

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2975-I

Appeal MA12-453

City of Toronto

November 12, 2013

Summary: A requester made a three-part request for records in the City of Toronto's Office of the Integrity Commissioner and Office of the Mayor. In this interim order, the adjudicator finds that any responsive records in the Office of the Integrity Commissioner cannot be disclosed because of the confidentiality provisions of the *City of Toronto Act, 2006*. The adjudicator concludes that the city's search for records in relation to a prior request was reasonable, and that records relating to a Superior Court Application are not in the custody or control of the city. However, the adjudicator directs the city to conduct a further search of the Mayor's Office and provide more information in relation to records about a Council decision and a Report of the Integrity Commissioner.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1), 53(1), *City of Toronto Act, 2006*, S.O. 2006, CHAPTER 11, Schedule A, sections 161(1), 161(3).

Orders and Investigation Reports Considered: MO-2629-R

BACKGROUND AND OVERVIEW¹

[1] Several years ago, current Toronto Mayor His Worship Mayor Robert Bruce Ford (the Mayor) established, in his personal capacity, the Rob Ford Football Foundation ("the Foundation"). The Foundation is not part of any city business, nor is it endorsed or sponsored by the City of Toronto (the city). In May 2010, in response to a complaint, the Integrity Commissioner for the city (the Commissioner) investigated allegations that the Mayor (at the time of the events, a city Councillor) had violated the city's Code of Conduct in the manner in which he sought donations to the Foundation.

[2] The Commissioner reviewed several elements of the then Councillor Ford's fundraising activities, and issued a report on August 12, 2010, in which she determined that certain activities breached the Code of Conduct. The conclusion of the Commissioner was that Councillor Ford had wrongfully "combined the roles of public office holder and private citizen."

[3] Among the Commissioner's recommendations was that City Council impose a sanction requiring the then Councillor to reimburse money donated to the Foundation by the lobbyist and corporate donors. City Council subsequently adopted this recommendation on August 27, 2010 (reference CC 52.1), and also required the Councillor to provide the Integrity Commissioner with proof of reimbursement. After this meeting, there was a municipal election as a result of which Mr. Ford was elected Mayor of Toronto.

[4] Proof of reimbursement was not filed with the Commissioner and the Commissioner then issued a further report on January 30, 2012, reporting on the non-compliance. In that report, the Commissioner's recommendation was to require the Mayor to provide proof of reimbursement by March 6, 2012.

[5] At its meeting of February 7, 2012 (reference CC 16.6), City Council did not adopt the recommendation in the January 30th report, and instead passed a motion rescinding its earlier decision to require the reimbursement. The effect of this motion was that Council rescinded its adoption of the Commissioner's findings as to the Mayor's violations of the Code of Conduct (while Councillor), as well as the repayment obligation. The Mayor was therefore no longer required to repay any money to donors.

¹ The following description of the background context is taken from the undisputed facts in the city and the Mayor's representations, as well as public records, and provides a context for the request and my determination of the issues.

[6] Following this, a municipal voter, Paul Magder, brought an application under the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 (the MCIA), alleging that the Mayor had contravened the MCIA by speaking to and voting on a matter in which he had a pecuniary interest. The title of that application is "*Paul Magder v. Robert Ford*". The parties to the application were these two individuals; neither the city nor any of its offices were a party to the application.

[7] On April 2, 2012, a request was made to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) seeking various records from the offices of the Commissioner, the Lobbyist Registrar, and Council and Support Services (the "initial request").

The current request and appeal

[8] On May 2, 2012 a further request under the *Act* was made for access to the following records:

1. Any records involving Mayor Rob Ford and/or the Office of the Mayor related to [the initial request];
2. Any records involving Mayor Rob Ford and/or the Office of the Mayor related to the Superior Court application brought by ... Paul Magder under section 9 of [the MCIA] ("*Paul Magder v. Robert Ford*"); and
3. Any records involving Mayor Rob Ford and/or the Office of the Mayor on or after February 7, 2012 related to:
 - a. Council's decision regarding Item CC 16.6 on February 7, 2012; or
 - b. The Integrity Commissioner's January 30, 2012 Report on Compliance with Council Decision CC 52.1.

