

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-2993

Appeal MA12-472

City of Toronto

December 31, 2013

**Summary:** The requester sought access to certain records relating to the event Ford Fest, held by the Mayor of Toronto and his family. The adjudicator finds that the records, if they exist, are not in the custody or control of the city and cannot be the subject of an access request.

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

**Cases Considered:** *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 24, [2011] 2 SCR 306.

### OVERVIEW:

[1] In 2012, His Worship, Mayor Robert Bruce Ford, Mayor of Toronto (the Mayor, or Mayor Ford) invited members of the public to attend an event known as "Ford Fest".

[2] Following this event, the City of Toronto (the city) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

... all records of communications between Mayor Rob Ford and any of his staff members and the following companies since August 1, 2012:

- [company A], Toronto
- [company B], Toronto

This request includes, but is not limited to, emails exchanged between Mr. Ford or his staff and any representatives from [company A] or [company B].

[3] The requester states that these companies were in attendance at the Ford Fest event.

[4] The City of Toronto issued an access decision, advising the requester as follows:

We asked staff of the Mayor's Office to search for records responsive to your request. This decision reflects the results of their search.

### **Decision**

Staff of the Mayor's Office advises that it does not do business with these organizations, and any records are of a personal nature and not related to City business. Therefore, any such records fall outside the City's custody or control and will not be disclosed.

[5] The requester, now the appellant, appealed the city's decision to this office. In his appeal letter, the appellant stated:

... if Mr. Ford or any of his staff were making plans or preparations for Ford Fest using city computers or other city resources, these records should be released under the *Act*. Any personal information, such as credit card numbers, can easily be redacted.

Finally, any suggestion that Mr. Ford was acting as a private citizen and not as mayor when planning or preparing for Ford Fest is, frankly nonsensical. Mr. Ford promoted the event on his Facebook page, "Toronto Mayor Rob Ford," and under his Twitter handle, "TOMayorFord."

[6] The city indicated in correspondence with this office that the responsive records are the personal records of the Mayor, and "as such the City has no authority to compel the Mayor to produce his personal records in response to a request made under MFIPPA and any subsequent appeals." During mediation, the city reiterated that staff of the Mayor's Office were asked to search for records responsive to the request, that staff of the Mayor's Office advised that it did not do business with these companies, and that

"any records reflect the actions of an individual in their personal involvement in a political activity."

[7] Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the process. During my inquiry I received and shared representations from the city, the Mayor and the requester.

[8] The sole issue in this appeal is whether responsive records, if they exist, are in the custody or control of the city.

## **DISCUSSION:**

### **Custody or Control: General Principles**

[9] Section 4(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[10] 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>1</sup>

[11] 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 (Order PO-2836). 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).

[12] The courts and this office have applied a broad and liberal approach to the custody or control question.<sup>2</sup>

[13] 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. [Order P-239] However, in certain circumstances, records not in the possession of an institution may be under its control.<sup>3</sup>

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

<sup>2</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>3</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 24, [2011] 2 SCR 306.

### **Factors relevant to determining "custody or control"**

[14] 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, the ones most relevant to this appeal are:

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120 and P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above]
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
- Does the content of the record relate to the institution's mandate and functions? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *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"? [Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above]
- 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? [Orders P-120 and P-239]
- Does the institution have a right to possession of the record? [Orders P-120 and P-239]

- Does the institution have the authority to regulate the record's content, use and disposal? [Orders P-120 and P-239]
- 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? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above]
- To what extent has the institution relied upon the record? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders P-120 and P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120 and P-239]
- 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? [Order MO-1251]
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.); *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.)].

[15] 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)*,<sup>4</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>4</sup> See above at footnote 3.

## Representations

[16] The city's representations describe the Ford Fest event as a "family get-together". Relying on news reports, it states that, as of 2012, it has been continuously held in the backyard of the Mayor's mother for well over a decade. The city states that the event has been taking place since well before either the Mayor or his brother, Councillor Doug Ford, were elected to office.

[17] The city states that it did not do business with the named companies during the responsive time-frame. It indicates that during its search, it discovered that "perhaps the individual known as Mayor Ford may have had some dealings with these companies in relation to "Ford Fest". As such the City's access decision indicated that any records are of a personal nature and not related to City business. Therefore, these records, if they exist, fall outside the City's custody or control."

