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

ORDER MO-1251

Appeal MA-980234-1

Township of King

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BACKGROUND:

In 1994, the Township of King (the Township) and the Regional Municipality of York (the Region) decided to carry out a study of sanitary sewage disposal needs in King City (the study). The study was undertaken in connection with an environmental assessment under the Environmental Assessment Act (the EAA). For the purpose of the study, a consultant (the consultant) was retained to provide professional engineering services. In turn, the consultant retained a sub-consultant (the sub-consultant) to assist it in its tasks. The study consisted of two main phases: (i) problem identification; and (ii) alternative solutions. One component of the first phase of the study consisted of defining the existing sewage servicing conditions in King City. This involved, among other things, a door-to-door survey (the survey) "to confirm and expand results of preliminary assessments" carried out by the sub-consultant. The survey consisted of a two-page questionnaire to be filled out by King City residents. One of the questions asked was whether the resident had experienced "septic problems" and, if so, the specific nature and timing of the problem or problems. The questionnaire also asked whether and how any septic problems had been solved.

In 1997, the Township made a funding application to the Ministry of the Environment (the Ministry) under the Provincial Water Protection Fund. This fund is set up by the Ontario government to help municipalities that are having health and/or environmental problems with water or sewage infrastructure. The survey was supplied to the Ministry in support of the Township's application.

NATURE OF THE APPEAL:

In 1998, the appellant, a Township Councillor, asked the Township for information contained in the survey forms collected by the sub-consultant. The appellant sought access specifically to a list of the 41 lots noted as having septic tank problems. In its reply, the Township stated:

> [The consultant] has advised that [it] is unable to provide the list of the 41 lots noted on the application as having septic tank problems as per your request.
>
> When I met with [named consultant representative] this morning he explained that the [Township] Council in office in 1994 directed that the information remain confidential. [Township] Council never received a copy of the list of 41 lot owners. [The named consultant representative] noted that one reason for the confidentiality was that the [Township] Ward One Councillor at that time wanted to ensure that the integrity of the [assessment] process was protected.
>
> [The named consultant representative] advised that the only way the private information could be released would be through a direction of [Township] Council.

The appellant subsequently submitted a request to the Township under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request stated:

> I am requesting, from [the consultant] survey conducted in King City in 1994, the street names of the 41 dwellings that experienced sewage ponding or discharging off property, as referenced on Page 28 of the Funding Application submitted to [the Ministry on] October 27, 1997.
> I am also requesting the year that each dwelling experienced this problem, [and] how and when it was corrected.

The Township replied by stating it had reviewed its files and was unable to locate the requested information. The Township further stated:

> This will also confirm that we contacted [the consultant] and were advised that [it] was instructed by a previous Council not to release the information.

The Township then wrote to this office summarizing the circumstances of the request. Specifically, the Township stated that "[the consultant] will not release the information."

The appellant appealed the Township's response to this office.

Later, the Township issued a decision under the Act as follows:

> The request … is denied due to the fact that the Township does not have this information on record at the Township Offices.

During the mediation stage of the appeal the Township wrote to the consultant asking for a copy of the requested records. Approximately two weeks later the Township again wrote to the consultant indicating that it had received neither a response to this request nor copies of the records, and reiterating its request. To date, the Township has not received copies of the records from the consultant.

Also during the mediation stage of the appeal, the appellant clarified that she was seeking only the street names of the 41 dwellings identified in the survey, not owners' names or specific addresses. In addition, the appellant indicated that she was seeking access to information revealing the year each dwelling experienced the problem and how and when it was corrected.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant, the Township, the consultant, and the sub-consultant, and received representations from all parties. I later sent a Notice of Inquiry to the Region. The Region submitted representations to me, and indicated that it "entirely endorsed" the Township's representations.

DISCUSSION:

CONTROL OF THE RECORDS

Introduction

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 records responsive to the appellant's request (the survey forms) are not in the custody of the Township. Therefore, the sole issue in this appeal is whether the records are "under the control" of the Township within the meaning of section 4(1). If so, the right of access under section 4(1) applies.

In the 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 made reference to various authorities under each question, where appropriate:

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

2. Is the activity in question a "core", "central" or "basic" function of the Township? [Ontario (Criminal Code Review Board)]

3. Are there any provisions in any contracts between the Township and the consultant, and the consultant and the sub-consultant, in relation to the activity which resulted in the creation of the records, which expressly or by implication give the Township 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. Is there an understanding or agreement among the Township, the consultant, the sub-consultant or any other party that the records are not to be disclosed to the Township? [Order M-165]

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

6. Are the consultant or the sub-consultant agents of the Township for the purposes of the activity in question? If so, what is the scope of that agency, and does 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.)]

