



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-462

Appeals M-9400341, M-9400342 and M-9400343

City of Toronto



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NATURE OF THE APPEALS:

In June 1993, as part of its efforts to implement the Social Contract, the City of Toronto (the City) decided to adopt a recommendation to eliminate overtime pay and/or lieu time for deputies and department heads. Under the compensation arrangement which existed prior to this decision, each senior official could claim up to five weeks a year in either salary or time off. The effect of this change was to reduce the compensation formerly paid to these individuals by as much as 9.6%. Since this initial determination was made, there have been ongoing discussions between the City and its senior officials to determine how this disparity might be addressed.

The requester in these appeals, which is brought under the Municipal Freedom of Information and Protection of Privacy Act (the Act), is a City Councillor with an expressed interest in this issue. He has asked that the City of Toronto provide him with access to the following categories of information:

- (1) Any documentation relating to the issue of overtime pay for City of Toronto Commissioners for the period commencing July 1, 1993 to the date of the request (April 6, 1994).
- (2) Any documentation pertaining to those meetings attended by three senior City officials or their representatives to discuss the overtime pay issue over the same time period. (Such information was to include the location of these sessions, the persons who attended and any notes taken during these meetings.)
- (3) Notes, agendas, memoranda and all other documents derived from any meetings or discussions held between the then Mayor and/or representatives of her office and Commissioners and Heads of Departments of the City or their representatives regarding the same issue.

The requester filed three separate requests of this nature with the City. In each of these, he sought documentation pertaining to the activities of a particular senior City official. I will refer to the three appeals which arose out of these requests as appeal number one (for file M-9400341), appeal number two (for file M-9400342) and appeal number three (for file M-9400343).

It should be noted that the City Councillor also filed a fourth request with the City where he has sought access to general records about the overtime pay issue. The appeal relating to this request (Appeal Number M-9400340) was the subject of Interim Order M-457.

In its decision letters, the City identified five records that were responsive to part one of the requests and disclosed these documents to the appellant in their entirety.

With respect to parts two and three of the requests, the City stated that, with one exception, records of the type sought did not exist. The City further indicated that, any records which might respond to the request would have been created by the City officials in their capacities as private individuals. As a result, these

documents would not fall under the custody or control of the City for the purposes of the Act.

The one exception was a letter dated October 23, 1993 from the City official referred to in appeal number three to the former Mayor of Toronto. The City also identified a copy of this document as a corporate record in Appeal Number M-9400340. In Interim Order M-457, I directed that this document (there referred to as Record 7) be disclosed to the appellant. On this basis, it is not necessary for me to deal with the October 23, 1993 letter in the present appeals.

The requester appealed the City's decisions to the Commissioner's office on the basis that (1) additional responsive records should exist and (2) documents of this nature, should they exist, would fall under the custody or control of the City. A Notice of Inquiry was provided to the requester/appellant, the City and the three City officials. Representations were received from all parties.

DISCUSSION:

CUSTODY OR CONTROL OF RESPONSIVE RECORDS

The threshold issue for me to determine is whether the City has custody or control of the types of records that the appellant seeks.

Section 4(1) of the Act introduces the concepts of custody and control. This provision states that:

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 the record or part falls within one of the exemptions under sections 6 to 15.

In Order 120, former Commissioner Sidney B. Linden stated that the concepts of custody and control should be given a broad and liberal interpretation in order to give effect to the purposes and principles of the Act. The Commissioner then proceeded to outline the following approach for determining whether specific records fell within the custody or control of an institution:

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

In doing so, I believe that consideration of the following factors will assist in determining whether an institution has "custody" and/or "control" of particular records:

- (1) Was the record created by an officer or employee of the institution?

- (2) What use did the creator intend to make of the record?
- (3) Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- (4) 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?
- (5) Does the institution have a right to possession of the record?
- (6) Does the content of the record relate to the institution's mandate and functions?
- (7) Does the institution have the authority to regulate the record's use?
- (8) To what extent has the record been relied upon by the institution?
- (9) How closely is the record integrated with other records held by the institution?
- (10) Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is "in the custody or under the control of a institution". However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

This approach has been followed in many subsequent orders. In each case, the issue of custody and/or control has been decided based on the particular facts of the case, the factors outlined in Order 120 and the related considerations which have been articulated in these orders. Similarly, these appeals must be decided on the basis of their particular facts.

In its decision letters, the City indicated that, following a search of its corporate records holdings, it was unable to locate any documents other than the ones which it previously disclosed to the appellant. The decision letters went on to state that, if records of this nature did exist, they would fall within the personal custody of the three officials and not be subject to the provisions of the Act.

In their representations, the City officials associated with appeal numbers one and three subsequently indicated that they had undertaken searches of their **personal** records holdings and had located a number of

documents which might be responsive to the request. The two individuals submitted, however, that these records were maintained for their personal use and that the City has no right to either possess, control or dispose of these documents. On this basis, they argue that the records do not fall within the custody or control of the City.

The City official involved in appeal number two indicated that he did not have records of this sort in his personal custody. He stated, however, that had he authored such documents, they would have been compiled for the purpose of undertaking negotiations with his employer. The official regards such a use to be personal, rather than institutional, in nature. For this reason, he also asserts that records of this nature would fall outside the scope of the Act.