[18] The city submits that Ford Fest is an event held by an individual and is not related to the city as an institution. It is the city's position that if Ford Fest is a "political" event, it is a political event held for the benefit of the individual elected official, who currently happens to be the city's Mayor, and not for the benefit of the institution of the City of Toronto or the Office of the Mayor. At most, it submits, any records, if they exist, reflect the actions of an individual in their personal involvement in a political activity.

[19] With respect to the use of the city's email system, the city states that it permits incidental personal use of its email system, and encloses a copy of its Acceptable Use Policy. Referring to the court decision in *City of Ottawa*,<sup>5</sup> the city submits that the fact that the Mayor or his staff may have used city computers in the planning of Ford Fest does not automatically put these records, if they exist, within the city's custody or control.

[20] Some of the city's representations on the factors typically considered in cases like this are:

- The activity that resulted in the creation of the records, if they exist, was a personal activity unrelated to city business. The records, if they exist, do not relate to the responsibilities of the city's Mayor under *COTA, 2006* [*City of Toronto Act, 2006*]<sup>6</sup> or relate to an activity of the City, but rather deal with Mayor Ford's personal and individual actions or activities.

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<sup>5</sup> See above at para. 14.

<sup>6</sup> S.O. 2006, c. 11, Schedule A.

- The records do not relate to the institution's mandate and functions. The records, if they exist, relate to the independent and personal activities of Mayor Ford.
- The city has no right to obtain the records. It does not have the authority to compel the Mayor to submit his personal documents to the city.
- The record(s) 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 the authority to regulate the content, use, and disposal of the records. The city notes with respect to the issue of disposal, these records, if they exist, are not corporate records and are not subject to the records retention by-laws contained in Chapter 217 of the Toronto Municipal Code.
- The city has not relied on the records.
- The records are not integrated with other records held by the city.

[21] The Mayor also submits that the records, if they exist, are personal in nature and do not relate to city business. If any communication took place between him and the named companies, he was not acting in an official capacity as a city "officer" or "employee". His duties as the head of City Council do not require communications with these companies. Any communication with the companies was not authorized by the city and was not in relation to any city business, statutory duty or part of any city mandate.

[22] The Mayor submits that Ford Fest is a family event that is entirely personal in nature. It is not sponsored, endorsed or otherwise affiliated with the city or city business, its mandate or statutory duties.

[23] Thus, in the Mayor's submission, any of the requested records that may be in the Mayor's possession, assuming they exist, are the Mayor's own personal records and are not in the city's custody or control.

[24] The Mayor refers to the IPC document "Working with the Municipal Freedom of Information and Protection of Privacy Act: A Councillor's Guide", and previous decisions of this office, in support of his position.

[25] The Mayor submits that at no point in time has he been given the authority by the city to engage in communication with the companies. The Office of the Mayor does

not do business with these companies. If the records exist, they exist in the context of planning and preparing for Ford Fest. Ford Fest, he submits, is not related to city business, it is a Ford family event and the records relating to it are personal.

[26] The Mayor's representations conclude with the following:

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, if any exist, are the Mayor's personal records and, therefore, not subject to the *Act*. As outlined expressly in the enclosed exhibit, the Requested Records relate solely to personal matters of the Mayor and his family organizing a community event. There is no connection whatsoever to city business.

To the extent that the Mayor has any of the Requested Records, the City has no authority over their *use* or *content*, and no reason for *reliance* on them. This flows from the fact that the Requested Records were not created as a result of the Mayor being engaged in any way in a *core, central or basic function of the City*, or in respect of any aspect of the City Council's *mandate and functions*. Further, the use of social media of the Mayor mentioning Ford Fest, to the extent that occurred, is not sufficient to render the City in the custody or control of the Requested Records. No authority was ever granted by the City to the Mayor at any time to engage in communications with the Companies. Also, the City has no right to obtain or control any of the Requested Records that may be held by the Mayor. The Requested Records have not been relied on by the City, and to the extent they exist, they are not integrated with other records of the City. The test as articulated by the Supreme Court has not been met. Further, the relevant factors indicate that the Requested Records are not in the custody or control of the City. [emphasis in original]

[27] With his representations, the Mayor submitted an affidavit sworn by an individual who became the Chief of Staff, Office of the Mayor in August 2012, and was Director of Policy & Strategic Planning with that Office before that. The affidavit confirms the Mayor's representations as described above. The affidavit also states that to the extent the Mayor receives personal emails or communications at city addresses, they are sorted and separated from business records of the city.