[9] The request for records included "final or draft versions of any reports, memos, e-mails, facsimiles, notes of conversations or meetings, phone logs, agendas and agenda materials, minutes of meetings, memos to file, issue notes, background notes, letters or any other similar written material."

[10] The request identified the city's Office of the Integrity Commissioner and Office of the Mayor as the divisions from which records were sought.

[11] Item 1 of the request was subsequently clarified as follows:

Records both originating from and received by the Mayor's Office and/or staff members with respect to [the initial request].

[12] In its decision letter, the city denied access to the responsive records and advised the requester as follows:

With respect to bullet 1, the Mayor's Office staff has advised that the Mayor's Office does not have any records relating to this request. With respect to bullets 2 and 3, the Mayor's Office staff has advised that all documents in their possession are strictly of a personal nature. Therefore, these records fall outside the City's custody or control.

With respect to any records held by the Integrity Commissioner, it has been determined that, in accordance with section 53 of [the *Act*], the confidentiality provisions of the *City of Toronto Act, 2006* prevail.

Access is denied in full to the requested information pursuant to section 53 of [the *Act*] and Sections 161(1) and (3) of the *City of Toronto Act, 2006*.

[13] The requester, now the appellant, appealed the city's decision. On receipt of the appeal, this office sent the standard Request for Documentation to the city, asking that it forward copies of the relevant documentation, including a paper copy of the records at issue. In correspondence dated October 12, 2012, the city responded that "requests for copies of responsive records will have to be made to both the Office of the Integrity Commissioner and to the Mayor's Office directly." With respect to the Integrity Commissioner, it referred to section 161 of the *City of Toronto Act, 2006*² and, with respect to the Mayor, it stated "the City has no authority to compel the Mayor to produce his personal records in response to a request made under [the *Act*] and any subsequent appeals. A request for such records must be made directly to the Mayor."

[14] During mediation, the parties clarified that the issue of reasonable search applies to item #1 of the request only. The issue of custody or control applies to items #2 and #3. As mediation of the appeal did not result in a resolution it was transferred to the inquiry stage of the appeals process.

² S.O. 2006, CHAPTER 11, Schedule A.

[15] I sent a Notice of Inquiry to the city, the Mayor and the Integrity Commissioner, all of whom provided representations. In the Notice, I requested that the Mayor “consider providing this office with either copies of the responsive records or a detailed index, which can be shared with the other parties.” The Mayor did not respond to this request by providing copies of records or an index, and his position on the existence and status of the records sought is detailed below.

[16] I sent the representations of the city, the Mayor and the Integrity Commissioner to the appellant and invited him to provide representations in response. He has declined to do so, relying on the material in the appeal file.

[17] In this order, I find that records, if they exist, in the Office of the Integrity Commissioner are not subject to the access provisions of the *Act*. I uphold the reasonableness of the city’s search for records in relation to Item #1 of the request. I conclude that records in relation to Item #2 of the request are not subject to the *Act* as they are not in the city’s custody or control. Finally, I direct the city to provide me with more information about records in the Office of the Mayor that relate to Item #3 of the request, to enable me to determine whether they are in the custody or control of the city.

ISSUES:

Issue A: What is the impact of section 161 of the *City of Toronto Act, 2006*?

Issue B: Did the city conduct a reasonable search for records responsive to item #1 of the request?

Issue C: Are the records “in the custody” or “under the control” of the city under section 4(1)?

DISCUSSION:

Issue A: What is the impact of section 161 of the *City of Toronto Act, 2006*?

[18] As noted above, the request covers records in the city’s Office of the Integrity Commissioner.

