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

ORDER MO-1403

Appeal MA_000345_1

City of Mississauga

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NATURE OF THE APPEAL:

The City of Mississauga (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> [A]ny and all records in the custody, or under the control, of the City pertaining to grants-in-lieu-of-taxes levied or received in respect of Toronto-Lester B. Pearson International Airport for the period January 1, 1996 through to the date of the request including, without limiting the generality of the foregoing:
>
> (a) records relating in any way to the calculation, determination, levying, payment or receipt of grants and/or payments-in-lieu-of-taxes; and/or
>
> (b) records in any way documenting communications in any way touching on grants and/or payments-in-lieu-of-taxes between:
>
> (i) the City and the Regional Municipality of Peel, or any of its agents, representatives, employees, municipal politicians (including, without limiting the generality of the foregoing, but for greater certainty, Members of the Regional Council and the Regional Chair) or officers (hereinafter "Peel");
>
> (ii) the City and any Minister or staff member of any Provincial Ministry, including, without limitation, the Ontario Ministries of Finance, Transportation, Municipal Affairs or Economic Development;
>
> (iii) Peel and any Minister or staff member of any Provincial Ministry, including, without limitation, the Ontario Ministries of Finance, Transportation, Municipal Affairs or Economic Development;
>
> (iv) the City and the agents, representatives, employees, officers and directors of the Greater Toronto Airports Authority or any other airport authority in Ontario; or
>
> (v) the City and any staff member or representative of the Mississauga Board of Trade.

The requester clarified that she was seeking access to all records responsive to the request which are in the custody or under the control of "the City of Mississauga or any of its agents, representatives, employees, municipal politicians (including, without limiting the generality of the foregoing, but for greater certainty, Members of Council and the Mayor)". The requester also confirmed that the request included records in the custody or under the control of the Mayor's office, the Corporate Services Department, the City Manager's office, the Economic Development Office or the Community Services Department. The requester also limited the

scope of the request to exclude records which are subject to solicitor-client privilege in the context of a specified piece of litigation.

The City responded to the request by advising the requester that, in accordance with section 20 of the *Act*, it was extending the time limit for responding to the request for an additional 120 days beyond the 30 day time period contemplated by section 19 of the *Act*. The reason provided to the requester was that because of the large volume of records and the multiple locations where such records may be found, conducting the search within the 30 day time frame will unreasonably interfere with the operations of the departments involved.

In addition, the City advised the requester that it would not be conducting searches of the record-holdings of its elected officials as it is of the view that such records are not within its custody or under its control.

The requester, now the appellant, appealed the City's decision with respect to the necessity for a time extension, as well as its decision not to conduct a search of the record-holdings of its elected officials.

I decided to seek the representations of the City initially and sent them a Notice of Inquiry setting out the issues in this appeal. The City responded with its submissions. In the circumstances, it was not necessary for me to seek the representations of the appellant.

DISCUSSION:

IS THE TIME EXTENSION REQUESTED BY THE CITY REASONABLE?

Time extensions are governed by section 20(1) of the *Act*. The first issue to be addressed in this appeal is whether the extension was reasonable in the circumstances of the request, in the context of the provisions of section 20(1) of the *Act*, which reads:

> A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
>
> (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

The City provided an affidavit from Legal Counsel with its Office of the City Solicitor, Corporate Services Department. In the affidavit, the deponent describes generally the nature and extent of the searches required to locate records responsive to the request, first in the estimated 272 responsive files opened by the City in its computerized records management system and then manually in the Departments where the records are maintained. The City indicates that, for example, the review of the files maintained by its Assessment Review Office which may contain responsive records has taken a total of 42.5 hours of staff time, up to January 17, 2001. In

addition, searches may also have to be undertaken in City Departments whose corporate records are not inputted into to City's central computerized records management system.

The affidavit also indicates that many of the files contained in the City Solicitor's office were managed by its former City Solicitor and that the deponent is the only remaining solicitor with sufficient familiarity with them to conduct a thorough review. Counsel submits that to review the large number of documents maintained by the City Solicitor's office would impact on her ability to provide legal advice to the other City Departments for which she is responsible.

Finally, the deponent explains that the records must also be reviewed by the City's Freedom of Information Co-ordinator in order to determine whether the identified records must be produced to the appellant. She summarizes her position by indicating that "the impact on City staff resources is considerable."

I note that the appellant has removed from the scope of the appeal any records which are subject to solicitor-client privilege in the context of a particular piece of litigation, thereby limiting the ambit of the records which are required to be searched.

