Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3519

Appeal MA16-686

City of Windsor

November 10, 2017

Summary: The appellant seeks access to records relating to an identified councillor and the 2015 federal election campaign. The city located a single record responsive to the request and denied the appellant access to it, in full, under the mandatory personal privacy exemption in section 14(1). The appellant appealed the city's exemption claim and took the position that the city's search was inadequate. During the inquiry, the city claimed that the record was not under its custody or within its control. In this order, the adjudicator finds that the record is within the city's custody and control, but the majority of it is exempt under section 14(1). The adjudicator orders the city to disclose part of the record to the appellant. The adjudicator also upholds the city's search as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of *personal information*), 4(1), 14(1), 14(3)(h) and 17

Orders and Investigation Reports Considered: M-813, MO-2821, PO-2745

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25, [2001] 2 SCR 306

OVERVIEW:

[1] The appellant filed a request with the City of Windsor (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records including correspondence from March 2015 to September 26, 2016 regarding the 2015 federal election and an identified councillor. The appellant specifically

identified he seeks access to correspondence between the mayor and/or his staff and the identified councillor and members of the campaign team. The appellant seeks access to all correspondence, particularly those relating to events, fundraisers, financial contributions, signs, advertising, automated calls and polling.

[2] The city conducted a search and located one responsive record. The city issued a decision to the appellant denying him access to the record. The city advised the appellant the record was exempt from disclosure under the mandatory personal privacy exemption in section 14(1) of the *Act*. The city also advised the appellant the presumption in section 14(3)(h) applied to the record.

[3] The appellant appealed the city's decision. In his appeal letter, the appellant raised the possible application of the public interest override in section 16 of the *Act* to the record. The appellant also claimed the application of section 14(2)(a) weighed in favour of disclosure of the record.

[4] During mediation, the appellant confirmed his interest in the record and reiterated his claim that section 16 should apply. In addition, the appellant claimed that additional responsive records should exist, thereby raising the reasonableness of the city's search as an issue. The city conducted a second search for records and advised the mediator it did not locate any further records. The appellant maintains that additional records should exist.

[5] Mediation did not resolve the issues in this appeal and the appeal was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I began my inquiry by inviting the city and two individuals whose interests may be affected by the disclosure of the records (the affected parties) to submit representations in response to a Notice of Inquiry. The city and the two affected parties submitted representations. In its representations, the city submitted that the record is not under its custody or control. As a result, I added the issue of custody or control to the inquiry. The two affected parties advised they do not consent to the disclosure of any information that relates to them. One of the affected parties submits that the information contained in the record contains their personal views and opinions.

[6] I then invited the appellant to make submissions in response to the Notice of Inquiry and the city's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. I did not share the affected parties' representations with the appellant due to confidentiality concerns. The appellant submitted representations.

[7] In the discussion that follows, I uphold the city's decision in part. I find that the record is within the city's custody and control but the majority of it is exempt under the personal privacy exemption in section 14(1) of the *Act*. I order the city to disclose a portion of the email to the appellant. I uphold the city's search for records as reasonable.

RECORD:

[8] The only record at issue in this appeal is a two-page email.

ISSUES:

A. Is the record *in the custody* or *under the control* of the city under section 4(1)?

B. Does the record contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?

C. Does the mandatory exemption at section 14(1) apply to the information at issue?

D. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: Is the record *in the custody* or *under the control* of the city under section 4(1)?

[9] The city takes the position that the record is not in its custody or control. The city states the record is a personal email sent by a city employee to a municipal councillor via the city's email server. The city submits the employee sent the email in their personal capacity and not in connection with their role as city staff.

[10] Section 4(1) of the *Act* reads, in part

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

Under section 4(1), the *Act* applies only to records in the custody or under the control of an institution. An *institution* is defined in section 2(1) and includes the city. The definition of *institution* does not specifically refer to elected offices such as a municipal councillor.