[19] The Integrity Commissioner is one of four “accountability officers” or officials created by the *City of Toronto Act, 2006*³ (“COTA”). The responsibilities of the Commissioner include the investigation of complaints about the conduct of members of City Council and local boards, to determine whether there has been a violation of the city’s Code of Conduct. The Commissioner reports to City Council, but is required to exercise her duties in an independent manner.

[20] Section 161(1) of COTA sets out the duty of confidentiality applicable to the Commissioner:

The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

[21] Section 161(3) of COTA provides that this confidentiality requirement prevails over the provisions of the *Act*. The only exceptions to the duty of confidentiality are found in section 161(2) and pertain to criminal proceedings and to the exercise of the Commissioner’s functions in reporting to council.

[22] Because the request included records which may exist in the Office of the Integrity Commissioner, in the Notice of Inquiry, I asked the parties to address the impact of COTA on the issues in this appeal.

[23] The Commissioner submits that the records of her office, if they exist, are not covered by the *Act*, and relies on this office’s decision in Order MO-2629-R. She states that although that decision deals with a different accountability official (the Auditor General), the reasoning and interpretation are persuasive and should apply here. The Commissioner states that the confidentiality provisions in COTA meet important public policy objectives, including ensuring the confidence in investigative processes, ongoing and future, as well as ensuring the protection of confidential or personal information.

[24] The city takes the position that section 161 “establishes a jurisdictional barrier” to the application of the *Act* to documents held by the Commissioner or a person acting under her instructions. While an individual is not prevented from making a request for documents held by the Commissioner, nor does section 161 prevent the holding of an appeal into the issue, it “does prevent the operation of [the *Act*] to impede the mandated requirement to ‘preserve secrecy’ with respect to this information.” The city submits, in conclusion, that access must be denied to any documents responsive to the request that may be held by the Commissioner or a person acting under her instructions.

³ The other accountability officers are the Auditor General, the Lobbyist Registrar and the Ombudsman.

Analysis

[25] It is, of course, beyond contention that the city is an “institution” covered by the *Act*. I do not take the representations of the Commissioner and the city to take issue with the general conclusion that the Commissioner is part of the city as an “institution”. In Reconsideration Order MO-2629-R, referred to by the Commissioner, this office found that the Auditor-General, one of the other accountability officers of the city, is part of the city for the purposes of the *Act*. The findings in that order apply here and I therefore conclude that the Commissioner is also part of the city for the purposes of the *Act*.

[26] This does not mean that the records of the Commissioner are subject to the access provisions of the *Act*. I have set out the duty of confidentiality under COTA above. Section 53(1) of the *Act* governs the relationship between the *Act* and a confidentiality provision in another statute. That section states:

This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

[27] This office has not treated section 53(1) (or its provincial equivalent) as a jurisdiction-limiting provision, but simply as a direction that the *Act* is not the controlling statute for protecting the confidentiality of information that falls within the scope of the confidentiality provision in the other statute.⁴ Regardless, the effect of section 53(1), combined with section 161 of COTA, is clear here: any records responsive to the request that are in the hands of the Commissioner cannot be disclosed in response to a request under the *Act*. Such records, if they exist, were clearly gathered or created in the course of her duties under COTA, and there is no suggestion or evidence that they fall under one of the exceptions to the duty of confidentiality.⁵

[28] Accordingly, I find that any responsive records which may exist in the hands of the Integrity Commissioner cannot be disclosed as a result of the confidentiality provision in section 161 of COTA, and I will not consider them further.

[29] I will now review the remaining issues as they relate to records that may exist in the Mayor’s office.

⁴ Orders PO-2029, PO-2083 and PO-2411-I.

⁵ I also note that previous orders which have addressed similar provisions in COTA have confirmed that the confidentiality provisions in COTA also apply to information in the hands of other city staff about the Integrity Commissioner’s investigation that was compiled by the staff member as a consequence of being instructed or asked to provide information to the Commissioner: See orders MO-2843 and MO-2439 (reconsidered on other grounds in MO-2629-R).

