

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2842

Appeal MA11-319

City of Toronto

February 6, 2013

Summary: The appellant requested records relating to communications between a named city councillor and outside parties about bringing an NFL team to Toronto. The city issued a decision claiming that no records exist in city offices. In addition, the city indicated that any records in the possession of the named councillor that may exist are not within the city's custody or control. In this order, the adjudicator finds that any records in the possession of the named councillor are not within the city's custody or control. The adjudicator also finds that the city's search for responsive records was reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended sections 4(1), 17.

Orders and Investigation Reports Considered: Orders M-813, MO-2821, MO-2824.

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; *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605).

OVERVIEW:

[1] The appellant, a member of the media, submitted a request to the City of

Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...all communications, either via email, letter, fax or documents relating to a phone call – perhaps a staff member took a message from a caller – to [a named councillor] between May 1 and June 5 of 2011 regarding Toronto and a potential NFL team. These communications could be originating from inside or outside of Canada. They could be related to [the named councillor's] interview with [a named media outlet], his comments at the Grey Cup event or they could also be just generally related to Toronto and a professional football team, such as words of encouragement from sports industry professionals.

[2] In response to the request, the city issued a decision in which it stated:

... 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 [the named councillor] or any members of his office or staff.

[3] In addition, with respect to their search for records, the city advised the following:

We asked staff of the Mayor's Office, the City Manager's Office, and Economic Development and Culture Division to search for records responsive to your request. ...

Staff of the Mayor's Office, the City Manager's Office, and Economic Development and Culture Division have advised that despite a thorough search, they were unable to locate the records that you have requested. As I can only conclude that the records do not exist, access therefore cannot be granted.

[4] The appellant appealed the city's decision.

[5] During mediation, the appellant indicated that she believes the search conducted by the city was not reasonable. Specifically, the appellant maintains that the records at issue are in the custody and control of the city and, as a result, the city should have searched the named councillor's office for records responsive to the request.

[6] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sought and received representations from the city, the councillor whose records have been requested (the affected party) and the appellant,

respectively. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

ISSUES:

A: Are the records "in the custody" or "under the control" of the city under section 4(1)?

B: Did the city conduct a reasonable search for records?

DISCUSSION:

ISSUE A: Are the records "in the custody" or "under the control" of the city under section 4(1)?

[7] The city and the affected party claim that the requested records are not in the custody or control of the city.

[8] Section 4(1) of the *Act* 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 . . .

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

[10] 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).

[11] Previous orders and privacy complaint reports issued by this office have considered issues related to "councillor records."³ In Order MO-2821, Senior Adjudicator Sherry Liang succinctly stated the general findings regarding records held by municipal councillors and the approach to take in determining this issue:

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

² Order PO-2836.

³ See, for example, Orders M-813, MO-1403, MO-2750, MO-2821, Privacy Complaint Report MC10-75 and MC11-18.

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 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.

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.

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.

[12] I agree with and adopt the reasoning and approach in Order MO-2821 and the orders previously decided on this issue. With the above discussion in mind, I will now consider whether any records that may be held by the affected party are subject to the *Act*.

Was the councillor functioning as an "officer" or "employee" of the city in the circumstances of this appeal?

Representations

[13] The city relies on the previous orders of this office cited above and states that the affected party is not an officer or employee of the city. The city states further that "no specific responsibility of the municipality has been assigned by the City to the individual Councillor." The city submits that the requested records relate to the affected party's actions in dealing with matters brought to his attention by members of the

public in his role as an individual "constituent representative." Furthermore, the city asserts that records relating to a constituency matter or records relating to a councillor's role as an elected representative would not be considered to be under the custody or control of a municipality.

[14] The city also submits that there is no basis for the position that the records at issue would relate to the affected party's responsibilities with respect to the city's business, in his role as a member of Council.

