Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3287

Appeal MA13-83

City of Vaughan

February 10, 2016

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of emails between a current city councillor and a former city councillor from February 1, 2010 to February 28, 2011. The city denied access to records pre-dating November 30, 2010, if they exist, on the basis that the city could not restore email back that far. It denied access to the remainder of the records on the basis that the records, if they exist, are not in the city's custody or under its control. The appellant appealed. During the course of adjudication of the appeal, the city conducted a search for the records, but none were found. The adjudicator upholds the city's search and finds that the records, if they exist, would not be in the city's custody or under its control.

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

Orders and Investigation Reports Considered: Order M-813.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

OVERVIEW:

[1] The appellant submitted the following request to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> Please accept this letter as a freedom of information request filed under MFIPPA for copies of all emails to and from [a named former member of council and a named current member of council, respectively] between February 2010 and February 28, 2011.

[2] Following receipt of the appellant's request, the city asked the appellant to provide a subject matter for the search. The appellant responded that there was no limit to the subject matter. The request was then refined by the parties to read "all emails between [the named former member of council and a named current member of council], relating to any topic or subject matter from February 1, 2010 – February 28, 2011."

[3] The city issued an access decision on December 24, 2012 in which it stated as follows:

> Please note that the two individuals named in the request held City of Vaughan email accounts during the following time periods:
>
> [The named former councillor] – February 1, 2010 – November 30, 2010
>
> [The named current councillor] – December, 2010 – February 28, 2011
>
> At no time between February 1, 2010 and February 28, 2011 did they hold City email accounts simultaneously.
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> Access Decision:
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> Access to emails between [the named former member of council and the named current member of council] from February 1, 2010 to November 30, 2010 is denied as the records do not exist. The City is only able to restore email back one year from the date it is requested.[1]
>
> Access to emails, if they exist between [the named former member of council and the named current member of council] from December 1, 2010 to February 28, 2011 is denied. Communications between Councillors and individual private citizens … are not in the custody or under the control of the City.

[4] The requester, now the appellant, appealed the decision on the basis that records should exist. Specifically, the appellant appealed the city's assertion that emails are not kept beyond one year and asked at mediation that reasonable search be added to the issues on appeal. The appellant also maintained at mediation that the records at

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[1] As discussed below, the city ultimately conducted a search for records during the adjudication stage of this appeal.

issue are in the custody and control of the city and, as a result, the city should have searched the named councillors' offices for records responsive to the request. The city, however, maintained its position that no responsive records existed.

[5] Also during mediation, the mediator asked the appellant whether she is seeking records related to a specific committee or event, so that the city could be asked if those records would be city business and to search for such records. The appellant responded that she is not seeking records relating to any specific event or committee.

[6] As mediation did not result in resolution of the issues, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The issues remaining in dispute are the reasonableness of the city's search and whether the requested records, if they exist, are in the city's custody or under its control.

[7] As the first step in her inquiry, the adjudicator formerly assigned to this appeal issued a Notice of Inquiry seeking representations from the city on the issues in dispute. The city submitted representations in response to the Notice of Inquiry. In its representations, the city explained that, during mediation, it had believed that the issue of custody or control was the paramount issue and declined to pursue a search of the email backup on that basis. However, upon receipt of the Notice of Inquiry and the adjudicator's request to address both issues (custody/control and reasonable search), the city decided to conduct a search, the particulars of which are set out below. No records responsive to the appellant's request were located as a result of the search.

[8] The adjudicator then sent a Notice of Inquiry to the appellant, along with a copy of the city's representations, and invited the appellant to make representations. At the appellant's request, the appeal was then placed on hold for several months. When the appellant advised this office that she was ready to proceed with the appeal, copies of the Notice of Inquiry and the city's representations were re-sent to the appellant and she was again invited to submit her representations.

[9] The file was then transferred to me to continue with the adjudication stage of the appeal. The appellant submitted a request that the appeal be bifurcated, with the reasonable search issue to be decided first by way of interim decision. I denied the appellant's request. The appellant then requested several extensions of time in which to submit her representations, which I granted. The appellant did not file any representations by the most recent revised deadline, and did not submit any further extension request. Five weeks after her revised deadline, I wrote to her and advised her that I assumed she had decided not to file representations, and that I would issue my order in due course. The appellant did not respond to this correspondence.

[10] In this order, I uphold the city's search as reasonable and find that any responsive records, if they do exist, are not in the city's custody or under its control.

RECORDS:

[11] The records at issue are emails between a named former councillor and a named current councillor from February 1, 2010 to February 28, 2011, if they exist.

ISSUES:

[12] This appeal raises the following two issues which, as will be seen below, are interrelated:

- Did the city conduct a reasonable search for records?
- Are the records at issue, if they exist, "in the custody" or "under the control" of the city under section 4(1)?

DISCUSSION:

Did the city conduct a reasonable search for records?

[13] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[2] Where an adjudicator is satisfied that the search carried out was reasonable in the circumstances, the institution's decision will be upheld. Where an adjudicator is not satisfied, further searches may be ordered.