7. 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?

8. What is the customary practice of the consultant, the sub-consultant 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 Township rely or intend to rely on the records? [Order P-120]

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

11. To what extent, if any, should the fact that the consultant has refused to provide the Township with copies of the records determine the control issue?

12. To what extent, if any, should the fact that the consultant provided the records to the Ministry, and deleted information from the records, "at the request of" the Township, determine the control issue?

13. What were the precise undertakings of confidentiality given by the sub-consultant and/or the consultant, to whom were they given, when and in what form?

14. Who has physical possession of the records, the consultant, the sub-consultant or both?

These questions reflect a purposive approach to the "control" question under section 4(1). A similar approach has been adopted in Ontario and 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) (1995), 30 Admin. L.R. (2d) 242 at 244-245:

> 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.

The Federal Court of Appeal continued (at p. 245):

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 will address each of the above-listed questions below.

Analysis of "control" factors

1. Statutory powers

The statutory framework is the starting point for any "control" analysis [Ontario (Criminal Code Review Board)].

The Township submits that the work performed in connection with the study was carried out pursuant to a contract between the Region and the consultant. The Township submits that sanitary sewage servicing is a matter entirely within the jurisdiction of the Region pursuant to sections 73-95 of the Regional Municipalities Act (the RMA), and that the Township has no statutory authority to carry out an environmental assessment with respect to sanitary sewage servicing.

The appellant states that, pursuant to the Municipal Act (the MA), the Township has a duty to ensure the provision of appropriate and adequate sanitary sewage facilities within the Township and to this end has the power to retain consultants to provide professional advice. The appellant submits that while some municipalities are able to undertake such studies through the use of "in house" professional staff, others such as the Township rely on outside expert consultants to perform this service. The appellant states that the consultant was retained to undertake the survey "for and on behalf of" the Township.

Neither the consultant nor the sub-consultant made representations on this point.

Under Part V of the RMA, the Region has authority over sewage collection, treatment and disposal in its regional area, specifically with respect to sewer linkages between municipalities within the area.

Under the MA, the Township has a range of responsibilities in relation to sewage collection, treatment and disposal at the local level. The Township has the authority to enter into agreements with adjoining municipalities for the establishment, acquisition, enlargement or extension of sewage systems [section 207(6)], to make any regulations for sewage that may be considered necessary for sanitary purposes [section 210(83)], to establish, acquire, operate and maintain sewage works [section 210(84)], to procure investigations and reports as to sewer systems or sewage works [section 210(98)], to extend sewers into adjoining municipalities [section 210(99)], to authorize laying down, maintenance and use of pipes and other necessary works for the transmission of sewage on, in under, along or across any highway under its jurisdiction [section 210(118)], and to prohibit, regulate and inspect the discharge of matter into sewer systems or sewage works [section 210(150)]. I note also that both the Township and the Region have some protection from liability in relation to nuisance proceedings and sewage works [sections 331.1-331.3].
Both the Township and the Region have jurisdiction over the broad area of sewage collection, treatment and disposal under the MA and the RMA. Pursuant to sections 207(6), 210(84), 210(98) and 210(150) of the MA, the specific function of conducting a survey at the local level as part of an investigation to determine the extent of problems with sewage works falls squarely into the Township's jurisdiction. The Region has concurrent jurisdiction in relation to the broader study under the RMA. Also, the EAA at the relevant time required an environmental assessment to be carried out "by" or "on behalf of" a municipality. In my view, given the joint responsibilities of the two municipalities in the area of sewage systems, both the Township and the Region had the

statutory authority to undertake the septic survey, as part of the broader study. This finding supports the conclusion that the directing mind in securing the septic survey comprised both the Township and the Region.

2. Core function

The Township submits that the activity in question is not a core function, that it "requested" that the Region initiate the study, and that its role was limited to providing input in the process.

The consultant submits that the survey is not a common activity of the Township. The consultant further submits that the purpose of the survey was unrelated to the Region's responsibility to regulate sewage systems, but was a characterization of waste disposal operations in the community as a basis for continuing with the investigations for alternative servicing concepts for King City.

