

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2750

Appeal MA09-103

City of Vaughan

June 13, 2012

Summary: The appellant sought records relating to various expenses, including 407 ETR expenses, for two City of Vaughan councillors for the years 2007 and 2008. The city located responsive records and provided partial access to them pursuant to two access decisions, claiming the application of various exemptions to deny access to the withheld information. The appellant appealed the city's denial of access and also claimed that additional records should exist, specifically the councillors' 407 ETR invoices, raising concerns about the adequacy of the city's search. The appellant then narrowed the scope of her appeal to the 407 ETR invoices for the councillors. The application of various exemptions claimed for other parts of the appellant's request were removed from the appeal. The city then raised the issue of custody or control, claiming that the councillors 407 ETR invoices were not in its custody or control. During the course of an inquiry, it was determined that the city has control of the councillors' 407 ETR invoices and the city was ordered to obtain copies of the invoices and issue an access decision. Since the 407 ETR invoices were the sole focus of the appellant's narrowed request, the adequacy of the city's search was not addressed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 4(1).

Orders and Investigation Reports Considered: P-120, P-239.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence) (Minister of National Defence)*, 2011 SCC 25.

OVERVIEW:

[1] The appellant submitted a detailed and comprehensive three-part request to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to various expense accounts of two city councillors (the councillors), including charges for the use of the 407 Express Toll Route (407 ETR). The text of the request is as follows:

1. A copy of any and all detailed 407 ETR Toll Charge Invoices incurred by [a named individual], Regional Councillor processed for the years 2007 and 2008 by Account Number 010015-7103. These invoices can be found in the City of Vaughan's Finance Department - Accounts Payable Section and/or by her assistants own records. In addition, please confirm whether any cheques to reimburse any portion of the payment has been made by [the named individual]. *Please note that these are recent records easily obtainable and I understand her assistant keeps at least one prior year's records on site as well - itemized cost for this section separate from other requests herein would much assist and can be provided separate from the completion of this entire request. *To act as a check list, please provide me with a GL Detailed Summary for this GL for these years.
2. A copy of any and all detailed 407 ETR Toll Charge Invoices incurred by [a named individual], Ward [Councillor] processed for the years 2007 and 2008 by Account Number 010015-7103. These invoices can be found in the City of Vaughan's Finance Department - Accounts Payable Section and/or by her [sic] assistants own records. In addition, please confirm whether any cheques to reimburse any portion of the payment has been made by [the named individual]. *Please note that these are recent records easily obtainable and I understand her [sic] assistant keeps at least one prior year's records on site as well - itemized cost for this section separate from other requests herein would much assist and can be provided separate from the completion of this entire request. *To act as a check list, please provide me with a GL Detailed Summary for this GL for these years.
3. A copy of all furniture purchase[s] detailed invoices and any backup therein (including model, quality, etc.) made from Account Number 010015 - GL 7210 in the Operation Budget Years 2003 (being 2002 actuals), 2004 (being 2003 actuals), 2005 (being 2004 actuals), 2006 (being 2005 actuals), 2007 (being 2006 actuals), and 2008 (being 2007 actuals) including any purchase orders and/or FPOs The location of these records can be found in the City's Financial Department - Accounts Payable Department and/or maintained by the assistant in their own records. Please note 2007 and 2008 should be easily obtainable, in fact,

she may even have in her office 2006. but more specifically the City's Accounts Payable Department-Finance. * To act as a checklist, please provide me with the GL Detailed Summary for these years. In fact, I do not want to think that there is a large search for this area you may wish to run a GL report for these years and you may find that some years nothing was purchased thereby making the search quicker and narrowing the scope of the search The other item I wish to point out is that many times it is just one invoice that has 4 items and not 4 invoices. If there was any cheque made in reimbursement of any of the items, even partially by [a named individual], I would ask that you provide me with a copy of the cheque, including a cancelled cheque.