[14] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[3] To be responsive, a record must be "reasonably related" to the request.[4]

[15] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[5]

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[2] Orders P-85, P-221 and PO-1954-I.

[3] Orders P-624 and PO-2559.

[4] Order PO-2554.

[5] Orders M-909, PO-2469 and PO-2592.

[16] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[6]

Representations

[17] In the Notice of Inquiry that was sent to the city, the city was asked to provide a written summary of all steps taken in response to the appellant's access request.

[18] The city submits that on receipt of the access request, it sent an email to the appellant attempting to clarify the request. Specifically, the city asked whether the scope of the request was limited to emails between the councillor and the former councillor, or whether the scope was intended to include emails between those two individuals and others. The city also asked the appellant to provide a subject matter for the search. The appellant responded that her request was for emails passing between the councillor and the former councillor. She also advised that there was no limit to the subject matter.

[19] The city explains that, despite its position that custody and control are the primary issues in this appeal, it decided, upon receipt of the Notice of Inquiry in this appeal, to conduct a search for records responsive to the appellant's request. The city contacted the current councillor and asked him to search for responsive email from December 1, 2010 (the first day of his term of office) to February 28, 2011 (the end date of the appellant's request). According to the city's representations and the affidavits filed by the councillor and his assistant, the latter searched the councillor's city email account and did not locate any responsive records.

[20] The city further submits that it asked its Information Technology department to recover email for the former councillor from February 2010 (the start date of the appellant's request). This recovery produced a snapshot of the content of the former councillor's email account as of the time it was disabled at the conclusion of the former councillor's term of office. The content of the email account was forwarded to the Access & Privacy Officer, who reviewed it and did not locate any records responsive to the request.

[21] In the Notice of Inquiry, the city was also asked to address Order MO-2634, in which it submitted evidence to this office stating that it is its practice to keep year-end email backup tapes for seven years. The city was asked to address the apparent discrepancy between this statement and its position in this appeal that it is only able to restore email back one year from the date it is requested.

[22] In response, the city points out in its representations that the search undertaken

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[6] Order MO-2185.

in Order MO-2634 was the result of an extraordinary set of circumstances. There was an allegation of improper and possible corrupt practices on the part of a city employee whose email was the subject of that request. The employee held a senior position within the city's information technology department, and was able to conduct a search that exceeded what would be considered reasonable.

[23] The city also points out that its ability to recover email back 7 years does not produce a fulsome recovery of the emails, but is rather a snapshot of the content of the email account as of the end of business on December 31 of any given year.

[24] The city submits that requiring such an extensive procedure in the ordinary case is beyond reasonable and would set too high a standard for institutions to operationalize. It submits that a reasonable search in the circumstances of this appeal would not necessitate recovering emails from back-up systems for current active users of the email system and that a recovery from the back-up was requested for the former councillor only because his email account had been deactivated soon after his term ended.

[25] As noted above, the appellant did not file representations in this appeal. However, during mediation, she contended that many responsive records should exist. As an example, she provided a copy of an email between the councillor and the former councillor which had been forwarded to her. That email, however, is dated December 9, 2007, outside of the time period specified in her request.

Analysis

[26] The *Act* does not require an institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[7] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[8]

[27] 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.[9] Furthermore, a requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to

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[7] Orders P-624 and PO-2559.

[8] Orders M-909, PO-2469 and PO-2592.

[9] Order MO-2246.

the request were reasonable.[10]

[28] From my review of the city's representations, including the affidavits filed, and from my review of the sample email submitted by the appellant, I find that the search was conducted by employees experienced in the subject matter of the request and that these individuals expended reasonable efforts to locate responsive records. Searches were conducted of the current councillor's email as well as the former councillor's back-up email account. Although these searches were not as extensive as the searches conducted by the city in Order MO-2634, I agree with the city that the circumstances in the present appeal do not warrant as extensive search as was conducted in that case.

[29] As noted above, an institution is required to conduct a search that is reasonable "in the circumstances". In this case, the city asked the appellant to identify a particular subject matter for the search, but the appellant indicated that she was not limiting her search to any particular subject matter. If the appellant had identified a city-related matter that she had reason to believe the requested records would address, the city might be obligated to conduct further specific searches to try to locate such records. However, the appellant did not do so. Moreover, the appellant has not provided any basis for her belief that records exist, other than providing a copy of one email sent outside of the time period covered by her request. In my view, the existence of this 2007 email is not evidence that emails between February 1, 2010 and February 28, 2011 should exist.

[30] The most compelling circumstance present in this appeal, however, is that responsive records, if they exist, are not in the city's custody or under its control. The request, on its face, is for records that would not be in the city's custody or under its control, and the appellant has not provided additional evidence during the course of this appeal to suggest that responsive records would be in the city's custody or under its control. My reasons for this finding are as follows.

Custody and control

[31] Under section 4(1) of the *Act,* the *Act* applies only to records that are in the custody or under the control of an institution. The courts and this office have applied a broad and liberal approach to the custody or control question,[11] and this office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution.[12] Some of the listed factors may not

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[10] Order MO-2213.

[11] *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.