The appellant's position is that the provision of adequate sanitary facilities within the Township is a core responsibility of the Township.

The specific function of conducting a survey at the local level as part of an investigation to determine the extent of problems with sewage works falls squarely within the jurisdiction of the Township under the MA (see section 210(98)). While the Region may have played an important role in the survey process, it was carried out on behalf of the Township, not just the Region. I do not accept that the survey was "unrelated" to the Township and the Region's responsibilities to regulate sewage systems. The survey was clearly and directly related to these statutory responsibilities. The survey was a necessary initial step towards the broader goal of ascertaining the nature and extent of sewage system problems, and determining and implementing sewage system alternatives. Put another way, one of the main purposes for which the survey was conducted was to fulfill the Township's statutory mandate under the provisions of the MA [Ontario (Criminal Code Review Board), p. 5, para. 29].

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 it will not necessarily be determinative when in conflict with the statutory framework [Ontario (Criminal Code Review Board) (Div. Ct.)].

The appellant indicates that she has no direct knowledge of the details of any contracts among the relevant parties.

The Township submits that it is not a party to any contract giving it authority to secure the records from the consultant or the sub-consultant, or to dispose of them.

The sub-consultant states that there is no contract between the sub-consultant and any other parties in this regard.

The consultant makes no specific submissions on this point, but provided me with a copy of a contract between itself and the Region. This contract contains provisions as follows:

- the consultant was to provide services "under the general direction and control" of the client [article 1.01];

- "documents . . . required for" the study were to be exchanged between the parties on a "reciprocal basis" and the client had the right to use documents prepared by the consultant for the client [article 1.05];

- the client owned the drawings [article 1.05];

- the client had the right "to inspect or otherwise review the Services" being performed under the study and the premises where they were being performed [article 1.18];

- the consultant was required to obtain the consent of the client before publishing or issuing any detailed information about the study [article 1.19]; and

- the consultant was prohibited from disclosing any specific confidential information it received in the course of the study; no such information could be used without the client's written approval [article 1.20];

The above-listed clauses demonstrate that the client is intended to have control over the records arising from the performance of the services, including the records at issue in this appeal. For example, in the case of the septic survey portion of the study, the "service" would entail generating and maintaining documents, which the client would thus have a right to inspect based on article 1.18.

Further, articles 1.19 and 1.20 indicate that the client is intended to have the power to limit the use and disclosure of records generated from the services performed by the consultants. It follows that the client has the power to exercise control over these records [Ontario (Criminal Code Review Board), p. 5, para. 31].

While the Township is not explicitly a party to this agreement, I found under "statutory framework" that the Township was a directing mind for the purpose of the study, along with the Region. Later in this order, under headings numbered 5, 9 and 12, I find that the Township paid for 50% of the cost of the study, and that the Township relied on the records to its benefit for the purpose of the study and its subsequent funding application to the Ministry. On this basis, the Township, as well as the Region, can be considered to stand in the position of "client" for the purpose of the study, even though the Township may not itself have an enforceable remedy under the terms of the contract and may have to invoke the aid of the Region in order to take advantage of these contractual terms.

In any event, it is reasonable to expect that the Township would ensure, by contract if necessary, that any records collected on its behalf and used for its benefit pursuant to its statutory mandate would be

used solely for this purpose and not otherwise. The Township should exercise control over the use of records generated for this purpose [Ontario (Criminal Code Review Board), p. 6, para. 32].

4. Agreement that records not to be disclosed to the Township

The Township submits that there is an understanding among the Region, the Township, the consultant and the sub-consultant that the records would not be disclosed to any person, including the Township and the Region, because of the confidential nature of the information in the records.

The Township further submits that the Township Mayor's letter of October 11, 1994, which the sub-consultant used to introduce the survey to homeowners, contains an undertaking of confidentiality, and that it is implicit in this undertaking that information collected would not be disclosed to the Township.

The Region echoes the Township's submissions on this point.

The sub-consultant states that the Township "was only interested in the overall interpreted results, not in the individual homeowner scientific and technical information".