Issue B: Did the city conduct a reasonable search for records responsive to item #1 of the request?

[30] The contention that the city did not conduct a reasonable search relates to the following part of the request, for records in the Mayor's Office:

Records both originating from and received by the Mayor's Office and/or staff members with respect to [the initial request].

[31] The initial request was made in early April 2012. The current request, made in May 2012, seeks records relating to the prior request. In response to a request by the city to clarify what type of information was being sought, the requester stated in an email to the city on June 13, 2012 that he sought "any records related to ... [the initial request]; for example, *any inter-office correspondence or notes* related to the original request" [my emphasis]. The requester also subsequently clarified that this item included records both originating from and received by the Mayor's Office and/or his staff members, with respect to the initial request.

[32] As indicated, the city's search did not locate any such records.

[33] The city provided an affidavit from its Manager, Access and Privacy. In it, she states that she determined that responsive records, if under the custody or control of the city, would be held within the records which are the responsibility of the Office of the Mayor or the Office of the Integrity Commissioner. She states that the specific request was communicated and directed to these offices in order to conduct a search for records.

[34] According to the affidavit, a named employee of the Office of the Mayor informed the Manager that searches of the Office of the Mayor (with respect to all parts of the request) were conducted on or about September 4, 2012, that "no responsive records were located in the custody or control of the Office of the Mayor" and "the responsive documents held by Mayor Rob Ford, were held in relation to his personal affairs."

[35] The city submits that prior decisions of this office have determined that a finding of an unreasonable search may not be imposed without a requester providing a reasonable basis for concluding that the records exist. It states that in this case, no such reasonable basis has been provided.

[36] Referring to the information in its affidavit, the city submits that it has made a reasonable effort to identify and locate records responsive to the request. It took efforts to clarify the request and ensure that it was clearly understood by city staff. There is no evidence it unilaterally narrowed the scope of the request, or misinterpreted

it. Rather, staff conducted their search with an expansive and liberal interpretation of the request. City staff in the affected business units was requested to search for responsive records. Staff knowledgeable of how the requested records are maintained and of how the information is recorded conducted the search. As a result, no responsive records were located.

[37] The appellant made no representations on the appeal, and the appeal letter does not address the issue of the reasonableness of the search.

Analysis

[38] The issue before me is whether the city conducted a reasonable search for records responsive to item #1 of the request, in the Mayor's Office.

[39] As indicated, item #1 sought records "related to" the initial request. The initial request was very detailed and specified that it covered a broad range of records in the office of the Integrity Commissioner, the Lobbyist Registrar and the "Office of Council and Support Services" (the City Clerk's office). This request resulted in a decision from the city on June 7, 2012 which provided access to a large number of records. The decision also denied access to other records pursuant to the confidentiality provisions in COTA.

[40] The wording of item #1 is somewhat ambiguous and, in order to decide the issue of reasonable search, it is necessary for me to arrive at an understanding as to the scope of the request. It could be read as covering any of the *records* covered by the initial request (the broader interpretation) or, alternatively, any records relating to the city's *response to and handling* of the initial request (the narrower interpretation), in the Mayor's Office. As I have indicated, there were communications between the requester and the city in order to clarify this item of the current request. On my review of all the material before me, and in the absence of any indication from the appellant, through representations or otherwise, that the broader interpretation is the correct one, I find that the narrower interpretation governs. Of greatest significance to my conclusion here is that the appellant's clarification that examples of the records sought were "inter-office correspondence or notes related to the initial request", which is much more specific than the broad range of records covered by the initial request.

[41] I therefore view the request as covering records in the Mayor's Office, relating to the city's response to and handling of the initial request.

[42] 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.⁶ The city must also provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁷

[43] Here, the appellant asserts, without providing any basis, that the Office of the Mayor should have records relating to a prior request, which itself was directed at records in the Office of the Integrity Commissioner, Office of the Lobbyist Registrar and City Clerk's Office. Given the fact that the prior request was directed at the records of those three other offices, it is unclear why the appellant believes that the Office of the Mayor should have communications regarding that prior request.

