**COURT FILE NO.:** 24/05
**DATE:** 20061030

**SUPERIOR COURT OF JUSTICE – ONTARIO**
**DIVISIONAL COURT**

| | | |
|---|---|---|
| **RE:** | Lawrence David | Applicant |
| | - and - | |
| | Donald Hale, Adjudicator<br>Information and Privacy Commissioner/Ontario | Respondent |
| | - and - | |
| | City of Toronto | Respondent |
| | - and - | |
| | Coulter A. Osborne | Respondent |

**HEARD:** October 27, 28; December 19; 2005; January 12; March 27; 2006

**BEFORE:** Lane, Greer and Epstein JJ.

**COUNSEL:** Applicant in person

William S. Challis, for the Information and Privacy Commissioner

Susan L. Ungar and Mark Siboni for the City of Toronto

## REASONS FOR JUDGMENT

**LANE J.:**

[1] This is one of three related applications[1] that were heard together. They all arose out of the political storm that developed about the selection process for bidders for the contract for the renovation and future operation of the Union Station, the main railway station in Toronto and a landmark historic site. This application involves a request by Mr. David for access under the

[1] The others are: Div. Ct. File No. 494/04, Lawrence David v. Robert Binstock (Registrar Information and Privacy Commissioner, Ontario), and Div. Ct. File No. 485/04, Rita Reynolds v. Robert Binstock (Registrar I.P.C.)

*Municipal Freedom of Information and Protection of Privacy Act*[2] to the notes made by the City's appointed investigator, the Hon. C.A. Osborne, of his interviews with Mr. David or of interviews with others referring to Mr. David, together with much information not relating to Mr. David, all obtained by Mr. Osborne in the course of preparing his report. The other two applications before us seek to require the Commissioner to investigate complaints as to alleged breaches of the applicants' privacy interests relating to the release, in Mr. Osborne's report, of certain information about Mr. David and about Ms. Rita Reynolds, the other applicant.

**Overview**

[2] The City rejected Mr. David's request for access to Mr. Osborne's notes on the basis that these records were not under the City's custody or control. His appeal to the Commissioner failed on the same basis. Mr. David applies to this court for an order quashing the Commissioner's Order MO-1892 and seeking an inquiry into the Commissioner's conduct of the appeal. It is the respondents' position that the Commissioner correctly concluded that the records the applicant requested were not in the City's custody or control but rather in the sole possession of Mr. Osborne. They were therefore not subject to public disclosure under MFIPPA.

**Factual Context of the Decisions**

[3] The background to all of this is that, at its meeting of February 6, 2003, the Council of the respondent City of Toronto engaged the Hon. Coulter A. Osborne, a retired judge of the Court of Appeal to inquire into the process adopted by the City to develop the Request for Proposals, evaluate the submissions and select the preferred proponent to carry forward the redevelopment of the Union Station. The purpose of the Review was to determine whether the RFP was fair, that is, not slanted toward the interests of one or the other of the two proponents. Mr. Osborne was to report directly to Council. He conducted 58 interviews with 43 persons, including the applicant who was interviewed twice. On May 23, 2003 his report was presented to Council and published on the City website. The applicant complained of personal references in the report as an invasion of his privacy and a breach of MFIPPA.

---

[2] R.S.O. 1990, c. M-56 (hereinafter "MFIPPA")

[4] On October 22 and 23, 2003, the applicant submitted access to document requests under MFIPPA to the City. He stated that Mr. Osborne had interviewed him and a number of other individuals in the course of conducting this review. The applicant asked that he be provided with:

> (i) copies of all notes that Mr. Osborne had taken in the course of interviewing him, as well as copies of all notes which referred to him which Mr. Osborne made either prior to or subsequent to the applicant's interview;
>
> (ii) copies of all references to him in notes that were created by, or submitted to, Mr. Osborne in the course of interviews with some twenty named persons during his interviews with such persons;
>
> (iii) notes as to the views or opinions of the general public or other persons not employed by Toronto in notes taken by Mr. Osborne in the interviews in item (ii) above;
>
> (iv) all notes, records, submissions, letters or emails received by Mr. Osborne in interviewing eight City Councillors;
>
> (v) all notes or records generated by Mr. Osborne in the course of the interviews or in the course of preparing the report.