[11] The courts and the IPC have applied a broad and liberal approach to the custody or control question.[1] 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.[2] Some of the listed factors may not apply to a specific case, while other unlisted factors may apply. In determining whether the records are in the *custody or control* of an institution, these factors are considered contextually in light of the

[1] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] OJ No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin LR (2d) 242 (Fed. CA) and Order MO-1251.
[2] Orders 120, MO-1251, PO-2306 and PO-2683.

purpose of the legislation.[3]

[12] The factors that the IPC found to be relevant include

- Whether the record was created by an officer or employee of the institution[4]
- The use the creator intended to make of the record[5]
- Whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record[6]
- Whether the activity in question is a *core*, *central* or *basic* function of the institution[7]
- Whether the content of the record relates to the institution's mandate and functions[8]
- Whether the institution has physical possession of the record and if so, whether it is more than *bare possession*[9]
- Whether the institution has a right to possession of the record or to regulate its content, use and disposal[10]
- Whether the institution relied upon the record[11]
- How closely the record is integrated with other records held by the institution[12]
- The customary practice of the institution and similar institutions in relation to possession or control of records of this nature, in similar circumstances[13]

[13] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[14] 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

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[3] *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), doc. M39605 (CA).
[4] Order 120.
[5] Orders 120 and P-238.
[6] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 1.
[7] Order P-912.
[8] *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[9] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 8.
[10] Orders 120 and P-239.
[11] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 8 and Orders 120 and P-239.
[12] Orders 120 and P-239.
[13] Order MO-1251.
[14] 2011 SCC 25, [2001] 2 SCR 306. (*National Defence*)

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?

In relation to the second question, the Court stated that

> … *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder….[15]

[14] The two-part test in *National Defence* has been applied by this office[16] and is a useful framework for analyzing these issues. In Order MO-2821, the adjudicator noted that many of the factors referred to in IPC decisions are aligned with the questions raised by the Supreme Court of Canada in *National Defence*.[17]

[15] 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 municipal council is not an agent or employee of the municipal corporation in any legal sense.[18] However, records held by municipal councillors may be subject to an access request under the *Act* in the following situations:

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

- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.[19]

[16] Records of city officers or employees, however, are generally considered to be in the custody or control of the city, unless the factors support a finding that they are not.[20]

Representations

[17] The city submits that, after considering the appropriate factors and *National Defence*, the record is not within the city's custody or control. The city submits the

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[15] *Ibid*. at para 56.
[16] See Orders MO-2570, MO-2821 and MO-3287.
[17] Order MO-2821 at para 40.
[18] *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 ACWS (3d) 497 (Ont. Sup. Ct.).
[19] Order M-813.
[20] *City of Ottawa*, *supra* note 3.

email was not sent in the sender's capacity as a city employee. The city submits the email record does not relate to a matter falling within the city's mandate or within the employee's mandate and, therefore, is not within the employee's discharge of their duty. The city submits the email is a personal message between the city employee and the councillor. The city states Order MO-2821 recognizes that an institution's email system may be used for personal matters and a record, such as an email, stored on an institution's computers but this does not mean the record is in the institution's custody because of bare possession.

[18] The city states it has an acceptable use policy relating to employee use of corporate technology, including emails sent via the city's email server. The city submits the policy adheres to a "common sense approach" to the personal use of email in recognizing that employees send and receive personal emails over the city's email server. The city submits the policy does not affect its position that the city does not have custody or control over the record.

[19] The city also submitted it did not rely upon the record and the record is not integrated with other records held by the city.

[20] The appellant submits that the city's possession of the record is more than *bare possession*. As such, the appellant submits the record is within the custody and in the control of the city.

Findings

[21] I find that the record at issue is in the custody or control of the city. The record at issue is a communication between a city employee and a city councillor. As such, my finding is distinguishable from Order MO-2821 as the email correspondence considered by the adjudicator in that appeal was between two councillors. In this case, a city employee and the city councillor created and exchanged the record.

