

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3000

Appeal MA12-475

City of Toronto

January 27, 2014

**Summary:** A requester made a request for records in the City of Toronto's Office of the Mayor, for correspondence between the Mayor and certain third parties. In this order, the adjudicator finds that any responsive records in the Office of the Mayor are not in the custody or control of the city.

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

**Orders and Investigation Reports Considered:** Order MO-2975-I.

### OVERVIEW:

[1] The following background facts are taken from the representations in this appeal as well as public documents.

[2] This freedom of information request arises out of a complaint filed on May 4, 2010 with the City of Toronto Integrity Commissioner, about the actions of then Councillor Rob Ford (now His Worship, Mayor Rob Ford). The complaint was filed by a Toronto resident who received a letter seeking donations to the "Rob Ford Football Foundation", printed on letterhead assigned to the Office of the Councillor for Ward 2,

in an envelope containing printed logos and seals containing the City of Toronto (the city) logo.

[3] As a result of the complaint the Integrity Commissioner investigated whether the actions of the then Councillor complied with the city's *Code of Conduct for Members of Council*. On August 12, 2010, the Integrity Commissioner issued her Report, concluding that certain actions of Councillor Rob Ford violated Articles IV, VI and VII of the *Code of Conduct*. The Integrity Commissioner recommended that the city require the Councillor to reimburse 11 lobbyists (or their clients) for their donations to the Foundation. At its meeting of August 25, 26 and 27, 2010, City Council adopted the Integrity Commissioner's recommendation, in Decision CC 52.1.

[4] In July 2011, the now-Mayor Rob Ford (the Mayor) wrote to the lobbyists asking them if they wished to be reimbursed, and some wrote back to him. This was referred to in a subsequent Report by the Integrity Commissioner, dated January 30, 2012.

[5] The city subsequently received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

... copies of the letters Mayor Ford sent, in July 2011, to 11 lobbyists and/or their employers, who had donated to the [named foundation]. The letters I am requesting copies of are described in a report by the lobbyist commissioner [the City of Toronto Integrity Commissioner] titled "Report on Compliance with Council Decision CC 52.1" dated January 30, 2012.

The [City of Toronto Integrity Commissioner] wrote:

"In July of 2011, the Mayor wrote to the lobbyist donors, which prompted some of them to write back to him, declining reimbursement. This was revealed by the Mayor on October 24, 2011."

I also request the responses mentioned above.

[6] The city issued a decision to the requester, denying access to the records in full. In the decision, the city advised that the Integrity Commissioner and the Mayor's Office were asked to conduct a search for records. The city stated:

The Mayor's Office staff have advised that these letters are personal communications, not related to City business, thus fall outside the custody and control of the City and will not be disclosed.

With respect to any records that may be held by the Integrity Commissioner, 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*.<sup>1</sup>

[7] The requester, now the appellant, appealed the city's decision to this office. Mediation did not lead to a resolution of the appeal and it was referred to adjudication. As the adjudicator in this matter, I provided the city, the Mayor and the Integrity Commissioner with the opportunity to provide representations on the issues set out in a Notice of Inquiry. All of them provided representations which were shared in their entirety with the appellant, who was also invited to submit representations. The appellant's representations were then sent to the city, the Mayor and the Integrity Commissioner for reply representations, which they submitted.

## **ISSUES:**

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

**Issue B: 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*?**

[8] Section 161(1) of the *COTA* sets out the following duty of confidentiality applicable to the Integrity Commissioner's role under that Act:

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.

[9] In Order 2975-I, this office found that responsive records which may exist in the hands of the Integrity Commissioner could not be disclosed as a result of the above confidentiality provision.

[10] During mediation, the appellant clarified that she was not seeking access to any records held by the Integrity Commissioner, but only those in the Mayor's Office. Her representations in the inquiry also make it apparent that the records she seeks are those in the Mayor's Office.

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<sup>1</sup> S.O. 2006, c. 11, Sched. A.

[11] It is therefore not necessary to consider the impact of section 161(1) of the *COTA* on the question of access to otherwise responsive records held by the Integrity Commissioner.

[12] Arguably, the appeal raises an issue about the impact of section 161(1) of the *COTA* on the question of access to records in the Mayor's Office which were copied and provided to the Integrity Commissioner. The January 30, 2012 Report of the Integrity Commissioner indicates that she sent requests to the Mayor in 2010 and 2011 asking for confirmation of his compliance with Council's decision to require reimbursement. The Mayor did not send such confirmation. Instead, the Report states that the Mayor wrote to her office on October 24, 2011, revealing that he had corresponded with the donors and attaching letters from three of them.