[5] The City responded to the applicant's requests by letter of November 12, 2003, advising him that the records he wished to access were not in the City's custody or control. Any notes or records relating to Mr. Osborne's review and the preparation of his report were under his care and control. Further, many of the requests would constitute an unjustified invasion of the privacy of individuals other than the applicant. The applicant's requests were denied for these reasons.

[6] By letter of November 17, 2003, the applicant appealed the City's decision to deny his requests to the Information and Privacy Commissioner of Ontario (the "Commissioner"). During the course of the mediation held in connection with the applicant's appeal, the applicant agreed to narrow the scope of his access request. In order to resolve the applicant's appeal, the Commissioner had to determine whether the City erred in not providing the applicant with copies of those records he asked for that were in Mr. Osborne's possession.

[7] The applicant's requests are made under section 4(1) of MFIPPA (which grants to every person a right of access to records) and section 36 of MFIPPA (which guarantees individuals the right to access their own personal information). These sections provide requesters, such as the

applicant, access to records and information that are "in the custody or under the control of an institution".

[8] On March 10, 2004 the Commissioner sent a Notice to the City asking 22 questions to obtain the information necessary to determine the custody or control issue. The answers indicated that Mr. Osborne was not a City employee, but an independent party retained to conduct an investigation on a fee for service basis; that his notes were prepared to assist his recollection in preparing his report; that the City did not have the records, nor was Mr. Osborne required by contract or statute to provide them to the City; that the notes, and indeed Mr. Osborne's whole operation, were never integrated with the City operations, but were kept separate and all data in the computer drive was destroyed when the report was completed. The City and Mr. Osborne agreed that the notes were his and all that the City expected to receive was the report. In summary, Mr. Osborne was an independent contractor, not an employee, officer or an agent of the City. Mr. Osborne made submissions that he was to do his work independently of the City; that his records were never in the City's custody or control during or after the review; and that much information was received on a "without attribution" basis and compliance with the applicant's request would breach this confidence.

[9] Subsequently, the Commissioner sent the City's submissions to the applicant for his submissions, noting that Mr. Osborne had also made submissions which supported the City's position, but not forwarding them as Mr. Osborne had marked them 'Confidential'. The applicant made extensive submissions in response. He contended that the review was an internal inquiry and not an independent inquiry by a judge under the *Municipal Act*, s. 274; that Mr. Osborne was a contract employee or an agent; that Mr. Osborne's activities were subject to MFIPPA; that the City had no authority to conduct a process outside of MFIPPA; and to fulfill its statutory duties, the City was obliged to control and maintain the records of Mr. Osborne's review.

[10] The City responded stating that section 8 of the *Municipal Act* provided authority for conducting the review; that the record retention provisions of MFIPPA did not apply as the City never had the records; and that the computer used by Mr. Osborne was independent of the City network. Mr. Osborne submitted that the whole thrust of the review was that it was to be independent of the City.

[11] On December 23, 2004, the Commissioner issued Order MO-1892 in which the respondent Donald Hale, acting as adjudicator on behalf of the Commissioner, held that the records the applicant wished to access were not in the City's custody or control. He found that the records had never been in the City's control; that the City had the authority under s. 8 of the *Municipal Act* to retain an independent contractor to perform functions independently of the City; that Mr. Osborne was not an officer or employee of the City; that the computer, while in a City building, was not available to City staff; the records had not been seen or used by City staff; that Mr. Osborne was not an agent of the City such that it could control his notes; and the City did not have the right to possess and control those notes. This decision disposed of the applicant's appeal because the rights of access that the applicant wished to assert under sections 4(1) and 36(1) of MFIPPA only relate to records that are in the care or under the control of "institutions" like the City. As a result of the Commissioner's finding, it was determined that the applicant did not have the right to access the records he asked the City to produce under MFIPPA. This, then, is the matter before us.