[2] The city conducted a search for responsive records and agreed to provide partial access to some of them. In its decision letter, the city indicated that it was denying access to the withheld portions of the records pursuant to sections 10 (third party information), 11 (a)(b) and (d) (economic interests) and section 14(1) (personal privacy) of the *Act*.

[3] After receiving the city's access decision, the requester contacted the city and advised that she believed additional records should exist. As a result, the city agreed to conduct an additional search for responsive records. The city located additional records and issued a second decision letter to the appellant, disclosing the additional records in part. The city denied access to the withheld portions of these records pursuant to section 14(1). In support of its section 14(1) exemption claim, the city raised the application of the presumption in section 14(3)(f) (finances).

[4] The appellant appealed the city's two decisions.

[5] At the outset of the mediation stage of the appeal process, the appellant narrowed the scope of her appeal to include only the adequacy of the city's search with regard to records responsive to parts 1 and 2 of her request. The appellant takes the position that additional records should exist and, in particular, she points to the invoices to support the 407 ETR charges that were claimed on the councillors' expenses which were then, in turn, reimbursed by the city.

[6] Part 3 of the appellant's request was removed from the scope of the appeal, as was the application of the exemptions in sections 10, 11 and 14(1) to the withheld information.

[7] Also during mediation the question of whether the city has custody or control of the councillors 407 ETR invoices was raised as an issue. The city advised the mediator that section 4.1.13 of its Council Budget/Expenditure Policy (the policy), which addresses the reimbursement of certain expenses, including 407 ETR charges, does not require councillors to submit invoices when claiming for reimbursement of 407 ETR

expenses, making it the responsibility of each member of council to retain supporting invoices and documentation. The city added that when expense claims were submitted for reimbursement, some expense claims had the 407 ETR invoices or partial invoices attached, while other expense forms did not.

[8] The city indicated that if invoices were not attached to the expense claims then it could not provide an access decision under the *Act* in relation to them. The city explained that if invoices were in possession of the city then a decision on access to those invoices would have been made.

[9] The city acknowledged that invoices may exist (or may have existed) for the periods in question. However, it is the city's position that the invoices requested are not in its possession and are not, therefore, within its custody or control. The city argues that the invoices would be in the custody and control of the individual councillors noted in the request.

[10] Conversely, the appellant asserts that the invoices are in the city's custody and control and that the city is required to obtain the records and issue an access decision. The appellant believes that the invoices can be obtained by either asking the councillors to produce them or, alternatively, contacting the 407 ETR offices and asking for a duplicate copy of the invoices.

[11] In light of the exchange between the parties regarding the status of the councillors 407 ETR invoices, custody or control was added as an issue.

[12] The parties were unable to resolve the search and custody or control issues during the course of mediation.

[13] The file was referred to the adjudication stage of the appeal process for an inquiry.

[14] During the course of my inquiry I sought and received representations from both the city and the appellant on both the search and custody or control issues, which were shared in accordance with *Practice Direction 7* and section 7 of the *IPC Code of Procedure*.

[15] In this order, I find the councillors detailed 407 ETR invoices for the period in question are in the control of the city and I order the city to obtain copies of these records and issue a new decision letter respecting access to them. As the detailed invoices are the sole focus of the appellant's narrowed request, and in light of my finding that these records are in the city's control, I find that I do not need to address the reasonable search issue in this order.

ISSUES:

Are the councillors' 407 ETR toll charge invoices "in the custody" or "under the control" of the city pursuant to section 4(1)?

DISCUSSION:

Are the councillors' 407 ETR toll charge invoices "in the custody" or "under the control" of the city pursuant to section 4(1)?

[16] Section 4(1) reads, in part:

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 . . .

[17] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[18] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.¹

[19] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.² A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[20] The courts and this office have applied a broad and liberal approach to the custody or control question.³

[21] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.⁴ The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?⁵

¹ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

² Order PO-2836.

³ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.

⁴ Orders 120, MO-1251, PO-2306 and PO-2683.