[22] I agree with the city that the majority of the record relates to personal matters between the two individuals. However, the email also contains information relating to official city business. Considering the factors outlined by this office, I find that while the main intent of the writer was to discuss personal matters, there was also clearly a business purpose for sending the email relating to city matters.

[23] In conclusion, I find the record is within the custody and under the control of the city. I will address whether the personal privacy exemption in section 14(1) applies to withhold the information contained in the record below.

Issue B: Does the record contain *personal information* as defined in section 2(1) and, if so, to whom does it relate?

[24] The city submits the personal privacy exemption in section 14(1) of the *Act* applies to the record as a whole.

[25] The section 14(1) exemption can only apply to information that qualifies as *personal information* as defined in section 2(1) of the *Act*. Consequently, I must first determine whether the record contains personal information. Section 2(1) states, in part:

> "personal information" means recorded information about an identifiable individual, including,
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> …
>
> (e) the personal opinions or views of the individual except if they relate to another individual,

[26] Section 2(2.1) also relates to the definition of personal information. This section states,

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be *about* the individual.[21] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[22]

[27] To qualify as personal information, it must be reasonable to except that an individual may be identified if the information is disclosed.[23]

[28] The city's representations do not address the personal privacy exemption specifically. However, the city submits throughout its representations that the records relates to personal matters between the councillor and a city employee.

[29] The two affected parties do not consent to the disclosure of any information relating to them. One of the affected parties submits that the information contained in the record consists of their personal views or opinions.

[30] The appellant did not address this issue in his representations.

[31] I reviewed the record at issue and find that the majority of it contains personal information within the meaning of section 2(1). I find the personal information relates solely to the two affected parties, a municipal councillor and a city employee. Specifically, I find the personal information consists of their personal views or opinions

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[21] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[22] Orders P-1409, R-980015, PO-2225 and MO-2344.
[23] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, 2002 CanLII 30891.

(paragraph (e)). Upon review of the record, I find the body of the first email and the body of the second email, with the exception of a portion of the third paragraph, contains the personal information relating to the two affected parties.

[32] However, I find a portion of the record does not contain personal information within the meaning of section 2(1). Specifically, I find the majority of the third paragraph does not contain personal information because it relates to city business. Based on my review of the third paragraph of the second email, I find the majority of the paragraph relates to official city business and the councillor's role as a representative of the city. The majority of this paragraph does not relate to her or the city employee in a personal capacity. As such, I find the majority of this paragraph does not contain personal information, as that term is defined in section 2(1).

[33] Similarly, I find the sender, recipient, date and subject of the email does not contain personal information within the meaning of section 2(1) of the *Act*. In addition, I find that the signature block of the second email does not contain the personal information of the city employee. As discussed above, the email correspondence was between the councillor and a city employee and a portion of the email relates to city business and does not relate to the affected parties in their personal capacities. Further, section 2(2) specifically states, "Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity." Therefore, I find this information does not relate to the affected parties in a personal capacity and is not their personal information within the meaning of section 2(1).

[34] In conclusion, I find the majority of the record contains the *personal information* of two identifiable individuals. I will consider whether the personal information is exempt from disclosure under section 14(1) below. I will order the city to disclose the information that is not personal information within the meaning of section 2(1) of the *Act* to the appellant.

Issue C: Does the mandatory exemption at section 14(1) apply to the information at issue?

[35] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[36] The section 14(1)(a) to (e) exceptions are relatively straightforward and, upon review, I find that none apply to the record at issue. The section 14(1)(f) exception allows for disclosure of the record if it would result in an unjustified invasion of an individual's personal privacy.

[37] Sections 14(2) and (3) assist in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1).