[13] In Order MO-2843, this office found that attachments to correspondence to the city's Ombudsman were captured by the confidentiality provision in *COTA*, when the correspondence and attachments were sent "under the instructions" of the Ombudsman. In this appeal, I do not have sufficient facts or submissions about the circumstances under which some responsive records were sent to the Integrity Commissioner on October 24, 2011, to make a determination about whether the confidentiality provision in the *COTA* applies to them and, specifically, whether they were sent by a person acting "under the instructions" of the Integrity Commissioner.

[14] However, again, it is unnecessary to consider this issue because I find in any event below that any responsive records in the Mayor's Office are not in the custody or control of the city.

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

***General Principles***

[15] 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.<sup>2</sup>

[16] 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. 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 16 and section 38).

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<sup>2</sup> Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[17] The courts and this office have applied a broad and liberal approach to the custody or control question.<sup>3</sup>

[18] Bare possession does not amount to custody for the purposes of the *Act*. There must be some right to deal with the records and some responsibility for their care and protection.<sup>4</sup> However, in certain circumstances, records not in the possession of an institution may be under its control.<sup>5</sup>

*Factors relevant to determining "custody or control"*

[19] Based on the above principles, 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. The list is not intended to be exhaustive. Of those factors, some which are relevant to this appeal are:

- Was the record created by an officer or employee of the institution?<sup>6</sup>
- What use did the creator intend to make of the record?<sup>7</sup>
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?<sup>8</sup>
- Is the activity in question a "core", "central" or "basic" function of the institution?<sup>9</sup>
- Does the content of the record relate to the institution's mandate and functions?<sup>10</sup>

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<sup>3</sup> *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].

<sup>4</sup> Order P-239.

<sup>5</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 24, [2011] 2 SCR 306.

<sup>6</sup> Order P-120.

<sup>7</sup> Orders P-120 and P-239.

<sup>8</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, above at footnote 3.

<sup>9</sup> Order P-912.

<sup>10</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, above at footnote 2; *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.

- 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? [Orders P-120 and P-239]
- If the institution does have possession of the record, is it more than “bare possession”?<sup>11</sup>
- 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?<sup>12</sup>
- Does the institution have a right to possession of the record?<sup>13</sup>
- Does the institution have the authority to regulate the record’s content, use and disposal?<sup>14</sup>
- 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?<sup>15</sup>
- To what extent has the institution relied upon the record?<sup>16</sup>

[20] Where the records are in the hands of elected representatives, the Supreme Court of Canada, in *Canada (Information Commissioner) v. Canada (Minister of National Defence) (National Defence)*,<sup>17</sup> adopted the following two-part test on the question of whether an institution has control of the records:

- (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?

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<sup>11</sup> Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>12</sup> Orders P-120 and P-239.

<sup>13</sup> As above.

<sup>14</sup> As above.

<sup>15</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, above at footnote 2.

<sup>16</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, above at footnote 2; Orders P-120 and P-239.

<sup>17</sup> See above at footnote 5.

## ***Representations***

[21] The city submits that it does not have custody or control over the personal correspondence of "*Mr. Robert Ford, the individual*" (emphasis in original), in relation to the operation of his personal charity the "Rob Ford Football Foundation". It states:

The Personal Correspondence in question in the Current Appeal is letters sent and received between Mr. Robert Ford, the Individual and donors to his personal charity, the "Rob Ford Football Foundation". None of the considerations which would result in a finding of custody or control on the part of the City are present in the Current Appeal.

[22] It states that during the time that Mr. Ford was the holder of the Office of the Councillor for Ward 2, and the Office of the Mayor, he has and currently carries on other activities unrelated to his official positions with the city, including: a coach for a high school sports team; a radio host; a corporate director; his involvement with the Foundation.

[23] The city states that there is no involvement of the Office of the Councillor for Ward 2, or the Office of the Mayor, in the operation of the Foundation. The Foundation, it submits, is a personal private charity of the Mayor and is not city business. The city states that as the operation of the Foundation and fundraising is a private activity and not city business, the original report of the Integrity Commissioner made the finding of violation of the city's policies with respect to the use of city resources for activities which are not city business.