[15] The affected party's representations support those of the city. The affected party states that, during the relevant time, he did not have any authority to act on the city's behalf concerning the city's potential acquisition of an NFL team. The affected party refers to an Affidavit, sworn by the Manager, Access & Privacy, that was attached to the city's representations, in which she affirms that the affected party "had no authority to act for the city except in conjunction with other members of Council constituting a quorum..." The affected party asserts that he had no authority to act individually regarding an NFL team and any records in his possession which may exist are, therefore, maintained by him in his personal capacity.

[16] The appellant submits that to suggest that the requested records are not accessible under the *Act* is inconsistent with the *Act's* intent. She argues that the public would be shocked to learn that they could not access records held by public officials such as elected representatives of municipal council. She believes that the *Act* provides access to all councillor records, although she appears to accept that records relating to "constituency" matters may not be accessible. She also refers to certain guidelines to councillors, issued by the city, which she submits support the position that any councillor records, other than those relating to specific constituency work, are covered by the *Act*.

[17] The appellant states that the request was for all records "regarding Toronto and a potential NFL team," which, she argues, is a city-wide issue and has nothing to do with the councillor's ward. The appellant refers to a number of public statements the affected party has made in the past about this issue. She submits that, "[e]ven if there is a proper exemption for a councillor's constituency records, the records being sought in this appeal do not fall under this category."

[18] The appellant also submits that although the affected party represents a particular ward, and has no formal title, he plays a much more important role in the administration of the city and its business and is, in essence, a *de facto* member of the administration. The appellant provides copies of a number of newspaper articles in support of her position. The appellant also cites a number of examples of the special relationship the affected party has with the city, such as: seeking to adjoin his office with that of the mayor; and meeting with developers and officials on behalf of the administration.

[19] By way of further argument, she describes the affected party's actions in September, 2011 where he "nearly derailed a decade of work on waterfront revitalization." The appellant states that he met with a consulting firm, developers and stakeholders, and the plan went to executive committee and council. She adds that "[i]f the deal had passed ... it would have meant hundreds of millions of dollars of taxpayer money wasted." Accordingly, she argues that when the affected party says he wants to bring an NFL team to Toronto, the media must investigate.

[20] The appellant submits that the importance of public accountability, democracy and transparency requires that the city not be able to shield councillor records from public scrutiny. Given the activities of the affected party, the appellant asserts that councillors should not be allowed to act "in secret."

Analysis and findings

[21] Having considered the representations of the parties, I am satisfied that the affected party was not acting as an officer of the city if or when he communicated with any party outside the city about bringing an NFL team to Toronto.

[22] In addition to the previous orders of this office that have addressed the records held by municipal councillors, the courts have provided guidance in addressing this issue. Of note is the clear statement made by the Court in *St. Elizabeth Home Society*:⁴

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]

[23] The appellant raises an interesting situation, however, where a municipal councillor has been asked or directed by the administration or the mayor to communicate on behalf of the city, absent a formal designation to do so. In considering this issue, I have turned my mind to the factors raised by the appellant. However, I am not persuaded, by the evidence the appellant has submitted that the affected party held any kind of agency or representative position on behalf of the city or on behalf of any officer of the city in regards to the NFL matter. Moreover, the

⁴ *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

evidence submitted by the city in the affidavits sworn by city staff that it attached to its submissions⁵ confirms that the NFL matter had not been an official topic of discussion within the city.

[24] In the circumstances of this appeal, I find that the affected party had no express authority to act for the city. Based on the evidence provided, I find that the circumstances of this appeal do not result in the "unusual circumstances" where the affected party might also be considered an "officer" of the municipality. Furthermore, the evidence provided by the city and affected party, including the affidavit evidence of the Manager of Access and Privacy, confirm that Council had not assigned any specific responsibility to the affected party to deal with this matter on its behalf.

[25] The appellant points out that the records are not "constituency records" and should, therefore, fall within the purview of the *Act*. In Order MO-2821, Senior Adjudicator Liang commented on the issue of "constituency records" as follows:

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."

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.

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.

⁵ These affidavits were sworn by the city staff who conducted searches for the requested records. As set out in the discussion below under Issue B, the affiants have all affirmed that no records were located in the Mayor's office, Strategic Communications and Economic Development & Culture. In addition, the city confirms in its submissions that there "was no plan, communication, or direction from City Council, the Mayor's Office, [the affected party's] office, or the City Manager's Office regarding this subject."