[12] Orders 120, MO-1251, PO-2306 and PO-2683.

apply in a specific case, while other unlisted factors may apply. In determining whether records are in the "custody or control" of an institution, these factors are considered contextually in light of the purpose of the legislation.[13]

[32] The factors that this office has found to be relevant include whether the record was created by an officer or employee of the institution;[14] the use that the creator intended to make of the record;[15] whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record;[16] whether the activity in question is a "core", "central" or "basic" function of the institution;[17] whether the content of the record relates to the institution's mandate and functions;[18] whether the institution has physical possession of the record and if so, whether it is more than "bare possession";[19] [20] whether the institution has a right to possession of the record or to regulate its content, use and disposal;[21] [22] the extent to which the institution has relied upon the record;[23] how closely the record is integrated with other records held by the institution;[24] and the customary practice of the institution and similar institutions in relation to possession or control of records of this nature, in similar circumstances.[25]

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[13] *City of Ottawa v. Ontario,* cited above.

[14] Order 120.

[15] Orders 120 and P-239.

[16] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

[17] Order P-912.

[18] *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.) and Orders 120 and P-239.

[19] Orders 120 and P-239.

[20] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

[21] Orders 120 and P-239.

[22] Orders 120 and P-239.

[23] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

[24] Orders 120 and P-239.

[25] Order MO-1251.

[33] In addition, several factors have been found to be relevant where an individual or organization other than the institution holds the record. These factors include who has possession of the record, and why;[26] the circumstances surrounding the creation, use and retention of the record;[27] whether there are any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record;[28] whether the individual who created the record was an agent of the institution for the purposes of the activity in question; and the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances.[29]

[34] Recently, in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[30] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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?

[35] Records of city councillors are not generally considered to be in the custody or under the control of the city, as an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense.[31] However, records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or

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[26] PO-2683.

[27] PO-2386.

[28] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

[29] Order MO-1251.

[30] 2011 SCC 25, [2011] 2 SCR 306.

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

- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.[32]

Representations on the custody and control issue

[36] The city notes that during the time period specified in the request, the former member of council and the current member of council did not hold office simultaneously. It relies on Order M-813 and submits that neither of the individuals was serving as an officer of the city during the time period specified.

[37] The city submits that it has possession of the records (if they exist) to the extent that the use of city email accounts requires use of the city's server. It submits, however, that it does not have custody or control over communications exchanged between an elected representative and a constituent in the absence of the communication being disseminated by either party to members of city staff or others.

[38] The city submits, further, that constituents require the ability to communicate with their elected representatives on constituency matters without fear of records of their communications being public knowledge.

[39] As noted above, the appellant did not make representations.

Findings on the custody and control issue

[40] Several previous orders of this office have considered the factors set out above and found that city councillors' communications were not in the custody or under the control of the city in the circumstances of those appeals.[33] For example, in Order MO-2821, communications between City of Toronto councillors about cycling issues were found not to be under the control of the city. The adjudicator in that appeal distinguished between city records, on one hand (which would be subject to the *Act*), and personal or political records, on the other (which would not), and found the records at issue to fall in the latter category.

[41] In the present appeal, the city's searches did not locate any records responsive to the request. For the following reasons, I find that any records, if they do exist, are not in the custody or under the control of the city.

[42] I have not been provided any information to suggest that the current councillor was acting as an officer or employee of the city when emails (if any) were exchanged with the former councillor. As noted above, the appellant declined to identify a

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[32] Order M-813.

[33] See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

particular subject matter of the sought records. Absent any description from the appellant of the types of records she seeks, I cannot conclude that the current councillor was discharging a special duty assigned by council or was otherwise acting as an officer or employee of the city.

[43] There is also very little evidence before me about the circumstances surrounding the creation of any responsive emails, if they exist. Likewise, there is little evidence before me indicating that any responsive emails, if they exist, relate to the city's mandate and functions, or that the city has relied on the records in any way. The sample email provided by the appellant (which I note was sent outside of the time period of her request) relates to a charitable foundation that is not within the city's mandate.

[44] Applying the two-part test in *National Defence*, cited above, I find that 1) the records, if they exist, may or may not relate to a "city" matter, but that 2) the city could not reasonably expect to obtain a copy of the records upon request. The records are emails between a current and a former councillor, and the appellant has not provided me with any reason to believe that such records would be anything other than personal or political records of the current councillor. The fact that the city's servers may have been used to send the emails (if they exist), taken alone, is not enough to establish that the emails are in the city's custody or under its control.

[45] I find, therefore, that if responsive records do exist, they are not in the custody or under the control of the city.

Conclusion

[46] In my view, it would not be appropriate to require the city to conduct further searches where any records that might exist are not records that would be subject to the *Act*. For this reason and the other reasons stated above, I find that the search conducted by the city was reasonable in the circumstances.

[47] As I have addressed the issue of custody and control in the context of my findings on the search issue, I do not need to consider it separately.

ORDER:

I uphold the city's search as reasonable and dismiss the appeal.

Original Signed by: February 10, 2016
Gillian Shaw
Adjudicator