[24] The city further submits that the fact that the operations of the Foundation have nothing to do with the operation of the city is the very reason that a violation of Article VI of the Code of Conduct was found to exist by the Integrity Commissioner. Article VI provides that:

No member of Council should use, or permit the use of City land, facilities, equipment, supplies, services, staff or other resources (for example, City-owned materials, websites, Council transportation delivery services and Member of Council expense budgets) for activities other than the business of the City. [emphasis in original]

[25] The city submits that the Integrity Commissioner specifically reviewed the issue of whether the Foundation was in any way part of the city's business and determined it was not. The city refers to the decision in *City of Ottawa*,<sup>18</sup> stating:

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<sup>18</sup> Above at footnote 10.

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 individual's 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.

[26] The city also notes that the records at issue are not documents which were the proof of reimbursement to be provided to the Integrity Commissioner as required by Council's decision. Rather, they are documents relating to a personal decision by the Mayor to engage in a course of action with respect to the operation of his charity, other than the one specified in Council's decision.

[27] The city refers to the decision in *National Defence*.<sup>19</sup> Referring to the principles established in that decision, the city submits that the records do not relate to any "departmental" matter of the Office of the Mayor. Further, it submits, the city could not reasonably be expected to obtain a copy of such records on request.

[28] The Mayor submits that the Mayor's records are only subject to the *Act* when he is performing city business, and given that the requested records do not relate to any city business, they are not subject to the *Act*. While acknowledging that he is a city officer, the Mayor submits that the records do not relate to his activities as a city officer or to any business authorized or endorsed by the city. Rather, they were produced when he was acting when he was acting in his personal capacity.

[29] Regarding the facts of this appeal, the Mayor submits that the underlying activity giving rise to City Council's decision was the Mayor's personal activity. It is because the Mayor was acting in his personal capacity that the Integrity Commissioner found in her report that he should not have used his city letterhead and the city logo as part of this endeavor.

[30] The Mayor submits, among other things, that any arguable city business at issue in this case was the making of Decision CC 52.1, which was subsequently found by the Divisional Court to be a legal nullity.<sup>20</sup> Assuming it was valid, however, the city business at issue, it submits, would extend only to (a) the making of the Decision itself and (b) the Mayor providing proof of having complied with the Decision. The Mayor states that the requested records deal with neither of these.

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<sup>19</sup> Above at footnote 5.

<sup>20</sup> *Magder v. Ford*, 2013 ONSC 263.



[31] The Mayor reviews the factors typically considered in determining whether records are in the custody or control of an institution and submits that they establish that the requested records are the Mayor's personal records and, therefore, not subject to the *Act*. Further, he submits that the circumstances do not meet the test of custody or control articulated by the Supreme Court of Canada in *National Defence*.

[32] The appellant submits that the Mayor of Toronto occupies a unique statutory role, recognized in the *COTA*, as Chief Executive Officer of the City of Toronto. For this reason, IPC decisions dealing with access to records of city councillors have little application to issues involving the records in the custody or under control of the Mayor of Toronto.

[33] The appellant submits that the circumstances under consideration in *National Defence* are distinguishable from those in this appeal as, among other things, the federal access-to-information law speaks of records in the "control" of an institution, and not those within its "custody or control".

[34] The appellant disagrees that the records do not relate to a city matter. She submits that "the correspondence was created in direct response to the proceedings and resolutions of the City Council, and that but for those proceedings, the correspondence would never have been created." Further,

[t]he Mayor made his involvement with the Foundation City business when he used his Office and City resources to further its interests.... It is submitted that even if the records have the character of "personal records", there is no such exemption in the MFIPPA. The records, personal [or] otherwise, nevertheless relate to the business of the institution and are in its custody.... The documents in question go to the core function of the City as they deal with the Mayor's compliance with the Code of Conduct, and the integrity of municipal governance in Toronto.

[35] The appellant submits that the records are in the city's possession as they are in the possession or custody of the Chief Executive Officer of the City, and it has the right to their possession. Further, as the records relate to city business, the city has the authority to regulate their content, use, and disposal.

[36] In reply, the city states that the appellant's submissions fail to provide any distinction between the Mayor as an individual, and the Office of the Mayor. It states that the appellant's submissions rely on noting the status of the individual holding the position of Mayor, as conclusive of the city's custody or control over his personal correspondence; these submissions are contrary either to previous judicial determinations and IPC decisions and/or the relevant legislative provisions.

[37] The city further submits, among other things, that City Council made a decision requiring the Mayor, as an individual, to do something, which was to pay monies to third-parties. This direction was not given to the Office of the Mayor, but to the individual holding the office.

