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

ORDER MO-1892

Appeals MA-030386-1 and MA-030394-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to certain information generated or received by a named individual (the affected person) during the course of his review of issues surrounding the Union Station redevelopment project. The requests encompassed the following:

> Request #1:
>
> 1. all notes taken by [the affected person] during the course of interviewing me;
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> 2. all notes referring to me made by [the affected person] prior to and/or subsequent to interviewing me.
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> Request #2:
>
> 1. any and all references to me, including those which do not specifically identify me by name but that a reasonable person could conclude could refer to me, in the notes taken by [the affected person] and or submitted to [the affected person] during the course of interviewing the individuals in the list that follows:
>
>   [a list of 24 individuals]
>
> 2. any and all references made to the views or opinions of the general public or of any other group or individual who is not otherwise employed by the City of Toronto, Union Pearson Group or L P Heritage in the notes taken by and or submitted to [the affected person] during the course of interviewing the individuals in the list supplied in item 1.
>
> 3. all notes or records generated by [the affected person] or written submissions (such as letters or emails) received by [the affected person] in the course of interviewing the following individuals:
>
>   [8 City Councillors listed]
>
> Request #3:
>
> All notes or records generated by [the affected person] or written submissions (such as letters or emails) received by [the affected person] in both the course of interviewing all individuals listed in Appendix "A" and in the preparation of his Report to Toronto City Council entitled Union Station Review.
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> [Appendix "A" consists of a list of 44 individuals]

The City designated the requests as Requests 03-2800 and 03-2801.

Shortly after its receipt of these requests, the City received a second request, which it designated as Request 03-2825 for access to:

> All notes taken by [the affected person] in the course of interviewing [the requester in the first requests], in preparation for a report to Toronto City Council entitled "Union Station Review", dated May 22, 2003.

In its response to the both requests, the City stated, among other things, that the documents requested are not in the custody or under the control of the City:

> Any notes and records relating to [the affected person's] preparation and independent research leading up to the final Report are in his custody and under his control. The City does not have a contractual or statutory right to possess any of [the affected person's] notes and records nor does the City have a contractual or statutory authority to regulate the use of any such notes and records. These notes and records have not been relied upon by the City in any way.

As a result, the City denied access to the records. The appellants in both requests appealed this decision. During the course of mediation, the appellant in the first set of requests narrowed his request to cover responsive records in the possession of the affected person only, as is the case with the records at issue in the second request. In both cases, the requests do not cover responsive records in the City's possession, such as those records that are also in the possession of the affected person. Because the sole issue raised by both appeals is whether the requested records are in the custody or under the control of the City, I will dispose of both by way of a single order.

For both appeals, the Commissioner's office first sought and received the representations of the City and the affected person on this issue. The representations of the City were shared with the appellants in each of the appeals, along with a Notice of Inquiry setting out the facts and issues in the appeal. The representations of the affected person were not shared with the appellants. The appellant in the first appeal, MA-030386-1, made submissions in response to the Notice and I determined that it was necessary for me to share those representations with the City and the affected person. The appellant in the second appeal, MA-030394-1, did not provide any representations in response to the Notice. I then received further representations by way of reply from both the City and the affected person in Appeal Number MA-030386-1.

Because the issue and the records in both appeals are identical, I will address the custody or control issue relating to both appeals in this decision. As a result, this decision is intended to be determinative of the outstanding issues in both MA-030386-1 and MA-030394-1.

DISCUSSION:

CUSTODY OR CONTROL

General principles

Section 4(1) reads, in part:

> 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 . . .

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, (1999), 47 O.R. (3d) 201 (C.A.); *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Factors relevant to determining "custody or control"

Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

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

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

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above]

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

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

- Does the institution 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? [Orders P-120, P-239]

- 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? [Orders P-120, P-239]

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

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

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the record? [Orders P-120, P-239]

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

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

The following factors may apply where an individual or organization other than the institution holds the record:

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

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- 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 institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution 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 institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution? [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 institution?