The consultant submits that the issue of confidentiality of the information proposed to be collected by the survey had been discussed between the client (defined by the consultant as both the Township and the Region) and the consultant (defined by the consultant as both it and the sub-consultant):

> … Firstly, it was not necessary for the purposes of the study, to point to individual properties where problems had occurred, only to indicate the number of problems within a geographic area of the community. Secondly, there was a concern that homeowners would refuse to respond to the survey questionnaire if they thought their particular information would or could [become] public.
>
> . . . . .
>
> [The consultants] prepared a report that summarized the information collected in the survey and presented this information in a public document. The information presented in this fashion became one of several sources of information used to make some generalized statements about the nature of the sanitary sewage disposal problems in King City. The information was not presented, as promised, in such a way that individual sites were or could be identified.
>
> There was no undertaking to provide the site-specific information to the Township, other than in general statistical form, as it was provided. The Township did not require the specific information to be reported. The Township wished a professional opinion of the consultant team … about the sanitary sewage systems in King City. The consultant team noted the need to collect this information to develop the professional opinion.
>
> The consultant …, through the sub-consultant … , requested homeowners to respond to the survey on the understanding that their information would remain confidential. In some cases people would be reporting problems that might require financial outlay

> to correct. There would be reluctance to report these if it was thought we were only collecting this information to force them to address any current shortcomings. If this information is now made public the reputation of the [consultants], relative to these commitments of confidentiality would be harmed.

The appellant states that it appears the Township at some point during the process directed the consultants not to disclose the survey information, although she takes the position that this does not appear to have been a pre-condition to the initial collection of information from the homeowners. The appellant states that the reasons for any such direction have not been made clear, other than an apparent comment by the then Township Ward 1 Councillor that he wanted to ensure the integrity of the environmental assessment process. The appellant submits that it is difficult to imagine how non-disclosure to the Township of the base information upon which the consultants relied to reach their conclusions would ensure the integrity of the environmental assessment process. The appellant argues that disclosure of the information to her would "support and lend credibility to" the process. The appellant reiterates that she is not seeking information that might even remotely be considered personal information, such as the names of the property owners. The appellant states in conclusion that there does not appear to be any basis for any understanding between the Township and the consultant or the sub-consultant that should result in the denial of her request.

I have no cogent evidence of an agreement, understanding or undertaking indicating that the records in question should not be disclosed by the consultant and/or the sub-consultant to the Township. The only document which might shed light on this issue is the 'introductory" letter used by the sub-consultant addressed to recipients of the survey. This letter is on Township letterhead, and signed by the Township's Mayor and Ward 1 Councillor. It indicates that the survey was being conducted "on behalf of" both the Township and the Region and, with respect to the non-disclosure issue, states:

> All comments and information received will be kept strictly confidential. All data will be presented in a combined or general manner to protect the privacy of individuals.

This statement indicates that information gathered, to the extent that it may be identifiable to a homeowner, will not be made public. I do not accept that this means that the information should not be disclosed by the sub-consultant or the consultant to the Township or the Region. Rather, it is meant to allay any concerns around making identifiable information public. A reasonable person would expect that the Region and the Township would have access to the material, although they may not expect it to be made public.

As a result, I conclude that there was no agreement among the Township, the Region, the consultant and/or the sub-consultant that the records in question would not be disclosed to the Township or the Region.

To the extent that the Township's submissions on this point have any probative value on the issue of the ultimate disclosure or non-disclosure of the records to the public, they support the conclusion that the Township had a significant degree of control over the manner in which the records were to

be treated. This ability to limit public access is direct evidence that the records are under the Township's control [Ontario (Criminal Code Review Board), p. 5, para. 31].

5. Payment for creation of the records

The Township, and the consultants submit that the cost for the study was split on a 50-50 basis between the Region and the Township. The Township provided me with a copy of a Township resolution in support of this submission. The Township further submits that, despite this arrangement, the Township "was not entitled to, nor did it provide, instructions to the consultant or the sub-consultant or direct any work carried out by them."

In my view, the fact that the Township shared the cost of the study, including the survey component, is consistent with my finding that the survey formed a part of the Township's core responsibilities, and that the Township was in effect a "client" or directing mind for the purpose of the study and its survey component.

6. Agency

Introduction

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 to possess or control the records in question. Although this may assist in my determination of 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.)].

Representations

The Township submits that neither the consultant nor the sub-consultant is an agent of the Township for the purposes of the environmental assessment. The Township reiterates that there was no contract between it and the consultant or sub-consultant, and argues that the fact of payment for work to be performed does not indicate that a contract existed. The Township submits that there is

no resolution from the Township Council creating expressly or by implication an agency relationship between the Township and the consultant or sub-consultant. The Township states that the consultants and sub-consultants were not officers or employees of the Township, and that they were retained only by the Region. The Township argues that it has no statutory or contractual right upon which to assert the right to possess or dispose of the records created by the sub-contractor. Finally, the Township states that even if some elements of agency exist, nothing suggests that that agency carries with it the right of the Township to control the records.

