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

ORDER M-813

Appeal M_9600075

City of Toronto

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act) of a decision of the City of Toronto (the City). On or about November 3, 1995, a City Councillor received a letter which was attached to a package of documents, regarding the Toronto Island Trust. A second letter was sent to the Councillor the following day. The Councillor read part of the first letter aloud at a Council meeting on November 7, 1995, but did not identify its author. The appellant subsequently submitted a request to the City for a copy of these two letters and the other attached documents.

The City denied access to the requested records as it maintained that they were not within its custody or under its control. The City advised the appellant that the requested records are the Councillor's personal records, and she should contact the Councillor directly for the records in question. The appellant appealed this decision. At the same time, she wrote to the Councillor and requested a copy of the records from him. In responding to her request, the Councillor indicated that he was unable to provide her with the requested records as they had been sent to him in confidence.

This office sent a Notice of Inquiry to the City, the appellant and the Councillor. Representations were received from the City and the appellant. The sole issue to be determined in this appeal is whether the requested records are in the custody or under the control of the City. If the records are found to be in the City's custody and/or control, they are subject to an access request under the Act.

DISCUSSION:

CUSTODY AND/OR CONTROL

As I indicated above, the City takes the position that the requested records are the personal constituency records of the Councillor, and are not subject to the Act. In this regard, the City states that a City councillor is not an officer, agent or employee of the City in the same sense as a municipal civil servant. Further, the City contends that councillors only have the authority to act for the City when they act in conjunction with other members of Council while constituting a quorum, or when councillors have been specifically authorized to act on the City's behalf as individuals. Therefore, the City asserts that the requested records are not in its custody, nor are they under its control.

The appellant, on the other hand, argues that as elected members of Council, councillors participate in the decision making processes of the City much like a board member of a corporation. She submits that as such, a councillor functions as an officer of the City. Moreover, she argues that councillors are paid by the City taxpayers and "in appearances, councillors work at City Hall". In this context, the appellant states:

> I believe the [Act] was set up to be and appear to be an avenue to ensure information used by public institutions (including those people who function within the institution) is available to the public while protecting individual rights.

It is apparent that the representations of both the City and the appellant focus on the role of the Councillor in the context of municipal corporations. In particular, each party has taken a contrary view as to whether the Councillor functions as an "officer" of the corporation, and is thus a part of the institution for the purposes of the Act.

Are the requested records subject to the Act?

At the time of the City's decision, section 4(1) of the Act read as follows:

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

It is clear from the wording of section 4(1) that in order to be subject to an access request under the Act, a record need only be in the custody **or** under the control of an institution (Order P-994).

Under the Act, an "institution" is defined as:

> (a) a municipal corporation, including a metropolitan, district or regional municipality or the County of Oxford,
>
> (b) a school board, public utilities commission, hydro electric commission, transit commission, suburban roads commission, public library board, board of health, police commission, conservation authority, district welfare administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the Municipal Act,
>
> (c) any agency, board, commission, corporation or other body designated as an institution in the regulations.

The wording of the Act does not specifically refer to elected offices, such as a municipal councillor, as falling within the definition of "institution".

In my view, in the circumstances of this appeal, there are two situations in which the records may be subject to an access request under the Act. In the first case, if the Councillor were found to be an "officer" of the City, he would be considered to be a part of the institution, and records maintained by him in conjunction with this position would thus be subject to the Act. Such a finding would end the analysis and it would not be necessary to go on and consider the second situation. A contrary finding, however, would not automatically remove records from the application of the Act. Rather, it would then be necessary to consider the second situation.

In the second case, even if the Councillor were found not to fall within the purview of the Act, records held by him personally may still be subject to the Act if it is determined that they are also within the custody or under the control of the City (Order P-239).

Therefore, as a first step in determining whether the Act applies to the requested records, it is necessary to examine the status of a municipal councillor within the scheme of the Act. In this case, in order to do so, it is necessary to consider the meaning of the term "officer" in the context of municipal corporations and to determine whether a municipal councillor is an "officer" of the municipal corporation.