- Was the individual who created the record an agent of the institution 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 institution 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 similar trace, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue? [Order MO-1251]

In Order PO-2306, Assistant Commissioner Tom Mitchinson outlined the rationale behind the approach taken by this office when determining whether records are within the "control" of an institution as follows:

> 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 …

I intend to apply these principles in my analysis of the issue before me in this appeal.

Representations of the parties

The City's position

The City responded to each of the criteria described above in its initial representations, and submitted additional evidence and argument in favour of finding that it has neither custody nor control over the records. It argues that the records were created by the affected person in his capacity as an independent contractor "retained to conduct an investigation on a fee for service basis" in accordance with certain resolutions of the City Council. The City states that the responsive records consist of notes taken by the affected person in the course of conducting interviews of witnesses to assist him in writing his report following the conclusion of his investigation. The City states that the affected person maintains possession of the requested records, nor is the affected person required to provide copies of his notes pursuant to his mandate to conduct an investigation into certain matters. It argues that because the terms of reference used to retain the services of the affected person involved a unique situation, "there is no general practice that has been formalized" for the regulating the use of any notes created in the course of the investigation.

The City argues that the notes taken by the affected person are not integrated into its record-keeping systems in any way. It submits that during the course of his investigation, the affected person was provided with an office and a computer for his use but that the computer was linked to a "confidential drive" and that no one in the employ of the City had access to this drive. Upon the conclusion of the investigation, the confidential drive was deleted from the computer.

The City submits that the review undertaken by the affected person was mandated by a City Council resolution passed pursuant to powers granted to the City by virtue of sections 2, 8 and 9(1)(a) of the *Municipal Act, 2001*. It argues that there is no written contract between the City and the affected person for the conduct of his investigation. It was the City's understanding that the only work product expected at the conclusion of the investigation would be a report containing his findings, as requested by City Council.

The City relies on a written response received from the affected person following the city's receipt of this request in which he states that it was his understanding the notes taken during the course of his interviews were to be considered his, and not the City's, property. The City provided me with a copy of this correspondence. The City also points out that it paid the affected person to create a report in accordance with City Council's mandate and did not pay the affected person specifically for the creation of the notes or other background material that are the subject of the request.

The City also relies on the reasoning contained in Order M-165 in which notes taken by a psychologist retained by a police service when conducting tests on potential recruits were found to be outside of the custody or control of that police service. The City also states that the affected person was not acting as its "agent" and relies on the decision of the Ontario Court of Appeal in *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 in support of this contention. In that decision, the Court held that the Ministry of the Attorney General did not have custody or control over documents created and maintained by the individuals comprising the Judicial Appointments Advisory Committee. Justice Goudge, writing for the Court, found that:

> . . . individual members [of the Committee] were neither employees or 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 had 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 the 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.

The City argues that:

> A proper examination of all aspects of the relationship between the City and [the affected person] would lead to a similar conclusion to that of the Court of Appeal in *Walmsley*. [The affected person] was an independent contractor and neither an employee nor an officer of the City. Recommendations of [the affected person] to

> the City Council were arrived at independently and at arm's length from the City. The City had no statutory or contractual right to control [the affected person's] actions or investigations in the preparation of his report. Therefore, [the affected person] was not an agent of the City for the purposes of the activity in question. Even if it appears that some elements of an agency relationship may exist between the City and [the affected person], the scope of such relationship does not extend to the control of the records requested.

The affected person's position

The affected person submits that the records in dispute in this appeal were prepared in the course of his review of the Union Station RFP "and related matters". He indicates that "[T]he review was independent of the City of Toronto in the sense that the City had no control over the manner in which I undertook the review" and that the records were never in the City's custody or control. He concludes by stating that:

> The information I received from those that I interviewed was almost entirely on a 'without attribution' basis. That confidence would be reached were I to comply with the request that has apparently been made under the *Municipal Freedom of Information and Protection of Privacy Act.*

The appellant's position

The appellant's representations are detailed and lengthy. I will reproduce portions of them in order to elucidate the most pertinent and relevant arguments that he has raised.