In *National Defence*,⁶ the Court stated that the “policy rationale for excluding the Minister’s office altogether from the definition of “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.

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. ...

[26] I agree with the Senior Adjudicator’s analysis and findings on this issue. In Order MO-2824, I addressed a similar argument raised by the appellant in that case with respect to records pertaining to lobbyists. In that case, the appellant sought to distinguish records received from actual constituents residing in the councillor’s ward from communications with lobbyists. In my decision, I found:

[T]he analysis of whether or not a councillor is an “officer” does not turn on who the councillor communicates with. Rather, the question requires an examination of the capacity in which the councillor is acting...

[27] In conclusion, I find that the affected party was not acting as an “officer” or “employee” of the city in connection with any communications he may have had regarding bringing an NFL team to Toronto. Having determined that he was not an officer, I must now determine whether the requested records are nevertheless in the custody or under the control of the city.⁷

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

[28] The courts and this office have applied a broad and liberal approach to the custody or control question.⁸

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

⁷ See: Orders P-239 and M-813, for example.

⁸ *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.

[29] 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.⁹ 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?¹⁰
- What use did the creator intend to make of the record?¹¹
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹²
- Is the activity in question a “core”, “central” or “basic” function of the institution?¹³
- Does the content of the record relate to the institution’s mandate and functions?¹⁴
- 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?¹⁵
- If the institution does have possession of the record, is it more than “bare possession”?¹⁶
- 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?¹⁷
- Does the institution have a right to possession of the record?¹⁸

⁹ Orders P-120, MO-1251, PO-2306 and PO-2683.

¹⁰ Order P-120.

¹¹ Orders P-120 and P-239.

¹² Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.

¹³ Order P-912.

¹⁴ *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.

¹⁵ Orders P-120 and P-239.

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

¹⁷ Orders P-120 and P-239.

¹⁸ Orders P-120 and P-239.

- Does the institution have the authority to regulate the record's content, use and disposal?¹⁹
- 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?²⁰
- To what extent has the institution relied upon the record?²¹
- How closely is the record integrated with other records held by the institution?²²
- 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?²³

[30] Moreover, in determining whether records are in the "custody or control" of the city, the above factors must be considered contextually in light of the purpose of the legislation.²⁴

[31] In addition to the above factors, the Supreme Court of Canada²⁵ has recently articulated a two-part test to determine institutional control of a record:

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.

[32] According to the Supreme Court, control can only be established if both parts of this test are met.

Representations

[33] The city reiterates that the affected party is not an officer or employee of the city. It submits that it has no knowledge of the use the creator intended to make of the records. The city states that it does not have statutory power or duty to carry out the

¹⁹ Orders P-120 and P-239.

²⁰ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

²¹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.

²² Orders P-120 and P-239.

²³ Order MO-1251.

²⁴ See *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605), para 31.

²⁵ *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 [*National Defence*].

activity that resulted in the creation of the record, nor would any documents relate to a responsibility of the city, as no specific responsibility of this nature has been assigned by the city to the affected party.

[34] The city adds that there is no basis for the position that the requested "Councillor's Records" relate to the affected party's responsibilities as a member of Council. It states, rather, that any responsive records relate to the affected party's personal and individual actions in dealing with members of the public in his role as an individual "constituent representative." The city asserts that interactions between individual members of Council and individual members of the public are not core, central or basic functions of the city as an institution, but are the personal matters of the individual councillor.

[35] In addition, the city submits that the records do not relate to the institution's mandate and functions, and any of the affected party's records, if they exist, relate to the independent and personal actions of a councillor's "political" or "personal" activities.

