

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2807

Appeal MA11-399

City of Toronto

October 31, 2012

Summary: The requester sought access to records held by municipal councillors. In the circumstances of this case, the adjudicator decided that the records, if they exist, are not in the custody or control of the city and cannot be the subject of an access request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(b) (definition of an institution) and 4(1) (right to access)

Orders and Investigation Reports Considered: Order M-813.

Cases Considered: *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 documents discussing or tracking public opinion on specified issues, and originating with the mayor, the mayor's staff, three named councillors and their staff, and staff of the city manager's office.

[2] On August 17, 2011, the city issued a decision on some parts of the request and a time extension, stating in part:

You have requested access to a copy of all documents, including but not limited to e-mails, text messages other electronic records, internal memoranda, handwritten notes which discuss, or track public opinion, formally or informally, on cycling issues, Pride and Jarvis bike lanes. You have requested these documents from the Mayor's office, the City Manager's Office and the offices of several City of Toronto councillors that you have listed.

Please note that the records created and maintained by City Councillors are not covered by the provisions of the *Act*. Access therefore cannot be provided to the records in the custody and control of various members of City Council that you have requested.

[3] With respect to the part of the request pertaining to the Mayor's Office, the city advised that access cannot be provided as no records exist.

[4] The city also advised that, with respect to the part of the request pertaining to the City Manager's office, the time limit to respond to the request was extended for an additional 30 days, to September 16, 2011, due to the large number of records to be searched.

[5] On September 16, 2011, the city issued a decision with respect to the part of the request relating to the City Manager's office, advising that despite a thorough search, access cannot be granted as the staff were unable to locate "any records which discuss or track public opinion, formally or informally, on cycling issues, Pride and Jarvis bike lanes".

[6] The requester (now the appellant) appealed the city's decision. The appellant takes issue with the city's position with respect to the named councillors' records as she maintains that councillors' records are within the city's custody or control, and subject to the *Act*. The other parts of the request are not at issue in this appeal.

[7] As a result, the sole issue in this appeal is whether the requested records (if they exist) are within the custody or control of the city, and therefore subject to the *Act*.

[8] Despite broader wording in the original request, the scope of the request is now restricted to documents that discuss or track public opinion in relation to "cycling issues, Pride and Jarvis bike lanes".

[9] I sent a Notice of Inquiry to the city and the three councillors, initially, inviting them to make representations on the appeal. Their representations were shared in

their entirety with the appellant, who was also invited to make submissions. Despite several extensions of time, the appellant has not provided any and was advised that the inquiry 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. In a number of decisions, this office has considered whether records held by municipal councillors are subject to the *Act*. 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" of the municipality in the particular circumstances; or
- Where, even if the councillor is not acting as an officer of the municipality, his or her records are in the custody or under the control of the municipality on the basis of established principles.

[13] 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 set 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.

[14] Although councillor records may also be subject to the *Act* if councillors are considered "employees" of a municipality, this office has never found that to be the case and there is no suggestion it is relevant here.

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

[15] The request covers records that discuss or track public opinion on "cycling issues, Pride and Jarvis bike lanes". The councillors submit that at the relevant time, they were not authorized by the city to discuss or track public opinion on any issue, let alone on the issues addressed in the request. They were not assigned any specific

responsibilities by Council concerning the discussion or tracking of public opinion. In fact, it is asserted, the city does not itself track public opinion related to those issues. Thus, any records that may be in the councillors' possession, assuming they exist, are the councillors' own personal or constituency records and are not in the city's custody or control.

[16] The city submits, among other things that the IPC has previously determined an individual municipal councillor does not constitute an "officer" or "employee" of an institution absent "unusual circumstances", which are not present here.

[17] 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 government policies and decisions opaque." Moreover, the appellant submits that the city's guidelines advise councillors that their records are subject to the *Act*.

