

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2821

Appeal MA11-398

City of Toronto

December 21, 2012

Summary: The City of Toronto (the city) received a request for access to any communications about cycling issues between the offices of the Mayor, two named councillors and staff within the city's Transportation Services. The city searched for and granted access in part to communications between the Mayor's office, the councillors and staff of Transportation Services. It took the position that communications between the councillors were not in its custody or control. The requester did not appeal the decision to grant partial access but did object to the city's position on custody or control. In this decision the adjudicator concludes that the records, if they exist, are not in the city's custody or control and not subject to the *Municipal Freedom of Information and Protection of Privacy Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 4(1), *City of Toronto Act, 2006*, S.O. 2006, c. 11, Schedule A.

Orders and Investigation Reports Considered: Orders M-813, MO-2750, Privacy Complaint Report MC10-75 and MC11-18

Cases Considered: *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.), *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any communications about cycling issues that originated from the Mayor, his staff, two named councillors and their staff, and staff within the city's Transportation Services. The requester subsequently clarified that her request was intended to cover communications between the specified offices.

[2] The city issued a decision on one part of the request, and a time extension on the remainder, stating in part:

Records maintained by City Councillors and their staff are not in the custody and control of the City of Toronto and, as a result, are not covered by the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*. Therefore, access to records maintained by [the two named councillors] cannot be granted.

[3] The city further advised that it had asked the Mayor's office staff and Transportation Services to conduct a search for records and it was extending the time limit for responding to the request due to the large number of records to be searched.

[4] The city ultimately located a number of records responsive to the request which originated from or were received by the Mayor's office and/or Transportation Services. These included communications between the Mayor's office and Transportation Services, between the two councillors (or their staff) and Transportation Services, and between one of the councillors' staff and the Mayor's office. For ease of reference, I will refer to the councillors or their staff below simply as "the councillors".

[5] Following its search, the city issued a final decision advising that partial access had been granted to 130 pages of records (subsequently corrected to 131 pages). Access to some parts of the records was denied pursuant to sections 7, 11 and 14 of the *Act*. In its letter, the city further advised that upon payment of the \$68.00 fee relating to the photocopying and severing of certain pages, the records would be mailed to the requester.

[6] The requester (now the appellant) appealed the city's decision.

[7] As indicated above, the 131 pages of responsive records include correspondence between the named councillors and the Mayor's office or Transportation Services staff. These records are considered by the city to be under its custody or control and it has decided to disclose them in part. It did not search the named councillors' offices nor did it ask the individual councillors to conduct a search for responsive records. The city

takes the position that the councillors' personal/constituency records are not in its custody or control, and therefore not subject to the provisions of the *Act*.

[8] The appellant takes issue with the city's position that councillors' records are not within its custody or control, and not subject to the *Act*. The appellant, however, confirmed that the exemptions claimed in the city's decision and the fee applied for processing the request are not at issue in this appeal.

[9] As a result, the sole issue in this appeal is whether some of the requested records, if they exist and to the extent they are in the possession of the councillors, are within the custody or control of the city, and therefore subject to the *Act*. I began the inquiry by sending a Notice of Inquiry to the city and the two named councillors as affected parties, seeking their representations on the facts and issues raised in this appeal. I sent those representations in their entirety to the appellant, who was invited to respond. The appellant did not provide representations despite being given several extensions of time, and she was advised that the inquiry process would proceed without her representations.

DISCUSSION

[10] 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 . . .

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

[12] An "institution" is defined in section 2(1), and includes a municipality. The definition of "institution" does not specifically refer to elected offices such as a municipal councillor.

[13] In Order M-813, this office reviewed this area of the law and concluded that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or
- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.

[14] The issues before me, therefore, are whether the two municipal councillors whose records are sought by the appellant are part of the institution, the City of Toronto, for the purposes of the *Act* and, even if they are not, whether their records are in the custody or under the control of the city.

[15] With respect to the second situation above, the adjudicator in Order M-813 referred to principles developed by this office and, in particular, Order 120 which sets out factors relevant to determining issues of "custody or control". The courts have also considered these issues and I will refer to both court and IPC principles relevant to the issue of "custody or control" below.

Representations

[16] The councillors referred me to Orders M-846 and MO-1403 in which this office found that record holdings of councillors were not subject to the *Act*. They also rely on the decisions in *Davis v. Sovereign Bank* (1906), 12 O.L.R. 557 (H.C.J.) and *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.). In the latter case, the Court stated,

It is an equally long-standing principle of municipal law that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. Elected members of council are not employed by or in any way under the control of the local authority while in office ... Individual council members have no authority to act for the corporation except in conjunction with other members of council constituting a quorum at a legally constituted meeting; with the exception of the mayor or other chief executive officer of the corporation, they are mere legislative officers without executive or ministerial duties ...
[para.264]

[17] The councillors submit that the records relate to their own actions as councillors, not under any authority derived from statute or city council. They state that they are members of the city's Standing Committee on Public Works and Infrastructure, which has six members.¹ This Committee considers, among other things, "cycling issues". However, they submit, it would be wrong to conclude that the records were created as part of their work on the Committee. The councillors may only bind the city when they act as part of a quorum on the Committee and the request involves no such quorum, let alone a Committee meeting.