[36] The city confirms that:

- It does not have possession of the records, and reiterates that, if any records exist, they would be constituency records of the affected party; and as such the city has no right to obtain these documents.
- The record is not being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee of the city.
- The city does not have a right to possession of the affected party's records, nor does the city have the authority to compel him to submit his personal documents to the city.
- The city does not have the authority to regulate the affected party's records content, use, and disposal, as the content, use, and disposal of a councillor's records are a matter for the individual councillor to determine.
- The city has not relied upon the record. As the records are not in the custody or control of the city, they have not been relied upon by the city in any fashion, or for any purpose.
- The records are not integrated with other records held by the city. The records form part of the affected party's constituency records, which are not records under the custody or control of the institution, and are maintained separately from the records under the city's custody or control.

- The city's customary practices with respect to "Councillor's Records" contained in the Handbook and the City Guide, are in accordance with the practices outlined in the Guide.

[37] Finally, the city notes that it relies on the reasoning contained in Orders M-813, M-846 and MO-1403 to support its position that the records subject to this appeal are not within the city's custody or control. The city argues that any such records would represent the affected party's personal or constituency records, and not records which relate to his role as a member of municipal council in dealing with business of the municipality.

[38] The affected party also relies on Orders M-813 and M-846, and provides representations which support the city's position.

[39] The appellant's representations on this issue, generally, are set out above.

Analysis and findings

[40] Having found above that the affected party was not acting as an officer of the city at the time he may have had communications regarding an NFL team, I have also considered whether any responsive records may, nevertheless, be in the custody or control of the city.

[41] After considering the submissions made by the parties referred to above, as well as those discussed below under Issue B, I find that the requested records are not in the custody or control of the city.

[42] With respect to the factors to consider in determining whether or not a record is in the custody or control of an institution, I accept the position of the city and the affected party that the records were not created by an officer or employee of the city, that the city has not relied on the records, and that the city does not have a statutory power or duty to carry out the activity that resulted in the creation of the records.

[43] Moreover, based on the city's submissions, including the affidavits sworn by the city staff responsible for conducting the search for responsive records, I am satisfied that any such records, if they exist, have not been provided to or integrated with records held by the city, regardless of whether they may have been received or created by the councillor at his municipal office. Additionally, I find that the city does not regulate their content, use or disposal.

[44] With respect to the issue of whether the content of any records relates to the institution's mandate and functions, while it may be that, on a broad view, discussions about the potential location of a professional sports team in the city engages city interests, I accept the city's submissions that, during the relevant time period, bringing

an NFL team to Toronto was not part of any mandated activity. As I noted above, according to the city, there "was no plan, communication, or direction from City Council, the Mayor's Office, [the affected party's] office, or the City Manager's Office regarding this subject."

[45] With respect to any records that might exist within the affected party's municipal office, I note that a number of previous orders and decisions have reviewed the issue of whether records stored in municipal offices²⁶ or on institutional computers are in that institution's custody. A recent decision of the Divisional Court²⁷ reviewed this issue in some detail. Although that case dealt with records which were clearly the "personal records" of an employee of the City of Ottawa stored on a city server, the following quotation is instructive:

... The City in this case has some limited control over the documents in the sense that it can dictate what can be created or stored on its server. However, this is merely a prohibition power, not a creation power. The City can prohibit employees from certain uses, but does not control what employees create, how or if they store it on the server, and what they choose to do with their own material after that, including the right to destroy it if they wish.

[46] Although an argument has not been made that any records might exist on a city server, I take a similar approach to responsive records that might exist in the councillor's municipal office. I accept the city's submission that, as records of this nature relate to the affected party in his role as individual constituent representative, the city does not assert control over what he creates or receives, how or if he maintains such records in his office or on a city server, and what he chooses to do with the material after that, including the right to destroy it if he wishes. As a result, to the extent that records of this nature may be in the possession of the city because they are located in his office, I find that such possession amounts to "bare possession" and that the records are not in the custody of the city in these circumstances.

[47] Based on the representations and material before me, I am satisfied that the city has no authority to compel their production or to otherwise regulate the affected party's use and disposal of them. They relate to the affected party's role as an individual constituent representative and are in the nature of "political" rather than "city" records.

[48] Although I found above that any records pertaining to the request did not relate to any mandated activity of the city, applying the two-part test set out in the decision of

²⁶ M-813 and M-846.