**Relevant statutory provisions**

[12] Section 4(1) of MFIPPA:

> 4(1) 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 [exemption details omitted]
>
> Section 36(1) of MFIPPA:
>
> 36(1) Every individual has a right of access to,
>
> (a) [omitted as inapplicable]
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

[13] It is clear from these sections that the question of the custody or control of these notes is the central issue. The City does not have them, so that the issue to be resolved is the degree to which the City controls them. As the answer will depend upon the nature of the relationship between the City and Mr. Osborne, it was necessary for the adjudicator to explore that relationship. He did so, with the results set out above. Our task is not to find the facts, but to review the decision to determine if

there is a sound basis for the factual findings and whether the appropriate legal principles have been applied.

**The Standard of Review**

[14] The parties are in agreement that the standard of review for the issue of whether the records are in the custody or control of the City is correctness. In my view the parties are correct in this agreement. A leading case on the standard of review applicable to the Commissioner is *Walmsley*[3] in which the Court of Appeal reviewed a decision of the Commissioner as to whether certain records were in the custody or control of an institution. The court held that the decision as to the meaning of 'custody or control' should be reviewed on the standard of correctness.[4] Applying the pragmatic and functional approach as outlined by Iacobucci J. in *Pezim*[5], the court found that the application of the custody or control test was:

> "a jurisdiction-limiting one in the sense that records under the control of an institution are subject to the workings of the Act, both as to access and as to protection of privacy. Records not under the control of an institution are not so subject and are beyond the jurisdiction of the commissioner or his designee. Moreover, the test found in section 10(1), namely "custody or control", is not one requiring a specialized expertise to interpret. By contrast, once records are found to be in the control of the institution, the applicability of the many legislated exemptions would clearly call on the particular expertise of the commissioner. Finally, the legislation has not seen fit to clothe the commissioner with the protection of any privative clause. Hence, using the pragmatic and functional approach, I conclude that the legislature did not intend the decision in issue here to be considered one within jurisdiction. Rather, it is one to be reviewed on the standard of correctness."

[15] Our attention was drawn to *Minister of Health*[6] where the Court of Appeal held that the appropriate standard was reasonableness, even on a pure question of law, if the question was in the Commissioner's core expertise. In my view, the main question of law before us is not at the core of the Commissioner's expertise, but is more correctly characterized in *Walmsley* as one in which the

---

[3] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) [hereinafter "Walmsley"]

[4] See also *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (1999), 47 O.R. (3d) 201, 207 (C.A.).

[5] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 590.

[6] *Ontario (Minister of Health) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.)

expertise of the Commissioner is not engaged. I therefore conclude that the standard of review which we must apply on the meaning of "custody or control" is that of correctness. The standard of review of other aspects of the Commissioner's decision, such as fact-finding or interpreting sections of MFIPPA at the core of the expertise, is reasonableness.

**Custody or Control: The Walmsley Case**

[16] The *Walmsley* court addressed the indicia of custody or control under section 10(1) of FIPPA, which uses the same language as section 4(1) of MFIPPA, the section before us. In *Walmsley* the entity having the requested documents was a nominating committee called the `Advisory Committee on Judicial Appointments', which had been appointed by the Attorney General. It described itself as "a completely independent body with a mandate to select, interview and recommend to the Attorney General suitable candidates for judicial appointment." It was composed of two judges, four lawyers and four lay persons, none of whom had ever been employees of the Ministry, who received a per diem honorarium and expenses but no salary, were not appointed by Order-in-Council and had no contractual or codified relationship with the Ministry. They received applications for provincial judicial appointments, made their own inquiries, and made their decisions and recommendations without any involvement of the Attorney General. The assistant commissioner, who heard the matter, determined that the committee was "part of the Ministry" because its work was very closely connected to the activities of the Ministry. He then continued by finding the documents in the possession of the members fell under the control of the Ministry for the purposes of FIPPA. The Court of Appeal held that the assistant commissioner was in error on both points.