[38] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the

information is presumed to be an unjustified invasion of personal privacy under section 14(1). In this case, the city raised the application of the presumption in section 14(3)(h) to the record in its decision letter. The city did not make submissions on the personal privacy exemption. Nonetheless, I will consider whether the presumption in section 14(3)(h) applies to the record. Section 14(3)(h) states,

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
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> > indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[39] I reviewed the record before me and find the personal information that remains at issue falls within this presumption against disclosure because it indicates the affected parties political beliefs or associations for the purposes of section 14(3)(h). I find support for this finding in Order PO-2745, in which the adjudicator considered the application of section 21(3)(h), the provincial equivalent of section 14(3)(h), to a letter. In her finding, the adjudicator stated,

> … I am satisfied that the affected party's correspondence to the Ministry is a manifestation of his "political beliefs", since it entails action taken as a consequence of holding a belief about what is happening, or should be happening, with respect to an issue of municipal governance. Accordingly, in the circumstances of this appeal, I find that the affected party's views respecting the municipal issue in question, as they are contained in the correspondence to the Ministry, fall within the presumption against disclosure in section 21(3)(h) of the *Act* because they "[indicate] the individual's … political beliefs" for the purposes of the section.

[40] Applying this analysis, I find the personal information falls within the presumption in section 14(3)(h). The two affected parties clearly discuss and reveal their political beliefs or associations within the meaning of section 14(3)(h) in the email correspondence. In particular, one of the affected parties includes their opinions regarding the federal election campaign. Therefore, I find the personal information at issue falls within the section 14(3)(h) presumption and its disclosure is a presumed unjustified invasion of the affected parties' personal privacy.

[41] Since I found the presumption in section 14(3)(h) applies, I do not need to consider whether any of the factors in section 14(2) are relevant. A presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if one of the exceptions in section 14(4) or the public interest override at section 16 applies.[24] I reviewed the exceptions in section 14(4) and find that none apply.

[42] In addition, I find the public interest override at section 16 does not apply to the personal information I find exempt under section 14(1). In considering whether there is

[24] *John doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 OR (3d) 767 (Div. Ct.).

a *public interest* in disclosure of the record, there must be a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[25] Previous orders have stated, in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[26] The appellant alleges that the councillor used the city's resources, such as email, internet, offices, laptops, phones, vehicles, city employees who volunteered during work time, in her election campaign. The appellant also alleges in his appeal letter that a number of city staff, including the Mayor, supported the councillor's campaign publicly and notes this endorsement was "unusual". Given these circumstances, the appellant submits there is a compelling public interest in the information exempt from disclosure.

[43] I reviewed the personal information that I found exempt under section 14(1) and find there is no compelling public interest in its disclosure. Upon review of the record, I find its disclosure would not serve the purpose of informing or enlightening the public about the activities of the city or adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make public choices. While I agree there is a public interest in ensuring the city's resources are used appropriately, I am not satisfied that the disclosure of the personal information I found exempt responds to that public interest or would serve the purpose of informing or enlightening the citizenry about the city in that regard. Finally, I find the appellant did not provide me with enough information to satisfy me that there is a public interest in the disclosure of the personal information exempt under section 14(1).

[44] Accordingly, I find the personal information contained in the record is exempt under section 14(1) of the *Act*.

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

[45] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.[27] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the city's search. If I am not satisfied, I may order further searches.

[46] 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 it made a reasonable effort to identify and locate responsive records.[28] To be responsive, a record must be *reasonably related* to the request.[29]

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[25] Orders P-984 and PO-2607.
[26] Orders P-984 and PO-2556.
[27] Orders P-85, P-221 and PO-1954-I.
[28] Orders P-624 and PO-2559.
[29] Order PO-2554.

[47] 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.[30]

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

[49] Although a requester will rarely be in a position to indicate precisely which records the institution did not identify, the requester still must provide a reasonable basis for concluding that such records exist.[31]

[50] The city states that it located one responsive record. The city submits it located and identified the only record that may be responsive to the appellant's request. The city provided two affidavits describing the searches conducted, one sworn by the Manager of Records and Elections and Freedom of Information Coordinator (the manager) and the other sworn by the Chief of Staff for the city's Mayor (the Chief of Staff).