¹ The City of Toronto website states that the mandate of this Committee is to "monitor, and make recommendations on Toronto's infrastructure needs and services."

<http://app.toronto.ca/tmmis/decisionBodyProfile.do?function=doPrepare&decisionBodyId=370#Meeting-2012.PW19>

[18] The councillors state this appeal is focused on records created by the councillors acting alone, and covers either records of the two councillors communicating with each other or those in which the city is the recipient [or author]. With respect to the latter, they state, the request has been fulfilled. With respect to the former, any records that exist do not involve the councillors acting as "officers" or "employees" of the city as that term has been defined by this office and the courts.

[19] On the issue of "custody or control", the councillors submit that based on the indicia of "custody or control" described in IPC and court decisions, together with the law concerning the role of municipal councillors, the requested records, if they exist, are the councillors' personal records and not subject to the *Act*. They state that to the extent the councillors have any such records, the city has no authority over their use or content, and no reason for reliance on them.

[20] The city submits it is a longstanding principle that individual councillors are not officers or employees of a municipality and as such have no authority to act for the corporation except in conjunction with other members of council constituting a quorum at a legally constituted meeting. Councillors are, absent "unusual circumstance", "mere legislative officers without executive or ministerial duties...".

[21] In this case, the city submits, the councillors are not officers of the city nor had they been assigned any specific responsibilities by council and as such had no express authority, as individual councillors, to act for the city. The records are not in the city's custody or control as they represent the councillors' personal or constituency records, and not records relating to their role as a member of council in dealing with the business of the municipality.

[22] The city refers to the document "Working with the Municipal Freedom of Information and Protection of Privacy Act: A Councillor's Guide", published jointly by the City of Ottawa and the IPC in 2001. It states that consistent with this Guide, the City Clerk's Office has prepared a guide to assist councillors in understanding and complying with the *Act*. Both of these documents state that councillors' constituency records are considered "personal" and not subject to the *Act*.

[23] The city submits that the activities of an individual councillor, outside of an individual councillor's legislated role as a member of council, is not a core, central or basic function of the city, but relates to the personal matters of an individual councillor. In that role, an individual member may act not in the best interests of the municipal corporation, but in furtherance of their own aims. The records at issue are exclusively documents relating to the individual aims of the named councillors and not the city as an institution. They do not relate to the city's mandate and functions, but to the councillors' "political" or "personal" activities.

[24] The city states that it does not have possession of the records, nor the authority to compel councillors to submit them to the city. They are not integrated with other records held by the city, but are maintained separately from records under the city's custody or control. It states that it does not have the authority to regulate the content, use and disposal of such records, as these are matters for the individual councillor to determine. The city submits that the records are not subject to the records retention by-laws contained in Chapter 217 of the Toronto Municipal Code. Further, it states it has not relied on the records in any way.

[25] Although she did not provide submissions, in her Appeal Form, the appellant submits that "no exemptions listed in the *Act* apply in the case of this request as it: (a) pertains to a city-wide matter; (b) does not pertain to any individual constituent; and (c) refusal to provide the requested information would render significant municipal policies and decisions opaque." Moreover, the appellant submits that the city's guidelines advise councillors that their records are subject to the *Act*.

Were the councillors acting as officers or employees of the municipality in the circumstances of this case?

[26] As I have indicated, the city has searched for and located communications between the councillors and either the Mayor's office or Transportation Services, and issued an access decision on these records. The only responsive records remaining at issue, if they exist, are those in the hands of the councillors which are communications *between their two offices*.

[27] As the Court stated in *St. Elizabeth Home Society*, above, it is a "long-standing principle of municipal law that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense." In the words of the Court, municipal councillors are "mere legislative officers without executive or ministerial duties..."²

[28] Consistent with this, in Order M-813, the adjudicator concluded that only in "unusual circumstances" is a councillor considered an officer of a municipality, and therefore part of the institution for the purposes of the *Act*. She described those circumstances in the following terms:

[a]n 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

² *St. Elizabeth Home Society*, at para. 264. See also *J.H. v. Hastings (County)*, [1992] O.J. No. 1695 (Gen.Div.), in which the court expressed doubt about whether municipal councillors are included in the words "officer" or "employee" in section 32(d) of the *Act*.

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.