When is a municipal councillor an "officer" of the municipal corporation?

The word "officer" appears in several provisions of the Act (sections 2(3), 7(1), 7(2)(k), 14(4)(a), 29(2)(c), 32(d) and 49(1)), however, this term is not defined. In my view, in order to determine the issues in this appeal, it is useful to examine the meaning of the term "officer" as it is used in municipal law.

The word "officer" is not defined in the Municipal Act or any other related legislation, such as the Ontario Municipal Board Act and the Ontario Municipal Employees Retirement System Act. It is interesting to note, however, that in some situations these statutes clearly distinguish between "members" of a council or board, and its "officers" or "employees". For example, section 187(12) of the Municipal Act provides:

> Any member of the council or officer of the corporation who applies for any revenues so charged ... is personally liable for the amount so applied ...

On the other hand, some provisions of the Municipal Act imply that in certain situations, a member of council can be both a member and an "officer" of the municipal corporation. For example, section 247(1) of the Municipal Act provides:

> The Treasurer of every municipality shall ... each year submit to the council of the municipality an itemized statement of the remuneration and expenses paid to each member of council in respect of his or her services as a member of council **or as an officer of the municipal corporation** in the preceding year ... (emphasis added).

Part IV of the Municipal Act, which is entitled "Officers of Municipal Corporations", sets out the statutory duties and powers of the following "officers":

- **the head of council**, which includes a mayor, chair, reeve and warden (section 69);
- **the chief administrative officer**, which in some municipalities is also known as the City Manager (section 72);
- **the clerk, deputy clerk and acting clerk** (section 73);
- **the treasurer, deputy treasurer and acting treasurer** (section 77);

- **collectors** (section 85);
- **auditors** (section 86).

Other "officers" of Municipal Corporations derive their authority from statutes other than the Municipal Act, for example:

- **medical officer of health** (Health Protection and Promotion Act);
- **chief building official** (Building Code Act).

The meaning of the term "officer" in municipal law has also been considered in the courts and has been the subject of academic writing (for example, see: Kenneth Grant Crawford, Canadian Municipal Government (University of Toronto Press, 1954), at p. 177 and Ian MacF. Rogers, Municipal Councillors' Handbook, 5th Ed. (Carswell: Agincourt, 1988), at pp. 147 - 148).

In general, the above sources interpret the term "officer" to refer to a high ranking individual within the municipal civic service, who exercises management and administrative functions, and who derives his or her authority either from statute or from council. The Alberta Court of Appeal referred to "officers" in Speakman v. Calgary (City) (1908), 9 W.W.R. 264, I Alta. L.R. 454 (C.A.), as summarized in Stephen Auerback and Andrew James, The Annotated Municipal Act (Thomson: Scarborough, 1989), Volume 1, pp. 17 - 33, as those who exercise powers "of an executive and coercive and quasi-coercive character, and are binding upon and affect the rights of the inhabitants and ratepayers of the municipality".

In my view, the authorities referred to above all indicate that, except in unusual circumstances, a member of municipal council is generally not considered to be an "officer" of a municipal corporation. An example of an unusual circumstance would be where a municipal councillor of a small municipality has been appointed a commissioner, superintendent or overseer of any work pursuant to section 256 of the Municipal Act. In this regard, the authorities indicate that this would be an extremely unusual situation, and where it occurs, the councillor would be considered an "officer" only for the purposes of the specific duties he or she undertakes in this capacity. In these cases, a determination that a municipal councillor is functioning as an "officer" must be based on the specific factual circumstances.

Was the Councillor functioning as an "officer" of the City in the circumstances of this appeal?

Having determined those circumstances in which a municipal councillor may be considered to be an officer of a municipal corporation, I must now consider whether the Councillor in the current appeal was fulfilling any of the functions referred to above.

It is clear that the Councillor was not fulfilling the role of Mayor, Chair, Reeve or Warden.

The City indicates that the Councillor was acting in his individual capacity as a representative of his constituents when he referred to the letter at the Council meeting.