While I appreciate that the Corporate Services Department is short of staff due to the recent departure of the City Solicitor, this request was made to the City on October 31, 2000, nearly four months ago. I was not provided with any particulars to indicate how long the searches required in each of the City Departments might take (other than the preliminary information about the Assessment Review Office) nor any explanation of how the time required for searching would unreasonably interfere with the City's operations. The City's representations including the affidavit invite an inference that the search would be time-consuming but this is not quantified. Nor have I been provided with any estimate of the number of responsive records the City may have.

Moreover, for the purposes of section 20(1), it is not sufficient for the City to simply establish that a large number of records are involved, or that the search will be time-consuming. In addition, it must establish that this "would unreasonably interfere with" its operations. Though the deponent of the affidavit explains that she operates under "considerable time constraints" which "impact on [her] ability to review the significant number of documents related to the disclosure request ...", this in itself is not, in my view, sufficient to satisfy this requirement.

I therefore find that the City has not provided me with sufficiently detailed evidence to support its argument that meeting the 30 day time limit provided in section 19 of the *Act* would unreasonably interfere with its operations. Accordingly, I do not uphold the City's decision to seek a time extension under section 20(1) for an additional 90 days beyond the time frame provided by section 19.

My order will require the City to issue a decision letter to the appellant within the time required by section 19 of the *Act*, treating the date of the order as the date of the request, without recourse to a time extension. The time stipulated in section 19 is 30 days. By so doing, I have in effect allowed the requested time extension sought by the City in its initial decision letter. Although I am not upholding the City's decision to seek a time extension, I recognize that the searches required to respond adequately to the appellant's request will take time, particularly in light of

my findings below. The City may wish to avail itself of the interim access decision and fee estimate process originally described in Order 81, which is discussed further in Order M-555.

ARE THE RECORD-HOLDINGS OF CITY COUNCILLORS AND THE MAYOR IN THE CUSTODY OR UNDER THE CONTROL OF THE CITY?

Under section 4(1) of the *Act*, every person has a right of access to a record or part of a record in the custody or under the control of an institution unless one of the specified exemptions applies to that record or the request for access is frivolous or vexatious.

In Order M-813, Adjudicator Officer Laurel Cropley reviewed the law surrounding the application of the *Act* to record-holdings maintained by municipal councillors. She analysed this issue as follows:

> 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, ... records maintained by him in conjunction with this position would thus be subject to the *Act*. ... [E]ven 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. ...

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 [now referred to as Part VI] 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). [I note that amongst the duties set out with respect to the head of council in section 70(b), the individual holding this position is to "oversee the conduct of **subordinate officers**];

- **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.

Even if councillors are found not to be officers of the municipality, Adjudicator Cropley held that their record-holdings could still be subject to the *Act* if another basis for establishing custody and/or control could be found. She stated:

> ... 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).

I agree with Adjudicator Cropley's analysis, and will apply it in determining whether responsive records held by municipal councillors and the mayor, respectively, are subject to the *Act*.

Record-Holdings of City Councillors

As stated in Order M-813, a municipal councillor could only be considered to be an "officer" of a municipality in "unusual" circumstances. The City submits, and I find in the present circumstances, that the duties of Councillors for the City of Mississauga are strictly limited to their status as elected officials. They do not assume additional responsibilities such as those of a commissioner or superintendent as contemplated by section 256 of the *Municipal Act*. Accordingly, I conclude that they cannot be considered to be "officers" of the municipality, and this basis for finding that their records are under the City's custody or control has not been established.

I must therefore determine whether there is any other basis for finding that responsive records in the possession of a councillor 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?

In Order M0-1251, Senior Adjudicator David Goodis listed these questions, and additional considerations which were unique to the fact situation present in that case. He indicated that:

> 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.
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> 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 …

In 1986, Council adopted the "Elected Officials' Records Policy", which differentiates between "Official Civic Records" and "Personal Papers". "Official Civic Records" are described as "administrative records generated by the Mayor's and Councillors' Offices", and include "records used in determining organization charts and policy statements", "records used in explaining operating procedures or functions such as procedures manuals" and "reports prepared for inclusion in committee meeting files". "Personal Papers" are "... not considered official

records and as such may be dealt with by each individual as she/he so desires", and include "constituency and subject files" and "their own records on any committee or board". The City concedes that records which fit the criteria for qualification as "Official Civic Records" fall within the custody or control of the City and are, accordingly, subject to the *Act*.