[29] I see nothing in the *City of Toronto Act, 2006* (COTA)³, which governs this city, that departs from the above principles. There is no specific definition of "officers and employees" of the city in COTA. COTA appears to distinguish between members of city council on the one hand and officers and employees of the city on the other. Even if it were possible for a member of city council to also be appointed an officer or employee of the city, as indicated in Order M-813 this would have to be based on specific factual circumstances. There is nothing in the factual circumstances before me that supports a conclusion that these two councillors were acting as officers or employees with respect to the matters covered by this appeal.

[30] Further, I know of no authority suggesting that membership on a city committee by itself bestows on the two councillors the status of officers or employees, such that communications between them are "city records".

[31] On the basis of the evidence and submissions before me, I am satisfied that the communications between the councillors on cycling issues do not arise out of any exercise of duties as officers or employees of the city. To the extent the councillors hold such records, they do not hold them as part of the "institution".

[32] I find support for my conclusion in the Supreme Court of Canada decision in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*.⁴ The facts in that case are different from those before me, in that they concerned records in the offices of federal cabinet ministers. Nonetheless, the decision is instructive in that it affirmed that a government "institution" covered by access to information legislation is not synonymous with the office of an elected representative, even one who has responsibility for a particular government department.

Are the records in the "custody or control" of the city and therefore subject to the *Act*?

[33] A finding that the records do not relate to the exercise of duties on behalf of the city does not end the matter, for records of elected representatives may nevertheless be found in the "custody or control" of an institution under the *Act*, in certain circumstances.

³ S.O. 2006, c. 11, Schedule A

⁴ 2011 SCC 24, [2011] 2 SCR 306.

[34] It should be noted that 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.⁵ Further, the courts and this office have applied a broad and liberal approach to the custody or control question.⁶

[35] In Order MO-2750, for instance, detailed invoices retained by councillors for reimbursable expenses were found to be in the "control" of the municipality, where the municipality directed that these be retained by the councillors and was entitled to obtain copies of them on request.

[36] However, bare possession of a municipal councillors' records may not establish that a municipality has "custody or control" of the records.⁷

[37] 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.⁸ 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. The factors must be considered contextually, in light of the purposes of the legislation.⁹

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the record?
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?
- Is the activity in question a "core", "central" or "basic" function of the institution?
- Does the content of the record relate to the institution's mandate and functions?

⁵ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁶ *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.

⁷ See Order PO-1947-F, *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

⁸ See Orders 120, P-239, MO-1251, PO-2306 and PO-2683, Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above at note 2, *Ministry of the Attorney General v. Information and Privacy Commissioner*, above at note 3, *City of Ottawa v. Ontario*, above at note 5.

⁹ *City of Ottawa*, above at note 6.

- 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?
- If the institution does have possession of the record, is it more than “bare possession”?
- 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?
- Does the institution have a right to possession of the record?
- Does the institution have the authority to regulate the record’s content, use and disposal?
- 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?
- To what extent has the institution relied upon the record?
- How closely is the record integrated with other records held by the institution?
- 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?

[38] In *National Defence*, above, the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are in the hands of elected representatives (in that case, in Ministers’ offices):

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?¹⁰

[39] In relation to the second question, the Court stated that:

...*all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between

¹⁰ *National Defence*, para. 50.

the government institution and the record holder.... The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.¹¹

[40] The two-part test in *National Defence* has been applied by this office¹² and is also a useful framework in analyzing these issues. As is apparent from the above, many of the factors referred to in IPC decisions are aligned with the questions put by the Court in *National Defence*.

Analysis

[41] I find that the records, if they exist, are not in the "custody or control" of the city.

[42] I reiterate that the records at issue are communications between the two named councillors, about cycling issues. Applying some of the listed criteria as well as my findings above, the records were not created by officers or employees of the city. There is no information about what use the councillors sought to make of the records although I can reasonably conclude that since they were not forwarded to the city, they were not intended for city business, but for the councillors' own use. I note that some of the records the city retrieved and decided to release consist of email exchanges between city councillors which were forwarded to city staff for action or response. The city accepts that these records are in its custody or control and subject to the *Act*.

[43] Based on the representations, I find that the records, if they exist, are not integrated with records held by the city. They have not been sent to any city division or office. The city does not regulate the content, use and disposal of the records, and they are not subject to the records retention by-laws contained in the Toronto Municipal Code.

[44] The content of the communications relates broadly to matters in the city's mandate, in that the city does have an interest in and regulates certain aspects of cycling activity. It would not be surprising if councillors communicate with each other about matters that fall within the mandate of the city. In fact, it is entirely to be expected that councillors communicate regularly with each other and with any number of individuals and organizations about matters within the mandate of the city. Presumably, the reason for many of these communications is that an individual or organization wishes to express a view to councillors about an issue that may come to a vote at Council, or councillors wish to persuade each other about a position on an issue.

¹¹ *National Defence*, para. 56.