⁵ Order P-120.

- What use did the creator intend to make of the record?⁶
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁷
- Is the activity in question a “core”, “central” or “basic” function of the institution?⁸
- Does the content of the record relate to the institution’s mandate and functions?⁹
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?¹⁰
- If the institution does have possession of the record, is it more than “bare possession”?¹¹
- 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?¹²
- Does the institution have a right to possession of the record?¹³
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁴
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?¹⁵
- To what extent has the institution relied upon the record?¹⁶

⁶ Orders P-120 and P-239.

⁷ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.

⁸ Order P-912.

⁹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders P-120 and P-239.

¹⁰ Orders P-120 and P-239.

¹¹ Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

¹² Orders P-120 and P-239.

¹³ Orders P-120 and P-239.

¹⁴ Orders P-120 and P-239.

¹⁵ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

- How closely is the record integrated with other records held by the institution?¹⁷
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?¹⁸

Parties' representations

[22] The city relies on the policy to establish that members of council are charged with the responsibility of retaining supporting invoices and documentation and that, accordingly, such documentation remained in the custody and control of the councillors in this case. The relevant portions of section 4.1.13 of the policy state:

Reimbursement of expenditures for [...] 407 charges. It shall be the responsibility of each Member of Council to retain supporting invoices and documentation. Please note, under Canada Customs and Revenue Agency guidelines, mileage from home to and from the place of work is considered personal mileage and therefore is not an allowable expense.

[23] The city asserts that the supporting documentation relating to the 407 ETR charges incurred by the councillors never formed part of the city's record holdings. The city states that the 407 ETR created the records to communicate account information to its account holders (the councillors) and not to the city, pursuant to a contractual relationship between the account holders and the 407 ETR. The city submits that:

- it does not have physical possession of the records as there is no mandatory, statutory or employment requirement for their submission
- it does not have a right of possession to the records under the terms of the policy
- it does not have the authority to regulate the records' content, use or disposal
- it has not relied upon the contents of the records to fulfill its requirements under the policy

¹⁶ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.

¹⁷ Orders P-120 and P-239.

¹⁸ Order MO-1251.

[24] The appellant provides extensive representations on the question of whether the city has custody or control of the records at issue. I found the appellant's representations somewhat unfocused and, at times, difficult to follow. However, after several reviews of them, the following points emerge:

1. the city has "control" of the records at issue
2. the legal basis for finding control in this case is rooted in an application of the two-part test for "control" established by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence) (Minister of National Defence)*¹⁹

[25] With regard to the appellant's first point, I note that the appellant's representations are focused exclusively on the "control" issue. The appellant does not offer representations on whether the city has "custody" of the records at issue. It appears, therefore, that while the appellant may concede that the records at issue are not in the city's custody, she believes they are in its control.

[26] With regard to the appellant's second point, she articulates the following two-part test for institutional control of a record established by the Supreme Court of Canada in *Minister of National Defence*:

1. whether the record relates to a departmental matter, and
2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

[27] The appellant also notes that in regard to the two-part test, control can only be established if both parts of the test are met.

[28] The appellant then proceeds to make representations on why, in the circumstances of this case, the two-part test has been met.

[29] With regard to part 1 of the test, the appellant states that she is seeking information about the reimbursement of expenses incurred by the councillors in conducting city business. The appellant further states that the records relate to expense reimbursement paid from the city's operational budget. The appellant notes that section 2.1 of the "Guiding Principles" of its policy states:

Public funds may not be expended for personal use, non-City business use, campaign or election related purposes.

¹⁹ 2011 SCC 25

[30] The appellant also refers to section 4.1.13 of the policy (referenced above by the city in its representations).

[31] The appellant concludes that the information she seeks relates to a departmental matter as it will reveal the expenses incurred by the councillors to conduct city business and the amounts reimbursed by the city to these councillors, pursuant to its policy.