²⁷ *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605). This decision discussed the custody and control of both electronic and paper records, and reviewed certain factors that must be considered in conducting such a review.

the Supreme Court of Canada in *National Defence*, referred to above, I conclude that even if records of this nature could arguably relate to a “city matter,” the city does not have the authority to regulate the use or content of any such records, and could not reasonably be expected to obtain a copy of such records upon request.²⁸ The circumstances, therefore, do not fulfill the second part of the test in *National Defence* for a finding of institutional control.

[49] On a final note, with respect to the appellant’s general concerns about accountability and transparency, similar concerns were recently addressed in both Order MO-2821 and MO-2824. Those orders considered the impact of a finding that “political” or “elected or constituent representative” records fell outside the scope of the *Act*, and determined that such a finding is consistent with the scheme and purposes of the *Act*. As Senior Adjudicator Liang stated:

... 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.²⁹

[50] I agree with the approach taken by the Senior Adjudicator. My finding that the records at issue in this appeal fall outside the scope of the *Act* because they are not in the custody or control of the city is consistent with the overall framework of the *Act*. In addition, as referred to in Order MO-2821, this finding does not affect other ways in which the activities of municipal councillors are regulated.³⁰

[51] As a result of the above, I find that the requested records in this appeal are not in the custody or under the control of the city, and are therefore not subject to the *Act*.

Issue B: Did the city conduct a reasonable search for records?

[52] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a

²⁸ Unlike the situation in Order MO-2750, where the municipality’s policies directed that certain invoices be retained by councillors for reimbursable expenses, and where the municipality was entitled to obtain copies of those invoices on request.

²⁹ Order MO-2821.

³⁰ Examples of other accountability or transparency mechanisms that come to mind include the functions and powers of the various “Accountability Officers” established in Part V of the *City of Toronto Act, 2006*.

reasonable search for records as required by section 17.³¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[53] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³² To be responsive, a record must be "reasonably related" to the request.³³

[54] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.³⁴

[55] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.³⁵

[56] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.³⁶

[57] As identified above, during mediation the appellant indicated that she believes the search conducted by the city was not reasonable. Specifically, the appellant maintains that the records at issue are in the custody and control of the city and, as a result, the city should have searched the named councillor's office for records responsive to the request.

[58] The city states that searches were conducted in the Mayor's Office, the City Manager's Office (including Strategic Communications) and the Economic Development & Culture Division (EDC). It also states that searches were conducted of all Committee and Council minutes. The city indicates that no records were located in these above locations.

[59] The city provides affidavits from each of the three individuals who conducted the specific searches noted above, as well as an affidavit sworn by the Manager, Access and Privacy, which confirm that no records were located. The city notes further that:

³¹ Orders P-85, P-221 and PO-1954-I.

³² Orders P-624 and PO-2559.

³³ Order PO-2554.

³⁴ Orders M-909, PO-2469, PO-2592.

³⁵ Order MO-2185.

³⁶ Order MO-2246.

[T]he staff person from EDC indicated that there was no plan, communication, or direction from City Council, the Mayor's Office, [the affected party's] office, or the City Manager's Office regarding this subject. The City notes that it searched the City's records, for documents responsive and had there been correspondence sent from the [affected party] to any of the above-mentioned program areas regarding the subject (NFL), such records would have been located.

In light of all of the above, it was determined that any records that [the affected party's] office may or may not have regarding this subject were clearly his personal or constituency records and would not be under the custody or control of the City. Therefore, the [affected party's] Office was not asked to perform a search.

[60] The appellant did not address this issue in her representations.

[61] Based on the descriptions provided by the city of the locations searched and the affidavits sworn by the staff who conducted the searches, I am satisfied that the searches were conducted by knowledgeable staff in locations where city-held records relating to the subject matter of the request could reasonably be expected to be located.

[62] Accordingly, I find that the city's search for responsive records was reasonable.

ORDER:

1. I uphold the city's decision.
2. The city's search for responsive records was reasonable.

Original signed by: _____
Frank DeVries
Adjudicator

February 6, 2013 _____