The appellant begins by reviewing the factual background concerning the retention of the affected person by the City. He then argues that the City Council "had no authority to hire a consultant or conduct a process beyond the reach of [*the Act*] and the *Municipal Act*." He argues that a Council resolution that has the effect of breaching a provincial or federal statute is of no force and effect. Accordingly, the appellant submits that if the resolution retaining the services of the affected person had the effect of circumventing the operation of the *Act*, that resolution is "moot". He submits that the activities of the affected person in the conduct of the review, including the collection of evidence and the retention of records, is subject to all of the legal requirements imposed on the City by the *Municipal Act* and the section 30 of the *Act*. He argues that "retaining source records is critical to governance and the legitimacy of Council". Further, he submits that the records created by the affected person remain under the control of the City as they are its property and are, therefore, subject to the City's records retention schedules and the provisions of sections 28, 29 and 30.

The appellant goes on to submit that the review undertaken by the affected person was simply an internal activity of the City's administration, as opposed to an independent inquiry by a Superior Court Judge under section 274 of the *Municipal Act*, like the Bellamy Inquiry.

The appellant argues that the affected person was retained by Council as a "contract employee" operating as "agent" for the City and that he was provided with office space and equipment in a building operated by the City. The appellant argues that this employment relationship was established by the resolution empowering the affected person to undertake his review, the resolution deciding upon his remuneration, the fact that his report was submitted directly to Council and a resolution indemnifying him from liability was passed by Council in June 2003. In support of his argument that the affected person was acting as a "contract employee", the appellant points out that he was being paid on a "fee for service basis", rather than receiving an "honorarium" as was the case with the members of the Judicial Appointments Advisory Committee in *Walmsley*.

The appellant also relies on the decision of the Divisional Court in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [cited above] in which Mr. Justice O'Connor, writing for the Court, considered whether back up audiotapes of proceedings before the Criminal Code Review Board (as it was named then) that were created by a court reporter fall within the control of the provincial institution, the Board. The appellant argues that, as was the case with the court reporter's back up audiotapes, the City ought not to be entitled to "abandon" control over the records, thereby removing them from the scope of the *Act* and "attendant public scrutiny". In addition, the appellant submits that although the affected person requested that the records he created be kept separate from those of the City, the fact remains that they are City documents and cannot be removed from the scope of the *Act*.

The appellant has made very lengthy representations in support of his submission that the affected person was acting as a contract employee or as an agent on behalf of the City during the course of the conduct of his review. By way of summary, the appellant argues that:

> an examination of the retention of [the affected person] and the relationship between the City and [the affected person] reveals that he acted on behalf of and thus is an agent of the City for the purposes set out in his employment contract.

and goes on to add that:

> By authorizing [the affected person] as its employed agent to collect the personal information of those required or requested to participate in the investigation, the City undertook the resultant duty imposed on it by statute and regulation for the maintenance and protection of the personal information so collected. To fulfill that duty and obligation, the City was legally required to control the records and to maintain custody of them. The City has no authority to alienate custody or control of records of personal information collected under its authority. The statutory duty of the City in respect of the documents containing personal information collected at its behest, for the benefit and under its authority creates the right of the City to possess the records.

The appellant goes on to rely on the principles established in Order MO-1237 in which Senior Adjudicator David Goodis found an agency relationship existed between a school board and an

architect carrying out a pre-qualification review of building contractors on the board's behalf. The appellant draws an analogy between the situation present in that appeal and the present appeal in which an outside "contract employee" or "agent", the affected person, was retained to conduct what the appellant describes as a "business review". He submits that the records created during that review, which was similar to an audit, are routinely and customarily maintained in the custody or under the control of the City in order to afford the City and the reviewer the opportunity to respond to "questions or challenges of the review and its methodology."