The sub-consultant also submits that there is no agency relationship between it and the Township.

The appellant submits that both consultants were agents of the Township, and that the survey was authorized by the Township. The appellant states that "for all practical purposes", the consultants represented to the community that they were acting on behalf of the Township, in effect as agents of the Township. The appellant also submits that the fact that the Township appears to have directed the consultants not to disclose the records to it only supports the argument that the Township had "ownership and control" of the records.

Relationship between the Region and the consultant/sub-consultant

B.M. McLachlin et al., in The Canadian Law of Architecture and Engineering, 2nd ed. (Toronto: Butterworths, 1994) state the following (at p. 195):

> Architects and engineers are employed primarily as the agent of the owner, to design, supervise and administer the project …

[See also D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General), [1999] N.S.J. No. 163 (S.C.), at p. 32), in which this passage is quoted with approval].

In my view, there is an agency relationship between the Region and the consultant and the sub-+consultant, as indicated by the provisions of the contract reviewed above, in particular article 1.01, which states that the consultant was to provide services "under the general direction and control" of the Region. This is consistent with the description of the relationship between engineers and "owners" in The Canadian Law of Architecture and Engineering mentioned above.
The next question is whether or not this agency relationship carried with it the right of the Region, 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.
>
> Thus, to determine ownership of documents in the hands of an architect or engineer, it is necessary in each case to examine whether the architect or engineer was acting as agent of the client or as an independent contractor when the documents were generated. Generally, documents exchanged between the architect or engineer and persons and authorities concerned with the approval of plans and the administration of the project, are exchanged by the architect or engineer as agent for the owner and they belong to the owner. On the other hand, plans, specifications and documents connected with the role of an architect or engineer as certifier constitute work of an independent contractor providing professional services, belong to the architect or engineer and need not be produced to the owner.

The role of the consultants is that of agent, not independent contractor. The consultants were not impartial certifiers, but administered the study for the Township and the Region. The consultants' role is similar to a tender process, where the agent, on behalf of the principal, gathers relevant information for the purpose of making key decisions prior to undertaking a project. McLachlin et al. state (at p. 126):

> The architect or engineer acts as the agent for the owner in preparing and issuing tender documents and supervising the tender process.

I conclude that an agency relationship exists between the Region, as principal, and the consultants as agents, which carried with it the right of the Region to possess or control the records at issue.

Relationship among the Township, the Region and the consultants

The next question is how the agency relationship between the Region and the consultants affects the Township's position with respect to the records.

In my view, the Region acted as agent for the Township for the purpose of entering into the contract for the study and, in particular, for the septic survey portion. This is evidenced by the following:

- the Township shared equally in the cost of the study, including the survey;
- the Township's introductory letter to residents indicates that the Township and the Region jointly issued a "flyer" to all King City residents and gave notice in a local newspaper advising of the study; and
- the Township's introductory letter is also the consultants' "authorization to conduct the survey on behalf of the Township and Region";

The study was undertaken jointly by the Region and the Township, and the Region entered into a written contract with the consultants both on its own behalf and on behalf of the Township, as agent for the Township.

Further, the introductory letter is evidence of a direct agency between the Township and the consultants who were authorized to conduct the survey on the Township's behalf. Based on the foregoing, I find that there is an agency relationship between the Township and the consultants. As a principal, the Township has a right to acquire custody of the records from the consultants, to the same extent as the Region.

The fact that the consultant indicated that a previous Council of the Township instructed the consultant not to release the survey information is further evidence of control.

7. Customary practice of Township

The Township submits that it has rarely, if ever, possessed survey information collected on a confidential basis and therefore has no customary practice regarding information similar to that contained in the records.

This factor is not relevant to the control issue in this case.

8. Customary practice of consultants

The Township submits that the practice of these and other consultants in similar circumstances is that records "created on a confidential basis" are kept confidential and that where background information is of a technical and scientific nature, as is the case here, that information is the "property" of the consultant. The Township states that its only interest in the records is in their interpretation by the sub-consultant as part of the background work carried out for the environmental assessment.

The sub-consultant states that unless there is an immediate threat to public health and safety or to the environment, the consultant will keep project information confidential "unless otherwise directed by the client."