On the other hand, the appellant submits that information directed to a public official about an issue in public debate becomes public when used in that debate.

I agree with the City in the circumstances of this appeal. In my view, in representing the interests of his constituent, the Councillor was not carrying out the duties of an officer of the City. Rather, he was acting on behalf of the constituent in furthering the constituent's interests rather than the interests of the corporation or the council. Nor was he executing the duties of an officer in any of the other circumstances described above.

Accordingly, I find that the Councillor was not functioning as an "officer" of the City when he read from the letter at the November 7, 1995 Council meeting.

Are the Records held by the Municipal Councillor in the custody or under the control of the City?

Having found that, in the circumstances of this appeal, the Councillor was not an officer of the City, it does not necessarily follow that records which he referred to at the Council meeting are not subject to the Act. As Commissioner Tom Wright pointed out in Order P-239, dated September 5, 1991, the Act can indeed apply to records of non-institutions:

> It is my opinion that to remove information originating from non-institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the Act. Therefore, it is my view that the Act can apply to information which originated in [a non-institution] which is in the custody or under the control of an institution.

In this case, the Commissioner went on to determine whether the records in that appeal were in the custody or under the control of the institution.

I agree with the approach taken by Commissioner Wright in Order P-239. In accordance with this approach, I must now determine whether the requested records are in the custody or under the control of the City.

In Order 120, former Commissioner Sidney B. Linden set out a number of factors that would assist in determining whether an institution has custody or control of a record. These are as follows:

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 records used?

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?

The City states that the records were sent to the Councillor by one of his constituents who is neither an officer nor an employee of the City. Although the Councillor read from one of the letters at the Council meeting, he did not deposit any of the requested records with Council, nor does the City have possession of them in any other location. The City reiterates that these are constituency records of the Councillor and the City has no right to possession of them. Moreover, the City submits that it has no power to compel a Councillor to submit constituency records to the City even when these records are referred to at a Council meeting. Similarly, the City has no authority to dispose of such records, or to control them in any way.

The City acknowledges that the records relate to an issue that was before Council, however, it submits that the records do not relate to its mandate and function, nor did the records form the basis for Council's action. Rather, the City argues that the Councillor referred to the letter as part of his mandate and function as representative of his constituents.

Finally, the City states that the records form part of the Councillor's constituency records and have not been integrated with records held by the City.

The appellant's representations express concern about the use of anonymous information during public debates at a Council meeting. She is particularly concerned because this information relates to activities she has participated in, and she is unable to evaluate or respond to the entire package of information.

The appellant argues that I should make a finding that the City has custody and/or control of the records for several reasons. First, she points out that councillors have constituency offices and private homes to receive "private and personal" communications (presumably from their constituents). She submits that, in this case, where correspondence is directed to a councillor at City Hall, it has the appearance of "public property".

Further, she submits that it is clear that the author of the letter intended that it be used in the debates at the Council meeting. In this regard, she submits that once a councillor chooses to introduce correspondence into debate, this introduction places all related documents received by the Councillor into the "control" of the City because it is the City which has the responsibility for conducting the debate.

As I indicated above, I have found that, in the circumstances of this appeal, the Councillor is not an entity to which the Act applies. With respect to the issue of whether the requested records are in the custody or under the control of the City, after considering the representations of the parties I find as follows:

1. The City does not have custody of the requested records. I find that they are the constituency records of the Councillor, regardless of the fact that they may have been received by the Councillor at an office at City Hall as opposed to his constituency office. Further, I am satisfied that these records have not been provided to Council or integrated with records held by the City.

2. The City does not have control of these records. Despite the Councillor's reference to the letter at a Council meeting, I am satisfied that, in this case, the City has no authority to compel the Councillor to produce the requested records.

3. In view of the above, the records are not accessible under the Act in the circumstances of this appeal.

ORDER:

I uphold the City's decision.

Original signed by: July 31, 1996
Laurel Cropley
Inquiry Officer