The City's submissions by way of Reply

In response to the appellant's crucial assertion that the affected person ought to be considered to be its "contract employee", the City takes the position the affected person's status is that of an independent contractor, as was the finding in *Walmsley*. The City submits that the authority for appointing the affected person to conduct the review which gave rise to the creation of the records lies in section 8 of the *Municipal Act* which states:

> A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.

The City argues that, pursuant to the authority granted to it under section 8, the affected person was appointed to conduct the review in question.

The City refers to the appellant's arguments that the fact that the affected person was paid on a fee for service basis rather than an honorarium as was the case in *Walmsley*, that his report was made to Council directly and that he was reimbursed for his out of pocket expenses is of some significance in determining that he was, in fact, a contract employee. The City submits that these are "distinctions without a difference" and are of no relevance to a determination of the issue of whether the affected person was a contract employee or an independent contractor.

The City goes on to point out that at no time has it ever possessed, had access to or had in its control the affected person's notes. As a result, it argues that the records retention provisions of the *Act* and the *Municipal Act* could not apply to them. The City also distinguishes the facts of the present appeal from those present in the *Ontario (Criminal Code Review Board)* decision on the basis that the City was not under a statutory mandate, as was the Board in that case, to keep an accurate record of what transpired at each of the interviews conducted by the affected person. This was an important factor in the Court's finding of control in that case.

The City reiterates its reliance on the decision of the Court of Appeal in *Walmsley*, arguing that the necessary indicia of control set forth in that case have not been established in the present appeal. It also relies on a recent decision of this office in Order PO-2306, in which Assistant Commissioner Tom Mitchinson held that the Ministry of Education did not exercise the requite degree of control over notes taken by an external auditor in the course of an investigation. The Assistant Commissioner, applying the reasoning set out in the *Walmsley* decision, found 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.

The City also points out that the affected person requested and was given access to a completely secure computer and hard drive independent of the City's own internal networks. The City suggests that this indicates an intention on the part of the affected person that the contents of the computer hard drive were to remain under his sole control and were his own property. The City states that, following the conclusion of the investigation the affected person was free to delete the contents of the computer's hard drive. I note that the affected person states that, even if he were

required to do so, he would be unable to retrieve these records and could not be compelled to do so.

Analysis

Are the records in the custody or under the control of the City?

I accept that the City does not have actual physical possession of the records sought by the appellant and does not, therefore, have custody of them for the purposes of the *Act*. Accordingly, the sole remaining issue is whether the responsive records fall within the control of the City.

Addressing first the appellant's contention that the affected person was acting as a contract employee of the City while conducting his investigation, I rely on the findings of Assistant Commissioner Mitchinson in Order PO-2306 where he held that:

> 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.

Similarly, I find that the affected person was retained as an independent contractor and was not acting as an officer or employee of the City. Although he did not enter into a contract for the provision of his services, I find that the Council resolutions respecting his engagement by the City, the manner in which he was remunerated and the independence granted to him in the conduct of the investigation all point to this conclusion. This finding weighs strongly in favour of a conclusion that the City does not have control over the affected person's notes.

Under the circumstances, Order PO-2306 provides further guidance in the determination of whether an institution exercises the requisite degree of control over records created by a third party. In that decision, the Assistant Commissioner characterized another factor as that involving a "statutory power" as follows:

> As established in Order P-912, upheld in *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)* [cited above], the statutory framework is a factor to be considered in any "control" analysis.

I accept the arguments of the City that, pursuant to section 8 of the *Municipal Act*, it has the ability to retain the services of individuals to independently perform functions on terms

established by the City. I agree with the position taken by the City that section 8 of the *Municipal Act* may be broadly interpreted to allow for the retention of independent contractors to perform a service at the general direction of Council. However, despite agreeing with this interpretation, the fact that the City may enter into such an arrangement is not determinative. It simply means that the "independent contractor' arrangement described above was not precluded by this section.