[51] In his affidavit, the manager states that when he received the request he determined that the councillor's records were not under the custody or within the control of the city. Similarly, the manager states that he determined that the records held by Windsor Police Services were not under the custody or within the control of the city. The manager states that he and his staff identified the Office of the Mayor as the department that might have relevant records. The manager states that he contacted the Chief of Staff to search the records at the Office of the Mayor. The manager states, and the Chief of Staff confirms in her affidavit, that the Chief of Staff conducted a search of the Mayor's email files, her own email files and general email files in the Office of the Mayor and located a single record. The manager states that he conducted a second search for responsive records during the mediation stage of this appeal and did not locate any additional records.

[52] The appellant submits that the city should have required the councillor to conduct a search of her records. However, based on my review of the circumstances, I find the councillor's own records relating to her federal election campaign are not within the custody or under the control of the city. In Order M-813, the IPC reviewed the issue of custody or control in relation to councillor's records and concluded that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

1. 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

[30] Orders M-909, PO-2459 and MO-2592.
[31] Order MO-2185.

2. 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.

Applying this test, I find the councillor was not acting as an officer or employee of the city during her federal election campaign. Moreover, I find her records relating to her campaign are not in the custody or under the control of the city.

[53] I find support for this finding in Order MO-2821, in which the adjudicator found that political records of councillors are not within the custody or control of the municipality. In that decision, the adjudicator asserted, "a finding that the city, as an institution covered by the Act, is not synonymous with its elected representatives, is consistent with the nature and structure of the political process."[32] I adopt this finding for the purposes of this appeal and find that the councillor's political records are not within the custody or under the control of the city.

[54] Given the wording of the request, it is unlikely the records that would be responsive to this part of the appellant's request would be anything other than the councillor's political records and not within the city's mandate. The fact that the councillor may have used the city's resources, such as email or servers, to send emails or to create records is not enough to establish that the records are in the city's custody or under its control.[33] Therefore, I find that records responsive to the appellant's request for the councillor's records relating to her federal election campaign are not in the custody or under the control of the city.

[55] In addition, the appellant submits that the city should have included Windsor Police Services records within its search. The appellant takes issue with the city not providing an affidavit from the Windsor Police Services to support its position. However, I find this affidavit is not necessary. The City of Windsor clearly does not have custody or control over records belonging to the Windsor Police Services, which is another institution under the *Act*. If the appellant wishes to obtain access to Windsor Police Services' records relating to the federal election campaign of the identified councillor, he should file an access request with Windsor Police Services.

[56] Based on my review of the parties' submissions, I am satisfied that the city conducted a reasonable search for responsive records. As set out above, the *Act* does not require the city to prove with absolute certainty that additional records do not exist, but only to provide sufficient evidence to establish that they made a reasonable effort to locate responsive records. In my view, the city provided me with a sufficient explanation of their search for responsive records.

[57] Therefore, I am satisfied the city conducted a reasonable search for records responsive to the appellant's request.

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[32] Order MO-2821 at para. 53.

[33] See Order MO-3287 in which the adjudicator considered whether emails between a current city councillor and former city councillor are within the City of Vaughan's custody or control.

ORDER:

1. I uphold the city's section 14(1) claim to the personal information contained in the record.

2. I order the city to disclose the remainder of the record to the appellant by **December 18, 2017**, but not before **December 12, 2017**. For the sake of clarity, I enclose a highlighted copy of the record with the city's copy of this order. I order the city to disclose the highlighted information to the appellant. The information that I did not highlight is exempt from disclosure.

3. I uphold the city's search as reasonable.

Original signed by
Justine Wai
Adjudicator

November 10, 2017