[44] On the material before me, and in the absence of any submissions from the appellant, I have no reasonable basis to conclude that records responsive to this part of the current request should exist in the Office of the Mayor. On this part of the request, I accept the affidavit as sufficient evidence that the city made a reasonable effort to identify and locate responsive records.

[45] I therefore uphold the city's search for records in relation to item #1 of the request.

Issue C: Are records responsive to items #2 and #3, if they exist, in the city's custody or control?

[46] The issue of custody or control remains to be determined in relation to items #2 and #3 of the request. As noted, in view of my conclusion that any responsive records of the Commissioner cannot be disclosed, it is unnecessary to consider the question of whether the city has, in any event, custody or control over those records. The following discussion therefore relates to records, if they exist, in the Office of the Mayor.

[47] Although the parties were asked to address the "custody or control" issue separately from the "reasonable search" issue, it is apparent that these two issues overlap. An inquiry into whether records are in the "custody or control" of the city requires me, in this case, to review the adequacy of the city's search for records. At the end of the day, it may also result in a direction that the city conduct another search. The parties' representations on the "custody or control" issue, therefore, also address the search conducted in response to the request, and the results of that search.

⁶ Order MO-2246.

⁷ Orders P-624 and PO-2559.

[48] As indicated above, the city states that upon receipt of the request, it contacted the Office of the Mayor to search for responsive records. With respect to items #2 and #3, it states that the Office of the Mayor and staff had no records, and any responsive documents held by Mayor Ford are his personal records.

Representations

[49] In the Mayor's representations, he acknowledges that this office has found a mayor to be an "officer," and thus part of a municipality (i.e., an "institution") for the purposes of the *Act*. However, in his submission,

...that does not mean that one may *always* have access to records held by a Mayor. As the Commissioner has also made clear, the Mayor's records may be covered by the *Act's* general right of access to information only when the Mayor is acting *as a city officer* or when the requested records are in the City's "custody or control". Records that do not relate to mayoral duties, such as personal records, constituency records, or personal papers, and are not in the City's "custody or control" are not subject to the *Act*.

[50] The Mayor refers to various orders of this office which, in his submission, determine that a mayor's records are subject to the *Act* only when the Mayor is acting in his or her capacity as an institution's officer. Applied to this case, the Mayor submits that the requested records, assuming they exist, were not created as a result of the Mayor acting in his mayoral capacity, performing mayoral duties:

Records relating to Mr. Magder's application under the MCI A. Mr. Magder's application is a court proceeding commenced against Rob Ford in his individual capacity. City Council did not request or instruct the Mayor to become involved in this application. Moreover, in being a respondent to this application, the Mayor is in no way conducting City business. For this reason, the Mayor's involvement in Mr. Magder's application is a private matter, and, while the Mayor has many records relating to Mr. Magder's application, these are the Mayor's *personal* records. [emphasis added]

Records relating to Item CC16.6 and the Integrity Commissioner's January 30, 2012 Report. The Mayor confirms that he and his Office have no records concerning this aspect of the Requested Records. Again, after his Office underwent several recent personnel changes, his new Special Assistant conducted a fresh search for any relevant documents. No relevant documents were found.

[51] In the Mayor's submission, the requested records are not within the city's "custody or control" as that term is defined by the *Act*:

Based on the *indicia* of "custody or control" described in the above decisions, together with the law concerning the records of a Mayor, the Requested Records, to the extent they exist, are the Mayor's personal records and, therefore, not subject to the *Act*. The City has no authority over their *use* or *content*, and no reason for *reliance* on them. Nor does the City have any right to obtain or control any of the Requested Records that may be held by the Mayor - if the City wanted the Requested Records, it would need to decide in some official capacity to require the Mayor to provide them. Thus, the test articulated by the Supreme Court *National Defence* has not been met, and the relevant factors used by the Commissioner to indicate "custody or control" are not present.