[17] As to whether the Committee was part of the Ministry, the members were not employees of the Ministry and even if they could be regarded as agents of the Ministry, that was not enough to make them part of it. If that relationship sufficed, any agency would automatically qualify, and section 2(1)(b) of FIPPA, which designates specified agencies as coming within the Act, would have been superfluous. The documents could not come within section 10(1) because the Committee members were not part of the ministry. In the case before us, the applicant submits that Mr. Osborne was indeed "part of the City" and attempts to distinguish *Walmsley*. I will deal with these submissions later.

[18] As to the second question, were the documents under the control of the Ministry, the court said that the answer depended upon the examination of all aspects of the relationship between the members and the Ministry that were relevant to control over the documents. At page 619, Goudge J.A., for the court, wrote:

> It is true, as the assistant commissioner said, that the documents in question were held by these individuals because of their role on 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 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 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. In my opinion, the assistant commissioner was wrong in so deciding.

**Analysis 1: Custody**

[19] This passage from *Walmsley* establishes a number of factors that enter into the consideration of the 'custody or control' issue. As in that case, so here, there is no doubt that the documents are not in the custody of the City. To the extent that they still exist, the hard drive having been cleaned, they are in the personal possession of Mr. Osborne.

**Analysis 2: Control: Is Mr. Osborne Part of the City?**

[20] The applicant submits that section 2(3) of MFIPPA makes Mr. Osborne "a part of the municipality for the purposes of this Act". The section provides:

> (3) Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated [as an institution in the regulations] is deemed to be a part of the municipality for the

> purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality.

[21] In construing the subsection, it is useful to consider the list of entities contained in subsection (1), being those already brought into the definition of an "institution". They are all nouns referring to groups of people. The subsection appears to be designed to include as part of the municipality any group whose members are all appointed by the municipality. A "body" in the sense used in the subsection is defined in the Oxford[7] as "an aggregate of people". The use of the phrase "all of its members or officers" bears a plural connotation that supports the view that one individual engaged as an independent contractor is not caught by the subsection. In my view, this section does not make Mr. Osborne, as an independent consultant, "part of" the City of Toronto.

**Analysis 3: Control: Are the Records Under the Control of the City?**

[22] The applicant submits that the Commissioner erred in treating his application as one for a 'record' under section 4(1) of Part I the Act, whereas he actually sought the production of his 'personal information' under sections 36 and 37 of Part II. But the right to access personal information is given under Part II only in respect of such information as is in the 'custody or control' of an institution, so that there appears to be no practical difference. The applicant submits that the question of control of personal information has to begin with considering how the information was collected. He refers to the obligation of an institution to give notice to an individual when collecting his personal information, something which Mr. Osborne did not do. But that begs the question. Mr. Osborne did not have that obligation unless he was an "institution", or part of one, which, as I have said above, he was not. In any event, I cannot see that whether information is under the 'control' of the municipality can be read as having a different meaning in two parts of the same Act without some very express language.

[23] In determining 'control', there is some limited relevance in the fact that the records are in Mr. Osborne's control because of his role as investigator and their contents relate to the task that he was engaged to do for the City. More important factors include that Mr. Osborne was neither an employee nor an officer of the City. He was an independent person appointed to conduct an inquiry

---

[7] The New Shorter Oxford English Dictionary, 1993, Oxford University Press.

into, and to report on the selection process. He was to conduct the inquiry and make his report independently of, and at arms-length from the City. In my view, he was not an agent of the City in the traditional sense of one who has the authority to bind his principal; Mr. Osborne had no such power or authority. His recommendations were not to be binding on anyone. Nothing in the record before us leads to the conclusion that the documents were ever actually controlled by the City. Although they were in some cases stored in a computer owned by the City, it is clear that the computer was allocated to the inquiry and not accessible to persons not associated with the actual inquiry.

