the appellant in accordance with Part I of the Act, treating the date of receipt of the record as the date of the request.
3. I order the Township to provide me with a copy of the written direction referred to in provision 1 above, and a copy of the Township'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: _____
Tom Mitchinson
Assistant Commissioner

_____ March 31, 2000