In the absence of other evidence or indicia of the understanding between the City and its councillors as to ownership, custody and/or control over records, the Records Policy is an important indicator of which records ought to be viewed as being within the custody or under the control of the City. However, while this document is helpful, it is not definitive. For example, the category of "subject files" is potentially very broad and could well include materials otherwise considered to be "Official Civic Records" such as administrative or policy development records. Moreover, in the absence of any listing or description of the records pertaining to this issue that may be found in councillors' offices, it is not possible to definitively categorize these records under the policy at this time. The comments which follow are, therefore, intended to assist the City in characterizing these records for the purposes of the decision letter I will order it to issue to the appellant.

The requested records are concerned with certain grants-in-lieu-of-taxes levied or received by the City with respect to Pearson International Airport. In my view, records dealing with this subject could reasonably be expected, for the most part, to contain information about the work of City Council pertaining to issues beyond the constituency level, and could therefore not be excluded on the basis that they are "constituency" records. For example, reports to Council by City staff or legal counsel could be expected to fall within the definition of "Official Civic Records" as they would likely qualify as "reports prepared for inclusion in committee meeting files", and other internally or externally generated correspondence could also qualify on this basis.

This issue is complicated by the fact that these or other "Official Civic Records" may be held in a Councillor's "subject files", creating a conflict. In my view, however, the mere inclusion of an "Official Civic Record" in a subject file is not sufficient to defeat the intention to make such records subject to the City's control, and I find that any such records are, in fact, "Official Civic Records" and as such, under the City's control and subject to the *Act*.
If the Councillors' "personal papers" were integrated into the City's operations, it might be argued that they, too, would be in the custody or under the control of the City notwithstanding the records policy. However, the City submits that the "personal papers" are maintained by the Councillors in "storage areas that are not accessible to employees of the City", which in my view indicates that their personal or constituency papers are not integrated into the operations of the City and cannot be made subject to the *Act* on that basis.

Accordingly, responsive records in the possession of a Councillor may fall within the custody or control of the City, regardless of where they may physically be located in City Hall. I will order the City to obtain from City Councillors the responsive records in their possession that are in the City's custody or control, based on the foregoing analysis, and to prepare a decision letter with respect to access to these records by the appellant.

Record-Holdings of the Mayor

Part VI of the *Municipal Act* deals with "Officers of the Municipal Corporation". It begins with section 69, which describes a mayor as the "head of council and the chief executive officer of the

corporation." This in itself indicates that the mayor is an "officer" of the municipality. The inclusion of the term "head of council", which includes a mayor, in the description of statutory rights and duties of a municipality's "officers" provides a further indication that, for the purposes of the *Municipal Act*, the mayor of a municipality is to be considered an "officer". Further support for this view is found in section 70(b), which leads me to the conclusion that a mayor of a municipality is to be considered an "officer".

The City's "Elected Officials' Records Policy", discussed in the preceding section, indicates that it applies to Councillors and the Mayor. This policy, adopted by council in 1986, predated the *Act*. In my view, the positions of Councillors and the Mayor under the *Act* are different because the Mayor is an officer of the municipal corporation while Councillors are not. I find that, because she is an officer of the municipal corporation, the Mayor's record-holdings in relation to her duties as Mayor form part of the City's records for the purposes of the *Act*. By contrast, in some circumstances, records of the Mayor that do not relate to mayoral duties, and are maintained separately as constituency or personal papers, may not be subject to the *Act* (see Order P-267.)

As responsive records in this appeal would clearly relate to her duties as Mayor, I find that such records within the Mayor's record-holdings are in the custody and under the control of the City and I will order the City to identify them, and issue a decision letter to the appellant.

ORDER:

1. I do not uphold the City's decision to extend the time limit prescribed by section 19 of the *Act* from 30 days to 120 days. Accordingly, I order the City to render an access decision in response to the request within the 30 day time limit set forth in section 19, using the date of this order as the date for the commencement of that time period, and without recourse to a time extension.

2. I further order the City to conduct a search of the record-holdings of the Mayor for records responsive to the request, and to render a decision respecting access to any responsive records within the time limits established by section 19, using the date of this order as the date for the commencement of that time period, and without recourse to a time extension.

3. I further order the City to obtain responsive records from the City Councillors, using the guidelines in this order to determine whether records are in its custody or under its control, and to render a decision respecting access to any responsive records in its custody or under its control within the time limits established by section 19, using the date of this order as the date for the commencement of that time period, and without recourse to a time extension.

4. I further order the City to provide me with a copy of the decision rendered to the appellant in accordance with Provisions 1, 2 and 3 within thirty (30) days of the date of this order by sending it to my attention c/o Information and Privacy Commissioner/Ontario, Suite 1700, 80 Bloor Street West, Toronto, Ontario M5V 2S1.

Original Signed By: March 1, 2001
Donald Hale
Adjudicator