[38] In reply, the Mayor states that the appellant focuses narrowly on the fact that the requested records are correspondence to and from the Mayor, without drawing an appropriate distinction between activities in his personal capacity and his activities as the city's chief executive officer. In his submission, the appellant applies the *Act* too broadly by effectively suggesting that all of the Mayor's activities should be subject to public scrutiny under the *Act*.

### ***Analysis***

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

[40] The question before me is whether responsive records in the Mayor's Office, if they exist, are under the city's custody or control.

[41] The Mayor is an officer of the city, as he is its chief executive officer. Records held in connection with his duties as a Mayor are covered by the *Act*, in the same manner as the records of city employees or other officials of the city, and subject to any applicable exemptions.<sup>21</sup> This office has found, however, that records of a personal nature or "constituency records" that are maintained separately from those about a city's business, are not subject to the *Act*.<sup>22</sup> This applies whether the individual in question is a councillor or a Mayor. In this regard, I do not accept the appellant's submission that the Mayor of Toronto occupies a unique statutory role, described in the *COTA*, which is not covered by the principles in these prior decisions. I see nothing in the provisions of the *COTA* which would cast doubt on these principles and their application to the circumstances before me.

[42] The crux of the issue before me is whether the records sought by the appellant are the personal correspondence of the Mayor. The appellant's submissions that they are not personal correspondence rests essentially on two assertions: that they were created in direct response to a resolution of City Council and a report by the Integrity Commissioner under the city's *Code of Conduct* and; in using his Office and city resources to further his interests, the Mayor has made his involvement with the Foundation "city business".

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<sup>21</sup> Orders MO-1403 and MO-1867.

<sup>22</sup> See above.

[43] In Order MO-2975-I, I considered whether records created by the Mayor in connection with the Divisional Court proceeding were personal in nature. I stated:

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.

[44] In the same order, I considered another part of the request, as follows:

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....

...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.

[45] The circumstances considered in the above order, and those before me, illustrate that an event can be viewed both as a matter of "city interest", and personal interest. The decisions of City Council in August 2010 and January 2012 were obviously "city matters": they were on the agenda of the Council meetings of those dates, were part of official city business considered at those meetings, and were the result of Council's deliberations. As "city matters", these events potentially generated records that are within the city's custody or control and would ordinarily be covered by the *Act*, such as minutes and meeting agendas.

[46] However, the consequences of these decisions may also have *personal* implications for individuals affected by them, and lead to the creation of records which are personal in nature. An example of this is the application to the Divisional Court that resulted from Council's decision of January 2012. In Order MO-2975-I, I found that the Mayor's involvement in the Divisional Court proceeding was a private matter.

[47] Likewise, in the appeal before me, the following circumstances lead me to the conclusion that the records sought are the personal records of the Mayor and not in the city's custody or control:

- They relate to the Foundation, which is a private charity, not endorsed or sponsored by the city;
- The records sought are letters between the Mayor and donors to the Foundation;
- The letters were created on the Mayor's own initiative and not in compliance with a direction from the Commissioner or Council;
- The underlying activity giving rise to Council's decision was the Mayor's personal activities in connection with the Foundation which the Commissioner found improperly involved the use of city resources.

[48] Further, and having regard to the above facts, the factors traditionally relied on by this office in considering the issue of whether an institution has custody or control of records also support my conclusions here. I have found that 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 this type of correspondence. 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.

[49] With respect to the appellant's submission that in using city resources to raise funds for the Foundation, the Mayor has "made his involvement with the Foundation city business", I agree with the city's submission that

[n]either the presence of a policy regulating the use of institutional resources in relation to exercise of personal activities, nor the fact that the documents may be stored in a physical or electronic resource provided for the purposes of the individual's 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.

[50] While it may be, and indeed was found by the Integrity Commissioner, that the Mayor breached the *Code of Conduct* with respect to the use of city resources for personal activities, this finding does not lead to the conclusion that all documents subsequently generated in connection with the Foundation are part of the city's records for the purposes of the *Act*.

[51] The appellant refers to the "public interest override" in section 16 of the *Act*. As the records are not covered by the *Act*, this provision does not apply, and it is not my role to decide whether the public interest would be served by knowing their contents. That is a decision for the Mayor. The question before me is whether the city has an obligation, under the *Act*, to produce the records in response to a freedom of information request and as they are not in the custody or control of the city, the answer is "no".

**ORDER:**

I uphold the decision of the city.

Original Signed by: \_\_\_\_\_  
Sherry Liang  
Senior Adjudicator

\_\_\_\_\_ January 27, 2014