[52] The city's submissions distinguish between Mr. Robert Ford, the individual, and the Office of Mayor of the City of Toronto, currently held by Mr. Ford. The city submits that Mr. Ford, the individual, engages in many personal activities, including coaching high school sports, acting as a radio host, and being a corporate director and founder of the "Rob Ford Football Foundation". In the city's submission, the personal activities of Mr. Ford are not aspects of the Office of the Mayor or of the Office of the Councillor for Ward 2. While the actions of Mr. Ford, the individual, with respect to his personal charitable fund may have previously raised issues of whether Mr. Ford complied with city policies, the fact remains that the fund is not an aspect of the operations of the City, nor the Office of the Mayor, nor the Office of the Councillor for Ward 2.

[53] The city refers to the facts in the decision in *City of Ottawa v. Ontario*⁸ as analogous to those in this appeal:

Mayor Rob Ford is like many other people who may have to govern their personal involvement with a local charity, in light of policies related to his or her official position. For example, in the recent case of *City of Ottawa v. Ontario* the City of Ottawa's City's Responsible Computing Policy allowed for the City Solicitor, Mr. Rick O'Connor to utilize the email system resources provided by the City of Ottawa for purposes of his employment responsibilities, [and] for incidental use in relation to Mr. Rick O'Connor's volunteer efforts as a member of the Board of Directors of the Children's Aid Society. While in Mr. O'Connor's case such personal use would, of course, need to be in compliance with the applicable Responsible Computing Policy of the City of Ottawa, the presence of such a policy did not transform the operations of the Board of Directors of the Children's

⁸ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (CanLII).

Aid Society into aspects of the operation of the City of Ottawa, or the office of the City Solicitor for the City of Ottawa. Similarly, the actions of *Mayor Rob Ford* in relation to the Rob Ford Football Foundation are not aspects of the Office of the Mayor, nor the City.

[54] Further in its submissions, it states that

As noted by the Divisional Court neither the presence of a policy regulating the use of institutional resources in relation to exercise of personal activities, nor the fact that these documents may be stored in a physical or electronic resource provided for the purposes of the individuals responsibilities to the institution establish that documents relating to the individual in a personal capacity would be under the custody or control of an institution.

[55] The city's submissions describe the genesis of the Foundation, concluding that it is a "personal private charity of *Mr. Robert Ford*, the individual, and is not City business." The city submits that the Code of Conduct, among other things, establishes rules with respect to the actions of Members of Council with respect to the responsibilities and duties as a Member of Council, but "also establishes rules with respect to the individual's private or personal activities 'outside' the responsibilities and duties of a Member of Council - to ensure that these personal activities are not in conflict with the individual's role as a Member of Council."

[56] In its submissions, the city describes the complaint filed with the Commissioner about the actions of Councillor Ford, and the ensuing Report of the Commissioner. The city describes the decision taken by City Council to adopt the finding that the then Councillor Ford had violated the Code of Conduct, and adopt the recommendation requiring him to reimburse the lobbyist and corporate donors. The city states that Council's decision related to Mr. Robert Ford, the individual, and not the Office of the Councillor for Ward 2, or the Office of the Mayor.

[57] The city describes the events following this decision, including the municipal election as a result of which Rob Ford became the "holder of the Office of the Mayor". It refers to the Commissioner's report of January 30, 2012, and the meeting of February 7, 2012 which considered and rejected the Commissioner's recommendation that the Mayor provide proof of reimbursement.

[58] The city also refers to the application filed with the Ontario Superior Court of Justice the MCIA, pointing out that the title of that application is "*Paul Magder v. Robert Ford*". It submits that the parties to the application were these two individuals; neither the city nor any of its offices were a party.

[59] The crux of the city's submissions is that the records sought deal with two issues: 1) whether Robert Ford, who holds the Office of the Mayor, should repay certain monies in relation to the operation of a private charity and 2) the activities of Robert Ford as a respondent in a court proceeding. These records relate to Mayor Ford in his personal capacity rather than in his official position as the city's Mayor. They relate, in the city's submission, to his personal activities and not to the operations of the city as a whole or the operations of the Office of the Mayor.