[28] The affidavit also states

- Ford Fest has taken place since approximately 1995 and originated when the Mayor's father was a Member of Provincial Parliament. Ford Fest was established long before the Mayor was a Member of Council;



- Planning and preparations of Ford Fest are not conducted solely by the Mayor, rather efforts are undertaken by extended family and family friends as well;
- Ford Fest is funded by the Ford family. City monies are not used to fund this event;
- Ford Fest is not sponsored, endorsed or affiliated with City business, its mandate or statutory duties. I have attached as Exhibit "A" to this affidavit a copy of the invitation prepared for the 2011 Ford Fest (the "Invitation"). The Invitation makes no reference to the Mayor, City Councillors, the City of Toronto, City Hall or any other City affiliation. In fact, it makes specific reference to the Ford family. Previous and subsequent invitations have taken similar form...

[29] In response, the appellant quotes from a speech given by the Mayor at the 2012 Ford Fest, and compares it with media releases from the City of Toronto. He submits that in his remarks, the Mayor was explicitly promoting a stated goal of the city, using identical phrasing such as reducing the "size and cost of government." He submits that this suggests Ford Fest was related to a core function of the city.

[30] Further, he submits that the Mayor has used Ford Fest to promote not himself as a private citizen, but the "office of the mayor." He notes that in 2011, media reports indicated that the Mayor's staff distributed his standard business cards and the Mayor handed out fridge magnets reading "ROB FORD MAYOR".

[31] Thus, the appellant submits, having regard to the factors above, Ford Fest partially served to promote the interests and goals of both the city and office of the mayor. Any records were intended to help promote those interests and goals.

[32] The appellant notes that the mayor's office has neither confirmed nor denied the existence of any records responsive to the request. He states that many questions remain unanswered as the Mayor has, in the past, blurred the line between his private and political life, notably when he has appeared to use city resources to further personal and professional interests. The appellant submits that while the city has stated it allows "incidental" use of city resources for personal communications, the city has provided no proof that any use was incidental.

[33] The appellant submits that if a record was created using taxpayer-funded resources, like City Hall computers and email accounts, it seems reasonable that these records would fall within the confines of the *Act*. That is especially true, he submits, if the records were created during business hours by employees whose salaries are subsidized by taxpayers in which case one could say that taxpayers paid for the creation of the records.

[34] In reply, the city submits, among other things, that the Mayor's comments at Ford Fest were a personal communication, espousing his personal opinion on his performance as the city's Mayor. This does not change the nature of an event which is personal (political or otherwise), held for the benefit of an individual elected official, into an event held by or for the benefit of the city, including the Office of the Mayor. The sharing by the Mayor of a personal opinion about his performance as Mayor does not establish the city's custody or control over all documents relating to the event.

[35] The Mayor's reply submissions are similar in theme to those of the City. He submits that

...[t]he statements the Mayor made at Ford Fest do not render Ford Fest "city business" simply because the Mayor happened to mention his achievements as Mayor. Every time the Mayor speaks about the City does not mean that the person, place or thing spoken to automatically becomes official City business.

[36] Further, he states,

The Mayor must be acting *as* an officer for the *Act* to apply. This is not the case when the Mayor is simply speaking about the City in a context that is unrelated to the business of the City...The *City of Toronto Act* is explicit as to what the Mayor's roles are *as* chief executive officer and *as* head of council...A Mayor speaking to his achievements as Mayor is not a legislated duty of the Mayor, and for obvious reasons – the City would be bound by the Mayor's actions every time he spoke, which on a plain reading of the *City of Toronto Act*, cannot be the intended purpose of the legislation. [emphasis in original]

[37] The Mayor submits that, at most, the requested records would relate to the Mayor's "political" activities, like outreach and campaigning which have been held by this office (referring to Order MO-2184), to be "personal or constituency records" and not subject to the *Act*.

## **Analysis**

[38] 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.

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

[40] 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>7</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>8</sup>

[41] The records sought by the appellant relate to an event that was not authorized by the city and does not relate to the city’s mandate and functions. Nor does the event relate to the responsibilities of the Mayor under the *City of Toronto Act, 2006* as an officer of the city, or as head of council.