Analysis

[18] In Order M-813, the adjudicator concluded, after considering provisions of the *Municipal Act*, court decisions and academic writing, that "except in unusual circumstances, a member of municipal council is generally not considered to be an "officer" of a municipal corporation."¹ She stated that:

[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 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.

[19] There is nothing before me indicating that the councillors were acting in any official capacity in discussing or tracking public opinion on the issues with which the appellant is concerned. To the contrary, I accept the submission of the councillors that they were never authorized by the city to discuss or track public opinion on any issue, including these issues.

¹ The *Municipal Act* (now the *Municipal Act, 2001*) has been considerably amended since this order was issued but these amendments do not affect the conclusions reached in the order.

[20] I therefore conclude that the councillors were not acting as “officers” of the city in these activities and, to the extent any records exist, they are not records of the city, but of the councillors in their capacity as elected representatives.

Custody or control

[21] Records in the hands of elected representatives may nevertheless be found to be in the “custody or control” of an institution under the *Act*. The courts and this office have applied a broad and liberal approach to the custody or control question.²

[22] 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.³ 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.

[23] However, bare possession of a municipal councillors’ records may not establish that a municipality has “custody or control” of the records.⁴

[24] 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.⁵ 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?
- 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?

² *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.

³ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁴ See Order PO-1947-F.

⁵ 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*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

- Does the content of the record relate to the institution's mandate and functions?
- 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?

[25] The Supreme Court of Canada recently adopted the following two-part test on the question of whether an institution has control of records that are not in its possession (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?⁶

⁶ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 (*National Defence*).

[26] 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 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.

[27] The two-part test in *National Defence* has been applied by this office to questions of custody or control, where the records are in the possession of elected representatives,⁷ and I will adopt it here.

[28] In this appeal, the councillors submit that the records, if they exist, were not created as a result of the councillors being engaged in any way in a core, central or basic function of the city, or in respect of any aspect of the city Council's mandate and functions. As indicated above, the councillors state that at no point did the city ever grant to any of the councillors the authority to discuss or track public opinion on any issue, including these issues. In fact, they state, the city has made it clear that it does not itself even track public opinion related to these issues.

[29] The councillors state that to the extent that any of the councillors have any such records, the city has no authority over their use or content, and no reason for reliance on them. The city has no right to obtain or control any of the requested records that may be held by the councillors.

[30] The city also submits that the documents do not relate to a responsibility of the city, its mandate and functions. It submits that the records, if they exist, relate to the councillors' "political" or "personal" activities. It asserts that it does not have a right to possession of the records and does not have the authority to compel the councillors to submit the documents to the city. The city states that the records are not subject to the records retention by-laws contained in Chapter 217 of the Toronto Municipal Code.

Analysis

[31] I find that the records, if they exist, are not in the "custody or control" of the city. While in a general sense they may relate to issues that fall within the mandate of the city (ie. the regulation of cycling lanes and parades), there is no indication that the

⁷ Order MO-2750.

city engages in the tracking of public opinion on these issues *and* has authorized these councillors to pursue those activities for the city. I conclude therefore that any records in the hands of the councillors that discuss or track public opinion on these issues do not relate to a "city matter" in the sense referred to in the first part of the *National Defence* test, above.

[32] If the councillors engage in such activities, it is in their capacities as elected representatives and not in the discharge of a mandate granted by the city. There is nothing in the material before me indicating that the city has any authority over such records, the right to regulate their use or content, or the right to obtain them on request. The circumstances therefore do not fulfill the second part of the test in *National Defence* for a finding of institutional control.

[33] Although she did not provide submissions I have considered the points made in the appellant's Appeal Form. I do not find them persuasive, for the reasons given above. With respect to the reference to the city's "guidelines", the city referred to its document "A Guide to Access and Privacy for Councillors" in its representations. I have reviewed that document and find it consistent with the conclusions I have reached in this order.

[34] I conclude that the *Act* does not apply to the requested records.

ORDER:

I uphold the city's decision.

Original signed by: _____
Sherry Liang
Senior Adjudicator

_____ October 31, 2012