The appellant submits that records of this nature are routinely included by consultants within the body of similar reports or included with reports as appendices as background material to assist the reader as to the credibility of the reports and their recommendations.

The sub-consultant's submission demonstrates that the "client" dictates how relevant records are to be treated. While the Township states that it was not "interested" in the records, this does not mean it has no capacity to control their use or disposition. In my opinion, the sub-consultant's evidence is the most accurate reflection of customary practice, which is also consistent with the contractual provisions.

9. Reliance on records

The Township submits that it has not relied on the records per se but has relied on the compilation, interpretation and evaluation by the consultants of the information in the records among other information taken into account by the consultants in the environmental assessment. The Township states that it has never received copies of the records nor been advised of their specific contents, although information in the records does appear in summary form in the environmental assessment document. The Township states that it has never evidenced an intent to introduce the records into the public record or to request that the sub-consultant do so through the environmental assessment document.

The sub-consultant submits that it was its and the consultant's proposal to acquire detailed survey information for later interpretation and summary prior to reporting the information to the Township and the public. The sub-consultant reiterates that the Township only wanted the interpreted information to support the identification of sewage proposal options for the community.

The consultant states that there was no undertaking to provide site-specific information to the Township, other than in general statistical form, as it was provided. The consultant states that the Township did not require specific information to be reported to it, and that the Township wished only a professional opinion of the consultant team about sewage systems in King City.

The appellant submits that the conclusions and recommendations in the environmental assessment report were in large measure founded on the survey results. The appellant argues that the Township relied on the survey results to support its subsequent funding application and that the survey was not conducted for any purpose outside the scope of the original report commissioned by the Township.

It is clear that the Township relied on the records for the purpose of the study, as well as for the funding application to the Ministry.

10. Ownership

The Township submits that the sub-consultant owns the records since they were collected as scientific and technical information which formed part of the background work for the environmental assessment. The Township states that there was never an intent that the records should come into its possession, control or ownership. The Township argues that the nature of the information in the records is precisely the sort of information which a homeowner would not wish to place in the hands of a government body.

The sub-consultant also submits that it owns the records since they constitute scientific and technical information "as per the IPC's exemption from disclosure of information."

The consultant states that the records were collected by and for the consultants in order to prepare the report that provided professional opinions as to sewage servicing conditions in the community and recommendations for developing a strategy for overall sanitary services in the community.

The appellant argues that because the survey was conducted only for the purpose of preparing a report commissioned by the Township and paid for by the Township, the information belongs to the Township.

The sub-consultant and the Township describe the records as containing scientific and commercial information. While this submission raises the potential application of the section 10 "third party information" exemption, this does not assist in the "control" analysis.

The Canadian Law of Architecture and Engineering (at p. 266) states that documents the engineer receives or creates in his or her role as agent for the client are "owned" by the client. Since the consultants are agents of the Township and the Region for the purpose of the study, the Township and the Region are the owners of the records relating to this process.

11. Consultant's refusal to provide the records

The Township asked the consultant to provide the records to it on more than one occasion, but the Township's request was either denied or ignored. In denying the request, the consultant referred to instructions it had received from "a previous Council" not to disclose the records. The sub-consultant also said that it would not release the records because they are its property and the undertaking of confidentiality given to homeowners prevents it from releasing the records to any person, including the Township.

The Township agrees that the sub-consultant's refusal should be given significant weight, since it was given in the context of a confidentiality undertaking to homeowners.

The sub-consultant states that it "has always felt strongly that the information must be kept confidential to protect the individual homeowners and to respect the Township's direction."

The consultant states that if the information became public and was used as a basis for requiring homeowners to undertake activities to improve or correct deficiencies in their systems, the consultant would feel it may be at risk and held liable by the homeowners for these costs since the information was not provided with this understanding or purpose.
It is clear that the Township may direct what is to be done with the records and, in this respect, it has "control" over them within the meaning of section 4(1) of the Act.

12. Records provided to the Ministry

The Township submits that to support its funding application to the Ministry, it was required to provide the Ministry with a copy of the records. The consultant obtained the records from the sub-consultant with all information that could identify the homeowners, property addresses, and general location or site-specific information deleted by the sub-consultant. The Township says that this was not done at its request, nor was it advised that the records would be provided to the Ministry or that they would be provided only with such deletions. The Township submits that the consultants determined that it was in accordance with the original intent of all four parties to delete all identifying information from the records. Therefore, the Township submits that these facts do not determine the control issue but merely reflect the understanding of confidentiality under which the consultants carried out certain work related to the study.