[24] On these criteria, I am of the view that the case is very similar to *Walmsley* and the result should be the same: the records are not under the control of the City, for the same reasons the Appointments Committee's records were not under the control of the Ministry.

[25] However, the applicant submits that what is at issue is whether the City has the right to control, and a duty to structure its relationship with a consultant such as Mr. Osborne so as to obtain the right to control, any records which he may produce in the course of his inquiry. This is the heart of the argument made by the applicant: the City has no power to establish a relationship with Mr. Osborne that precludes the availability of his records to those who would be entitled to them under MFIPPA.

[26] The applicant has not referred us to any specific provision in MFIPPA that enacts in terms that a municipality shall require those with whom it does business to comply with the record-keeping and data collection practices mandated by MFIPPA for the City itself. Instead, he bases his submissions on the purposes of the Act, chiefly the purpose set out by the Williams Report[8], which served as a guide to the actual legislation. It stressed the need for individuals to be able to control for themselves how their information is communicated to others. This principle is reflected in the purposes of MFIPPA as set out in section 1 (b): "to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information." [emphasis added] This statement of purpose is accurately and fully reflected in the provisions of MFIPPA at issue: the information which is available is that held by

[8] *Report of Commission on Freedom of Information and Individual Privacy*, Queen's Printer, 1980.

institutions, not that which is held by others. The purpose of the Act is not so broadly phrased as to support an interpretation that information cannot be collected by those who are not institutions, for their own purposes, even though they are engaged in completing a contract with the City to supply their services to it.

[27] The applicant contends that by the device of engaging an independent contractor, Toronto has arbitrarily removed quasi-constitutional rights from him. If there were some evidence that the engagement of Mr. Osborne was a colourable device to enable the City to obtain personal information from persons so that it could be used without the restrictions of MFIPPA, this might be a different case. But there is no such evidence. The gathering of information for the inquiry was a legitimate activity, which the City wished to be conducted at arms' length from it and its staff for the very good reason that the conduct of the City and its staff was itself the subject of the inquiry. Nothing in MFIPPA leads me to conclude that everyone who does business with the City is thereby bound to submit to the MFIPPA regime. Had this been intended, it would have been easy to have said so.

[28] The applicant further submitted that through Mr. Osborne, the City was engaged in collecting personal information without the safeguards of the Act; that this was ultra vires and without authority. There are two aspects to this. Was Mr. Osborne simply a surrogate for the City such that his acts were the City's acts? Or was Mr. Osborne appointed without authority?

[29] If Mr. Osborne was an independent contractor, as in effect, the Commission found he was, and as I also think, it seems to me that the information was collected by him, not by the City. The separation of Mr. Osborne's inquiry from the City provides a guarantee that the City will not have access to the information gathered by him save to the extent that it may be referred to in the report, which is all that the City contracted to receive from Mr. Osborne. The evidence is that Mr. Osborne gathered information from many people who knew that he was doing so for the purposes of his report, in at least some cases on a "without attribution" basis, and that he used the information for that purpose alone and destroyed much of it when he had finished with it. This is consistent with his submission (and the City's) that the information was never expected, by either the City or himself, to be available to the City.

[30] The applicant submitted that, as the Commissioner had found that the records in question related directly to the City's mandate and function, therefore the City could not escape its responsibilities as to records by delegating the activity to an outside person. In my opinion, if the City had purported to assign to Mr. Osborne the responsibility of actually performing one of the City's core functions, there might well be some force in this submission. But that is not this case. Mr. Osborne was not performing contract procurement on behalf of the City. He was conducting an external arm's-length review of how the City had proceeded in a particular case. In these facts, I am satisfied that the Commissioner reached the correct decision when he found that Mr. Osborne was not an agent of the City in conducting his inquiry.