¹² Order MO-2750.

[45] In this respect, it is arguable that the records meet the first part of the test for determining "control" suggested by *National Defence*, above, adopting a broad and liberal understanding of what may constitute a "city matter". But, as the Supreme Court indicated, a conclusion that the content of a disputed record relates to a "departmental" (or, as in this case, a "city") matter is only the initial step in the inquiry. In *National Defence*, some of the records at issue related to "departmental" matters as they were about informal meetings between the Minister of National Defence and senior officials about matters within the Minister's responsibilities. Ultimately, some were found to be in the "control" of the government institution and others not, based on an analysis of whether the government institution could reasonably be expected to obtain copies of them on request.

[46] Applying the analysis in *National Defence*, and assuming that communications about cycling issues relate to "city matters", the next step therefore is to consider whether the city could reasonably be expected to obtain a copy of the records on request. In this case, based on the facts and representations before me, I am satisfied that the city could not reasonably be expected to obtain the records on request. My findings take account of the following factors:

- The records were created by and exchanged between councillors who are neither officers nor employees of the city
- Although the councillors are members of a city committee, the records do not relate to the discharge of any special authority to act on behalf of the city with respect to the work of the committee or otherwise
- The records were not forwarded to city staff
- The records have not been integrated with city records
- The city does not assert any authority over the content, use or disposal of the records

[47] Since the city did not request that the councillors search for records responsive to the request, there is no information about whether the records exist and, if they do, where they are located. I have considered the possibility that some records, if they exist, are located on city property, such as a councillors' City Hall office, or on computer servers provided by the city. From information in the records produced by the city [such as the use of city email addresses by staff for the councillors], and having regard to some of the findings in a recent Privacy Complaint Report by this office involving the city,¹³ it is possible some of the records are emails located on computer servers administered by city staff. But even if that is the case, I accept the submissions of the city and the councillors that such records are not integrated with city records and the city does not regulate their content, use or disposal. In such circumstances, I conclude

¹³ MC10-75 and MC11-18

that the city would have, at most, "bare possession" of the records which does not amount to "custody or control".

[48] The facts of this appeal are different from those considered in the Privacy Complaint Report above, in which this office found an email sent to a city councillor, who was the Chair of the Board of the Toronto Transit Commission (TTC), in the custody or control of the city.¹⁴ In that case the city had, through a Code of Conduct governing the conduct of members of council sitting on boards, recognized and assumed some responsibility for the care and protection of like records. As well, the record was sent to the councillor in his capacity as Chair of the Board and not as a constituent representative, and was forwarded to the TTC as a complaint about service. In setting out his conclusions, the investigator emphasized that his findings did not mean that the city would have custody or control over all records in the possession of a member of an agency, board or commission with members appointed by city council, and that the determination of custody or control issues would continue to depend on the substance and subject of the records at issue, in addition to other relevant factors.

[49] In the circumstances before me and on a consideration of the relevant factors, I conclude that the records at issue are not in the custody or control of the city.

[50] Before concluding, I wish to address the question of "constituency" records. The parties made reference to this description of councillor records, as prior decisions of this office have found councillors' constituency records to be excluded from the *Act*. One of the factors the appellant relied on in her Appeal Form is that the records do not involve any individual constituent. She suggests, therefore, that the records must therefore be "city records."

[51] Although the distinction between "constituency records" and "city records" is one framework for determining custody or control issues, it does not fully address the activities of municipal councillors as elected representatives or, as described in *St. Elizabeth Home Society*, above, "legislative officers." Records held by councillors may well include "constituency records" in the sense of having to do with an issue relating to a constituent. But they may also include communications with persons or organizations, including other councillors, about matters that do not relate specifically to issues in a councillor's ward and that arise more generally out of a councillor's activities as an elected representative.

[52] The councillors have described such records as "personal" records but it may also be appropriate to call them "political" records. In any event, it is consistent with the scheme and purposes of the *Act*, and its provincial equivalent, that such records are not generally subject to access requests. In *National Defence*, the Court stated that the "policy rationale for excluding the Minister's office altogether from the definition of

¹⁴ Above at note 11

“government institution” can be found in the need for a private space to allow for the full and frank discussion of issues” and agreed with the submission that “[i]t is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records” that Parliament sought to protect by not extending the right of access to the Minister’s office.¹⁵

[53] The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministers, do not have responsibility for a government department and are more like MPP’s or MP’s without a portfolio. A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the *Act*. A finding that the city, as an institution covered by the *Act*, is not synonymous with its elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.

[54] In conclusion, I find that the records at issue are not in the custody or control of the city.

ORDER:

I uphold the city’s decision and dismiss the appeal.

Original signed by: _____
Sherry Liang
Senior Adjudicator

December 21, 2012 _____

¹⁵ *National Defence*, above at note 3, para.41.