[32] With regard to part 2 of the test, the appellant relies on the wording of section 4.1.13 of the policy and, in particular, the section of that policy that states:

It shall be the responsibility of each Member of Council to retain supporting invoices and documentation.

[33] In the appellant's view, the import of that wording is that members of council are required to retain supporting invoices and documentation in the event they are needed to substantiate a claim. The appellant argues that the city therefore has a "right to possession of the full records." The appellant asserts that this is particularly important because the records that were disclosed (the summary pages) indicate that the councillor's invoices were reimbursed in full, so in order to substantiate what was allowable as a business expense, the complete invoice would have had to be viewed. The appellant argues that following such a protocol would be expected and in keeping with generally accepted accounting principles and practices.

Analysis and findings

[34] The courts and this office have applied a broad and liberal approach to the custody or control question.²⁰ As well, a record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.²¹

[35] I have carefully reviewed the parties' representations in this case. I find that while the city does not appear to have custody of the detailed invoices showing the councillors 407 ETR usage for business and personal purposes, it has control of these records based on the clear directive wording of section 4.1.13 of the policy and the application of the two-part test for institutional control articulated by the Supreme Court of Canada in *Minister of National Defence*.

[36] The Supreme Court of Canada's two-part test, as set out in *Minister of National Defence*, is the accepted test for institutional control in Canada. I note that in past

²⁰ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited at note 3 above, *Canada Post Corp. v. Canada (Minister of Public Works)*, cited above at note 3 above, and Order MO-1251,.

²¹ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at note 1 above.

decisions, this office has taken a similar approach to the issue (see, for example, Orders P-120 and P-239). I accept the Supreme Court's test and apply it in this case.

[37] With respect to part 1 of the test, I accept that the detailed invoices sought by the appellant relate to a departmental matter, as the contents of these records will reveal certain expenses incurred by the councillors while conducting city business. Further, I note that these expenses were reimbursed by the city to these councillors for performing city business. Accordingly, I find that part 1 of the test has been met.

[38] I now turn to examine part 2 of the test. The city is a public institution and publicly funded. Accordingly, it has a duty to account for the expenditure of public funds. Section 4.1.13 of the policy exists to ensure that the city is able to account for the disbursement of public funds to members of council, as reimbursement for expenses they incur during the course of conducting business in their role as councillor, and in the event it is asked to respond to an audit request. In my view, in order for the city to properly discharge its duty to account for the expenditure of public funds it would need to be able to distinguish between expenses incurred by a member of council for business rather than personal purposes. This can only be achieved by providing the city with the ability to obtain access to the detailed invoices, where it is necessary for it to do so.

[39] While it is not clear whether the detailed invoices ever formed part of the city's record holdings, it is plain from the wording of section 4.1.13 of the policy that the city exercised control over these records by directing members of council to retain supporting invoices and documentation in the event they were required for audit or other accounting reasons. Based on the wording of section 4.1.13 of the policy, I am satisfied that the city could reasonably be expected to be entitled to obtain a copy of the records in question upon request from the councillors and, therefore, I find that part 2 of the test has been met.

[40] To conclude, I find that the councillors' detailed 407 ETR invoices for the years 2007 and 2008 are in the city's control and I will order the city to obtain them from the councillors and issue an access decision with respect to these records.

[41] I note that the appellant has also raised reasonable search with regard to the whereabouts of the councillors' detailed invoices for their 407 ETR expenses for the years 2007 and 2008. However, having found that the councillors detailed invoices are in the city's control and having ordered the city to obtain copies of them and make an access decision, I need not address the reasonable search issue at this time.

ORDER:

1. The councillors' detailed invoices for their 407 ETR expenses for the years 2007 and 2008 are in the city's control, within the meaning of section 4(1) of the *Act*, and I order the city to obtain copies of these records from the councillors and issue an access decision.
2. I remain seized of this matter in order to ensure compliance with Provision 1.

Original signed by:
Bernard Morrow
Adjudicator

June 13, 2012