[60] The city reviewed the "traditional" factors considered by this office in determining whether an institution has custody or control of records and submits that they support its position that the records are not in its custody or control.

[61] The city submits that the opinion of the requester, unsupported by any evidence, that responsive records arising from the Office of the Mayor should exist, is contrary to the reasonable assumptions to be made on the facts. Although it recognizes that a requester will rarely be in a position to indicate precisely which records the institution has not identified, in the current appeal, the city submits, the requester has not provided a reasonable basis to suggest that further documents exist.

[62] As I have indicated, the appellant did not make representations on the issues. However, in the letter of appeal, the appellant takes issue with the city's decision, stating that it is "unbelievable" that all correspondence related to this matter originating from the office of a public official is "personal" in nature. The appellant states that "we cannot adequately complete an appeal based on nothing more than this blanket statement. I therefore request a privilege log, listing each correspondence and the reason for its not having been disclosed."

Analysis

[63] I will consider the issue in relation to items #2 and #3 of the request in turn. Item #2, as described above, covers records relating to the Superior Court application *Magder v. Ford*. In its decision letter, the city responded by stating that all documents in the possession of staff of the Mayor's Office are strictly of a personal nature, and fall outside its custody or control. Its representations in this inquiry state its position in a slightly different way, indicating that the Office of the Mayor and staff had no documentation related to the court application, and that any responsive documents that may be held by the Mayor are his personal records. These representations mirror information provided in the city's affidavit about the search for records in the Office of the Mayor.

[64] It is not in dispute that the Office of the Mayor is part of the city for the purposes of the *Act* and that records generated in connection with the duties of that office are in the custody or control of the city. However, this office has found that

records held by the person occupying the office of mayor but which do not relate to mayoral duties, such as personal records or constituency records, are not.⁹ The court proceeding in *Magder v. Ford* was brought against the Mayor in his personal capacity. It alleged a violation of the MCI Act arising out of a conflict between the Mayor's personal interests and his duties as an office-holder and sought as a remedy that the Mayor's seat on City Council be declared vacant.

[65] Although the application affects the city, and arises out of the activities of the Mayor during his term of office as a Mayor, I accept the Mayor's representations that his involvement in this application is a private matter. The application does not address any aspect of the Office of the Mayor itself, but the issue of whether Robert Ford in his personal capacity is barred from being the holder of the Office.

[66] I have considered the factors traditionally relied on by this office in considering the issue of whether an institution has custody or control of records, and they support my conclusions here. The records at issue were not created or received by a city official or employee as part of the exercise of the city's statutory powers or duties. They do not relate to the city's mandate and functions. I accept that the city has no authority to regulate the content, use and disposal of the Mayor's records relating to the court application. While the records may be held by the Mayor, who is an officer of the city, they are held for the purpose of his personal affairs and not for the purpose of his duties as Mayor.

[67] I have considered the appellant's request for a "privilege log" listing each document and the reason for its not having been disclosed. In this case, I do not find it necessary to require more detailed information about the records. The request itself and the submissions before me provide the necessary information to enable a determination about whether the records responsive to item #2 of the request are in the custody or control of the city.

[68] Item #3 of the request concerns records created on or after February 7, 2012, related to Council Decision CC16.6 (made on the same date), or related to the Commissioner's report of January 30, 2012. Here, I take a different view of the matter.

[69] To reiterate, this part of the request concerns a Council decision and a report submitted to Council by the Commissioner. I accept that these two matters raise issues of a personal interest to the Mayor. Both the decision and the report had personal implications for the Mayor. Council's decision relieved him of the obligation to personally repay money to certain donors to his Foundation, while the report of the Commissioner had recommended that Council require Mayor Ford to provide proof of such reimbursement. In this context, it is reasonable to conclude that if the Mayor has

⁹ See, for example, Order MO-1967.

records about these matters within the time frame of the request, at least some of those are his personal records and not in the custody or control of the city.