The sub-consultant submits that identifying information was deleted from information supplied to the Ministry in accordance with the Township's "original direction" that any personal information collected should be kept confidential.

The appellant submits that the consultant's action "reinforces" the finding that the Township has control of the records and that the consultant considers that the Township controls the records.

Because the Township, not the consultants, was the applicant and would be the beneficiary of any funding provided by the Ministry, I find that the records were provided to the Ministry by the consultants on behalf of the Township. This indicates that the Township has control of the records. The Township's evidence supports this view by stating that it was "required" to provide the Ministry with a copy of the records.

13. Undertaking of confidentiality

For this factor, the parties essentially repeated their submissions under heading 4. As I concluded above, the undertaking of confidentiality contained in the "introductory" letter from the Township to the homeowners extended to disclosure to the public, but not to disclosure to the Township itself.

14. Physical possession

The Township and the consultants all agree, and I find, that the records are in the sole custody of the sub-consultant.

Conclusion

The legal framework and factual circumstances as described above support a finding that the Township has control of records arising from the septic survey process in the possession of the sub-consultant. This finding is largely dictated by the relevant statutory framework (points 1, 2), as well as the nature of the agency relationships among the Township, the Region and the consultants (point 6) pursuant to the express or implied terms of the contract (point 3), and as evidenced by the Township's payment for creation of the records (point 5), ability to limit use and disclosure of the records (points 3, 4, 6) and reliance on the records (point 9). This conclusion also is supported by the fact that the records were sent to the Ministry in support of the Township's funding application (point 12). As a result of the agency relationships among the parties, the Township has a right of ownership (point 10) and possession (point 6) of the records. The Township's failure to enter into contractual arrangements explicitly giving it the right to control the records cannot dictate a finding that it does not control them [Ontario (Criminal Code Review Board), p. 6, para. 36]. Accordingly, I find that the relevant records are under the "control" of the Township for the purpose of section 4(1) of the Act.

Remedy

In addition to seeking submissions on whether or not the records were in the control of the Township under section 4(1), I asked the parties for representations on the appropriate remedy, should I find that the records were in the Township's control.

The Township submits that the appropriate remedy is to refer the matter back to it to permit it to determine whether or not the records should be disclosed or whether it is appropriate to refuse disclosure under any of the exemptions contained in the Act and to issue a decision accordingly. The Township submits that it has made a decision only on the custody or control issue, and not on the substantive issue of disclosure under the Act. The Township adds that its response is appropriate only if the sub-consultant releases the records to it. If the sub-consultant refuses to do so, the Township states that "there should be no further order made by the Commission against the Township as there would be no further action which the Township could take to satisfy such order."

The sub-consultant submits that it "should keep the information confidential as per the undertaking to the homeowners . . .The generalized information from the survey has already been made public through the project report."

The appellant submits that I should direct the Township to obtain the requested records from the consultant and/or sub-consultant and disclose them to her as soon as possible.

In my view, the appropriate remedy in the circumstances is to order the Township to direct the sub-consultant to provide it with the records, and to take all necessary steps available to it at law to enforce that direction, in the event that the sub-consultant fails to comply with the Township's direction. Once the records are received, the Township should issue an access decision in accordance with Part I of the Act. I accept the Township's submission that it should be given an opportunity to do so, and I do not accept the appellant's position that the records should be disclosed to her immediately without providing the Township with an opportunity to consider the application of any of the mandatory or discretionary exemptions in sections 6 to 16 of the Act.

ORDER:

1. I order the Township to send a written direction to the sub-consultant to provide the Township with records responsive to the appellant's request. The Township's written direction should be issued no later than **December 21, 1999**, but no earlier than **December 16, 1999**, and should require delivery of the records no later than **January 5, 2000**.

2. In the event that the sub-consultant fails to comply with the Township's direction, I order the Township to take all necessary steps available to it at law to enforce the direction.

3. I order the Township to issue an access decision to the appellant upon receipt of the records from the sub-consultant in accordance with Part I of the Act, treating the date of receipt of the records as the date of the request.

4. I order the Township to provide me with a copy of the written direction referred to in provision 1 above, a copy of the sub-consultant's response to the written direction referred to

in provision 1, and a copy of the Township's access decision referred to in provision 2 above.

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

Original signed by: November 16, 1999
David Goodis
Senior Adjudicator