[42] The city has stated that, even if some records were created using city computers, it has no right to obtain the records as they are the Mayor’s personal documents. I observe that the city’s “Acceptable Use Policy”, governing employees’ use of the city’s IT resources, states that all information created using city resources is deemed to be corporate business records and subject to the *Act*. However, the same policy also states that limited and occasional personal use of IT resources is permitted, and requires personal messages, files or data to be deleted. I do not read this policy as establishing that a city employees’ personal records, created on the city’s IT resources, become part of the city’s record-holdings for the purposes of the *Act*. The policy is similar to the one considered by the Divisional Court in its decision *City of Ottawa*<sup>9</sup>:

Understandably, employers who allow employees to use their electronic servers for personal matters will typically have policies to ensure that these electronic media are not being used in a manner that is inappropriate or illegal or that compromises the security of the entire system.

Employers from time to time may also need to access a filing cabinet containing an employee’s personal files. That does not make the personal files of the employee subject to disclosure to the general public on the basis that the employer has some measure of control over them. The nature of electronically stored files makes the need for monitoring more pressing and the actual monitoring more frequent, but it does not change the nature of the documents, nor the nature of the City’s conduct in relation to them. It does not, in my view, constitute custody by the City, within the meaning of the Act.

[43] The affidavit submitted by the Mayor’s former Chief of Staff establishes that to the extent the Mayor receives personal emails or communications at his City Hall address, they are not integrated with business records of the city. I accept the submissions of the city that it does not have the authority to regulate the content, use,

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<sup>7</sup> Orders MO-1403 and MO-1867.

<sup>8</sup> See above.

<sup>9</sup> See above at para. 14.

and disposal of the records and that, if they exist, they are not subject to the city's records retention by-laws. There is no evidence that the city has used or relied on the records.

[44] Having regard to the above, I find that on an application of the indicia of "custody or control" developed by this office and the courts, the requested records are not in the city's custody or control. To the extent that responsive records exist in the Mayor's Office, they are akin to the type of records found not to be in the custody of the city in *City of Ottawa*.<sup>10</sup>

[45] Further, to the extent that responsive records may exist elsewhere, such as in the Mayor's possession outside the Office of the Mayor, I find they are not in the control of the city. Applying the principles expressed in *National Defence*, above, they do not relate to "city matters" and the city cannot reasonably expect to obtain a copy of them upon request.

[46] I will address the two main arguments made by the appellant. He suggests, first, that Ford Fest is used by the Mayor to promote the interests and goals of the city and the Office of the Mayor and is therefore related to the city's mandate and functions. Second, he suggests that if the records were created using the city's resources, they should be subject to the *Act*.

[47] On the first argument, on a review of the material before me, I accept the city's submission that to the extent Ford Fest may be described as a "political" event, it is a political event held for the benefit of an individual, Mayor Ford, and not for the benefit of the city. It is intended to advance his interests as a politician and elected representative, and not those of the city. Mayor Ford's activities in connection with the event are not undertaken in an official capacity, as a city officer, and are not authorized by the city. The event's history predates the Mayor's time as an elected representative in the city and has not been integrated into any officially sanctioned city activities. Further, the fact that the Mayor promoted the event using his title, including on social media, does not transform the event into an official city event.

[48] With respect to the Mayor's remarks at the event, which may be seen as promoting goals which are also referred to in the city's media releases, I accept the Mayor's submissions that this does not change the fact that he was not speaking in any official capacity at the event. To find otherwise would be to extend the reach of the city's responsibility for records into personal events where the Mayor has decided to speak about city matters. I am satisfied that such a conclusion is not supported by the provisions of the *Act*, and the decisions interpreting those provisions.

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<sup>10</sup> See above at para. 14.

[49] With respect to the second argument, I find that it conflates the city's interests in ensuring appropriate use of its resources, with the city's interests and responsibilities in responding to an access to information request. The appellant has referred to the appearance that the Mayor has used city resources to further personal and professional interests, and argues that if taxpayers have, in a sense, subsidized creation of records, albeit about a personal matter, the records should be covered by the *Act*. If the appellant is concerned that activities of the Mayor in connection with Ford Fest raise issues of conflict of interest or appropriate use of the city's IT resources, the remedy is found in the city's processes and procedures for dealing with such matters. The possibility of such conduct does not lead to a conclusion that the records are therefore "city records" for the purpose of the *Act*, when the criteria for a finding of custody or control do not otherwise support such a conclusion.

[50] I therefore conclude that the requested records, if they exist, are not in the custody or control of the city and cannot be the subject of an access request.

**ORDER:**

I uphold the city's decision.

Original Signed By:  
Sherry Liang  
Senior Adjudicator

December 31, 2013