[31] As to the City's power to engage a person as an independent contractor, the applicant submitted that there was no basis for the Commissioner's finding that the City could do so without attaching all the provisions of MFIPPA to the agreement. The applicant contended that the City's powers of a natural person do not extend that far, and in any event ought to be exercised by by-law and no enabling by-law exists.

[32] The City submitted that by-law 3-2003, enacted at the Council meeting of February 4, 5 and 6, 2003, adopted, ratified and confirmed the recommendation in clause 1a of the Report No. 14 of the Administration Committee, that Mr. Osborne be requested to conduct a review of the Union Station RFP process, and authorized the officers to do what was necessary to give effect to this recommendation. Hence, if there was a requirement to act by by-law, it has been fulfilled. It is not necessary for us to decide whether the City can only exercise its natural person powers by by-law, as the by-law exists.

[33] As to the City's fundamental powers, counsel for the City referred to the view of Mr. I.M. Rogers, in his text[9] that a municipality possesses not only powers expressly given by statute, but also those powers fairly or necessarily implied or incidental to the express powers and those powers indispensable to effecting the purposes of the municipality. Counsel referred to section 27 of the *Interpretation Act*[10] which provides that legislation creating a corporation vests in the corporation power to sue and be sued, to contract and be contracted with, to acquire, hold and alienate property

[9] Ian M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., Carswell, Toronto, page 309.

[10] R.S.O. 1990 c. I-11, s. 27

etc. Counsel also referred to the coming into force on January 1, 2003 of sections 8 and 9 of the *Municipal Act, 2001*:

> 8. 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.
>
> 9. Sections 8 and 11 shall be interpreted broadly so as to confer broad authority on municipalities,
>
> a) to enable them to govern their affairs as they consider appropriate; and
>
> b) to enhance their ability to respond to municipal issues.

[34] The powers given to the City are certainly broad enough to authorize it to engage Mr. Osborne to perform an arms-length inquiry into the conduct of the procurement process with respect to the Union Station. There is nothing in MFIPPA to require that such persons follow the document-handling policies to which the City itself must adhere. I do not accept the applicant's submission that the City has no power to engage in business with a person without insisting on control over the information that is generated by the performance of the task contracted for. Such a requirement would extend MFIPPA well beyond "institutions" and deeply into the private sector, whose information is not intended to be accessible to the public.

[35] The applicant relies on the absence of authority to establish the Integrity Commissioner as an independent contractor exempt from MFIPPA as a precedent applicable to this case. He submits that the City has shown by its own resolutions about the Integrity Commissioner that Council knows it has no authority to exempt the Integrity Commissioner from MFIPPA and therefore also knows it has no authority to exempt Mr. Osborne. In my view, the two situations are entirely different. The Integrity Commissioner is hired as an officer of Council on an on-going basis. As an officer of Council, the Commissioner is clearly a part of the operations of the City and his records are subject to MFIPPA, unless exempted. By contrast, Mr. Osborne is not part of the operations of the City. He is a person engaged to study one particular facet of those operations as an independent investigator. His records are not within the control of the City, are therefore not subject to MFIPPA and no question of exemption arises.

[36] Even if there had been conduct by Mr. Osborne in the gathering of information, which would have been a breach of the provisions of MFIPPA, had it applied, the reality is that the City did not stipulate for the right to control the information and Mr. Osborne, as an individual and not a part of the City, has no obligation to surrender the information. Indeed, as he points out, to do so could involve a breach of undertakings given by him to some informants.

[37] For these reasons, I would dismiss the application for judicial review. Costs, if demanded, may be the subject of written submissions, those of the Commissioner within 30 days and those of the applicant within a further thirty.

Lane J.
I agree. – Greer J.
I agree. – Epstein J.

**DATE:** October 30, 2006