The appellant has provided me with compelling arguments with respect to what he characterizes as the "abandonment" of its control over the records to the affected person. The appellant quite properly points out that an institution cannot simply walk away from its responsibilities to maintain its records and have them available for review by members of the public, either following a request under the *Act* or otherwise. The undertaking of a review of the business practices of the City's administration qualifies as part of the "core, central or basic functions" of the City and I find that records relative to that undertaking relate directly to the City's mandate and function. Nevertheless, the City's powers in this regard are those established by the *Municipal Act*, which I have found permits the retention of the affected person as an independent contractor.

Another significant consideration weighing in favour of a finding that the City does not exercise control over the records is the fact that they are not now, and never have been, in the physical possession of the City. Throughout the investigation process, the notes taken by the affected person have remained solely in his possession. As noted in his representations, the affected person requested and was granted secure access to a computer. The information stored on the hard drive of the computer was not available to the City's information technology staff and was maintained by the affected person only. Despite the fact that the affected person conducted his review out of an office located in a City-owned building, I find that possession of the records, both electronically or in paper form, was retained solely by the affected person.

I also find that the City has no right of possession of the affected party's notes. The Council resolutions that governed the relationship between it and the affected person do not speak directly to this issue. In my view, however, it is implicit in the arrangement made between the affected person and the City that he be entitled to conduct his investigation privately and without interference from Council or the City's administration. Part of that implicit arrangement, in my view, includes the notion that the affected person was empowered to conduct his review in whatever manner he saw fit, without interference from City staff or Council members. I find that it is consistent with the affected person's independence to conclude that the records that he created remained his property and were not "compellable" by representatives of the City. This is a very significant consideration favouring a finding that the City does not exercise the requisite degree of control over the records to bring within the ambit of the *Act*.

The City and the affected person maintain that the records sought by the appellant were used by and relied upon solely by the affected person in the conduct of his investigation. I find that the records have never been seen by City staff and have not been used by them in any way. Again, this is a factor weighing in favour of a conclusion that the City does not exercise control over the records.

The appellant maintains that during the conduct of his investigation the affected person was acting as an "agent" for the City and that any records generated as a result of that principal and agent relationship ought to be the property of the City. This issue was canvassed by Assistant Commissioner Mitchinson in Order PO-2306 as follows:

> 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.)].

He then went on to apply these principles to the facts before him in that appeal in the following manner:

> 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.

I find that the approach taken by the Assistant Commissioner in Order PO-2306 is equally applicable here. In my view, evidence of a principal and agent relationship has not been provided in this situation. Even if elements of agency had been established, I am not satisfied based on the evidence before me that it went so far as to include the right of the part of the City to control the use of the notes taken by the affected person. I conclude that the appellant has not established the necessary elements to enable me to find that the affected person was acting as an agent for the City and that this arrangement included the right to control the use of the affected person's 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 City does not have control of any handwritten notes prepared by the affected party during the course of his investigation. I am supported in this finding by the

analysis set forth above of the considerations and factors weighing in favour of and against such a conclusion. Specifically, I have found above that:

- the affected person was not acting as an officer or employee of the City;
- section 8 of the *Municipal Act* provides a statutory basis for allowing the retention of independent contractors by the City;
- the City has an obligation to maintain its own records and have them available to the public, informally or in response to a request under the *Act*;
- the City does not presently and has never had physical possession of the records, the affected person has maintained possession of his own notes throughout his investigation;
- the City does not have a "right of possession" either explicitly through its contractual arrangements with the affected person or as a result of some other understanding;
- City staff have never seen or made use of the affected person's notes; and
- the affected person was not acting as an agent of the City.

I conclude that the considerations favouring a finding that the City does not exercise the requisite degree of control over the records outweigh significantly those favouring a finding that the City does have control over them. As a result, I find that the City does not have custody or control over the notes taken by the affected person during the course of his investigation.

ORDER:

I uphold the City's decision.

Original Signed by: December 23, 2004
Donald Hale
Adjudicator