[70] However, I find it hard to conclude, without more information about the matter, that *no* records in relation to Item #3 are in the custody or control of the city. Although, as I have indicated, these matters raise issues of a personal interest to the Mayor, they are also matters that relate to official city business. A decision made by Council is self-evidently a matter of "city business". A report of the Commissioner is also a matter of "city business." At the time of the meeting, the Mayor was a member of Council as well as the city's chief executive officer. It is difficult to accept on the basis of the material before me that the Office of the Mayor has no records whatsoever about the meeting.

[71] To take perhaps the most obvious example, it is reasonable to expect that the Office of the Mayor, as the office of the city's chief executive officer, received the minutes of the meeting of February 7, 2012.

[72] The fact that the Mayor has a personal interest in the issues is therefore not a complete answer to the question of whether the city may have custody or control of records relating to the same issues.

[73] The city's affidavit, in which it describes its search for records, is sworn by its Manager of Access and Privacy. With respect to the search in the Office of the Mayor, she states that she was informed by a named individual that searches for responsive records were conducted, on a specified date. The affidavit goes on to state that the Manager was informed by the same individual that "as a result of these searches no responsive documents were located in the custody or control of the Office of the Mayor." It also states that "the responsive documents held by Mayor Rob Ford, were held in relation to his personal affairs."

[74] The city does not identify this individual's position. The Mayor's representations suggest that at least two searches were conducted, one by his "new Special Assistant" [who is not named]. It is not clear whether this individual and the one referred to in the city's affidavit are the same. It is not even clear whether the individual named in the city's affidavit performed the search personally, or was reporting on a search by someone else.

[75] I find the city's affidavit to be unclear about whether its search located records relating to Item #3 in the Office of the Mayor, after which the city concluded they were the Mayor's personal records and not city records. The city's decision, that "all documents in [staff's] possession are strictly of a personal nature", suggests that some records relating to Item #3 were located in the Office of the Mayor, and the city concluded they were not in its custody or control.

[76] Having regard to the above, while I accept the evidence in the affidavit as sufficient for the purpose of deciding the issues with respect to Item #2 of the request, I am unable to find it sufficient to dispose of the issues raised by Item #3. Unlike Item #2, and based on the nature of the issues covered by this part of the request, the information before me is not sufficient for me to come to a conclusion that records relating to Item #3, in the Office of the Mayor, are not in the city's custody or control. If such records exist, and the city made a determination that they are not in its custody or control, I cannot review the correctness of its determination in the absence of further information about the records.

[77] I will therefore require the city to conduct a further search and then provide particulars about any records located in the Office of the Mayor, in relation to Item #3 of the request.

ORDER:

1. I uphold the city's decision that responsive records in the Office of the Integrity Commissioner cannot be disclosed as a result of the confidentiality provision in COTA.
2. I uphold the city's search for records in relation to item #1 of the request.
3. I uphold the city's decision that responsive records in relation to the Superior Court application *Magder v. Ford* are not in its custody or control.
4. I order the city to conduct a further search in the Office of the Mayor for records relating to item #3 of the request.
5. If, as a result of the further search, records responsive to the request in its custody or control are identified, I order the city to provide a decision letter to the appellant regarding access to these records, treating the date of this order as the date of the request, without recourse to a time extension under section 20 of the *Act*.
6. I order the city to provide me with an affidavit from the individual(s) conducting the search, which includes the following information:
 - a description of the individual(s) qualifications, positions and responsibilities;
 - the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

- information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
 - if as a result of the further search it appears that records relating to item #3 exist that are not in the city's custody or control, a description of those records and the factual basis for the city's assessment that they are not in its custody or control.
7. The affidavit(s) provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.
8. I remain seized of this appeal.

Original Signed by: _____
Sherry Liang
Senior Adjudicator

November 12, 2013