Following a review of these representations, I formed the impression that I could not determine whether the documents identified by the City officials in appeal numbers one and three fell within the custody or control of the City without actually reviewing the contents of these records. On this basis, I wrote to the two individuals and asked that they forward the relevant documentation to me. Both officials voluntarily complied with this request.

The City official involved in appeal number one forwarded one document to the Commissioner's office, which consists of a page excerpted from his diary. The relevant portion of this record refers to a meeting which the individual attended with other department heads to discuss the issue of compensation for senior City officials.

The City official named in appeal number three provided three documents to this office. These records consist of:

- (1) A letter in which the City official on behalf of himself and his colleagues engaged a law firm for the purposes of obtaining advice about the elimination of overtime pay.
- (2) A letter from the law firm engaged by the City officials addressed to the City's outside legal counsel. (In Appeal Number M-9400340 the City also located this record in its corporate filing system.)
- (3) A statement of account from this law firm issued to the City official.

Since the City has physical possession of the letter from the law firm (which I have identified as record 2 above), and because I have already dealt with this document in Interim Order M-457, it is not necessary for me to consider this record again for the purposes of these appeals. Thus, my analysis will be restricted to three documents - the diary entry, the letter engaging the external law firm and the statement of account from that firm.

In his representations, the appellant suggests that a number of meetings have been convened to deal with the

subject of compensation for senior City officials. He believes that, at the very least, notations regarding the dates and locations of these meetings should exist in the work diaries kept by the individuals involved. Finally, he takes the position that the information in question relates to the City officials in their employment, as opposed to their personal, capacities.

The City, for its part, indicates that it neither exercises custody nor control over what it describes as personal records in the possession of the two officials. The principal arguments advanced to support this proposition are the following:

- (1) While the issue of compensation arose because the two officials were City employees, the records compiled by these individuals were created in their personal capacities. The documents were not prepared in the exercise of their responsibilities as officers or employees of the City.
- (2) The records were intended for the personal use of the individuals in responding to the City's actions with respect to the elimination of overtime pay and lieu time.
- (3) The City has never had possession of the records in question nor does it intend to claim such a right in the future.
- (4) The records do not relate to the City's mandate or function.
- (5) The City lacks the authority to control, retain or dispose of these records as they are not subject to the City's records retention by-law.
- (6) The records have never been relied upon by the City.

In its representations, the City also states that some of the records in the possession of one of the officials may relate to that individual's efforts to seek and obtain legal advice from his solicitor. The City further indicates that, if these records reflect communications undertaken between an employee and a solicitor which he retained personally to represent himself and others in a compensation matter, "it would be very invasive and a dangerous precedent if the City claimed the right to possess [them]".

The City officials involved in appeal numbers one and three concur that the records at issue were maintained for their personal use and that the City has no right to either possess, control or dispose of these documents. On this basis, they also submit that the records fall outside the custody or control of the City.

I have carefully reviewed the representations provided by the parties to the appeals. In my view, the purpose of creating the diary entry and the request for legal advice was to permit the two City officials to respond to the City's decision to eliminate the provision of overtime pay to senior staff. I further find that the two documents were created by these individuals for their personal use and not pursuant to their

employment responsibilities.

I also find that a number of additional factors enunciated by the City and its officials lend support to the finding that the City neither exercises custody nor control over the two records. These factors are (1) the City has never had physical possession of these documents, (2) the records do not relate to the City's mandate or functions, (3) the City has no authority to either possess, control or dispose of these records and (4) the City has not relied upon these documents in any fashion.

While it is true that the authors of the diary entry and the request for legal advice were City employees and that these documents would not have been created but for their employment relationship, these factors are not sufficient to bring these two records within the custody or control of the institution.

After weighing all the circumstances of these appeals, my conclusion is that both documents fall outside the custody or control of the City. The same finding would necessarily apply to the statement of account issued by the law firm. The result is that these records are not accessible under the Act.

REASONABLENESS OF SEARCH

The remaining issue in these appeals is whether the City conducted a reasonable search for records within its corporate holdings which would be responsive to the appellant's requests.

Along with its representations, the City has attached three separate affidavits signed by the officials involved in the individual appeal files. In these affidavits, the individuals state that they personally searched their office files for any corporate records that would be responsive to the appellant's request.

The officials involved in appeal numbers one and two indicate that they were unable to locate such records and that, to the best of their knowledge, such documents have never existed. The City official to whom appeal number three relates states that he was able to locate several such records and notes that the City has already released these documents to the appellant. He confirms, however, that no additional records of this type exist.

Where a requester provides sufficient details about the records to which he is seeking access and the City indicates that further responsive records cannot be located, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. While the Act does not require that the City prove to the degree of absolute certainty that such records do not exist, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records that are responsive to the request.

I have carefully reviewed the representations of the City and its officials along with the three attached affidavits. I have concluded that the search undertaken by the City and its staff for responsive records was reasonable in the circumstances of these appeals.

ORDER:

I uphold the City's decisions.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ February 10, 1995