Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3779

Appeals MA17-383 and MA17-384

City of Toronto

June 3, 2019

Summary: The appellant submitted a request to the City of Toronto (the city) seeking access to electronic correspondence that was sent or received by two named city councillors or their staff between specified dates and regarding a named individual or a particular topic. The city issued two decisions, one for records pertaining to each of the named councillors. In one decision, the city granted access to the responsive records in part. In the second decision, the city denied access to the responsive records in full. With respect to the records that were withheld, the city claimed that the records were not in its custody or under its control as required by section 4(1) for the application of the *Act.* The city also claimed that some of the records that it located were outside the scope of the request. In this order, the adjudicator upholds the city's decisions and dismisses the appeals.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, as amended, section 4(1).

Orders and Investigation Reports Considered: Orders M-813 and MO-3471.

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

OVERVIEW:

[1] The City of Toronto (the city) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

> Any Electronic correspondence sent or received through the Office of [named councillor] by the councillor or any staff member that mentions any of the following words or phrase(s) [the requester's first and last name and two keywords identifying an organization that he is associated with].

[2] The named councillor and timeframe differed between the two requests. The timeframe of the first request was January 1, 2014 to April 30, 2017. The timeframe of the second request was January 1, 2013 to April 30, 2017.

[3] The city issued decisions in response to both requests. In response to the request for records between January 1, 2014 and April 30, 2017, the city granted partial access to the records, with portions withheld under the personal privacy exemption at section 14(1) of the *Act*. In response to the request for records between January 1, 2013 and April 30, 2017, the city denied access to the records in full. In both access decisions, the city explained its decision by stating:

> … the majority of information identified in the search for records consists of [named councillor's] constituency records, and thus falls outside of the scope of *MFIPPA*, since the City does not have custody or control of those records.

[4] The city's decisions also indicated that some of the records that it located fell outside the scope of the request, as they were not "correspondence … sent or received through the office of [the named councillors]." The city claimed that these records included emails regarding various Business Improvement Area matters that were sent from the requester to city staff and other individuals, and which copied the named councillors.

[5] The requester appealed the city's decisions to this office. Appeal files MA17-383 and MA17-384 were opened to address the January 1, 2014 to April 30, 2017, and January 1, 2013 to April 30, 2017 requests, respectively. The two appeals were processed together.

[6] During the mediation stage of the appeal process, the city explained that of the records disclosed to the appellant, 18 pages contained redactions under section 14(1) of the *Act*. The city maintained that the additional 194 pages of records that it located for Appeal MA17-383, and 249 pages of records that it located for Appeal MA17-384, are the named councillors' constituency records, which are not within the custody or control of the city, and therefore not subject to the *Act*. The city also claimed that some of those records are not responsive to the request.

[7] The appellant took issue with the city's position that the records are not within its custody or under the control and that some of the records are also not within the scope of the request. The appellant confirmed that he did not object to the city's decision to withhold some information pursuant to the personal privacy exemption at

section 14(1) of the *Act*. Accordingly, the application of section 14(1) is not at issue.

[8] Mediation did not resolve the appeals and the files were transferred to the adjudication stage of the appeal process. Given that the appeals deal with similar issues, I decided to conduct a joint inquiry. I began my inquiry by inviting the city and the two named councillors (the affected parties) to submit representations for my consideration. I received representations from the city, and representations and affidavits from the affected parties.

[9] I then invited the appellant to provide written representations on the issues and in response to those submitted by the city and affected parties. In doing so, I provided the appellant with complete copies of the city and affected parties' representations. The affected parties' affidavits were not shared because the affected parties' representative maintained that they were confidential and I was satisfied that they largely contained what was already stated in the affected parties' representations.[1]

[10] The appellant did not provide representations for my consideration.

[11] For the reasons that follow, I uphold the city's decisions on the basis that the records at issue are not in the city's custody or control as required for a right of access to exist under section 4(1) of the *Act*.

RECORDS:

[12] At issue in Appeals MA17-383 and MA18-384 are 194 and 249 pages of emails, respectively. The city maintains that none of the records are in its custody or under its control for the purpose of section 4(1) of the *Act*. The city also claims that there are nine pages in Appeal MA17-383 and four pages in Appeal MA17-384 that are not responsive to the appellant's requests.

DISCUSSION:

The records at issue in these appeals are not in the custody or under the control of the city for the purpose of section 4(1) of the *Act*

[13] As mentioned above, the city denied access to the records at issue on the basis that they fall outside the scope of the *Act* because they consist of constituency records over which the city does not have custody or control. In reaching this decision, the city relies on section 4(1) of the *Act*, which reads, in part:

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[1] In addition, I determined that it was not necessary, in the interests of procedural fairness, to share the affidavits with the appellant.

> 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 . . .

[14] Under section 4(1), a record will be subject to the *Act* only if it is in the custody or under the control of an institution; it need not be both.[2] In deciding the custody or control question, the courts and the IPC have applied a broad and liberal approach.[3]

[15] This office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or under the control of an institution.[4] Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?[5]
- What use did the creator intend to make of the record?[6]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[7]
- Is the activity in question a "core", "central" or "basic" function of the institution?[8]
- Does the content of the record relate to the institution's mandate and functions?[9]
- 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?[10]
- If the institution does have possession of the record, is it more than "bare possession"?[11]

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[2] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[3] *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.
[4] Orders 120, MO-1251, PO-2306, and PO-2683.
[5] Order 120.
[6] Orders 120 and P-239.
[7] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[8] Order P-912.
[9] *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.
[10] Orders 120 and P-239.

- 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?[12]

- Does the institution have a right to possession of the record?[13]

- Does the institution have the authority to regulate the record's content, use and disposal?[14]

- 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?[15]

- To what extent has the institution relied upon the record?[16]

- How closely is the record integrated with other records held by the institution?[17]

- 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?[18]

[16] To determine whether the records at issue are in the custody or under the control of the city, I must review each record and consider the factors contextually in light of the purpose of the legislation.[19]

[17] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[20] 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?

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[11] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[12] Orders 120 and P-239.
[13] Orders 120 and P-239.
[14] Orders 120 and P-239.
[15] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[16] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[17] Orders 120 and P-239.
[18] Order MO-1251.
[19] *City of Ottawa v. Ontario*, cited above.
[20] 2011 SCC 25, [2011] 2 SCR 306.

[18] According to the Supreme Court, control can only be established if both parts of the test are met.

Representations

[19] The city and affected parties submit that the records at issue are constituency records that are not within the city's custody or under its control.

[20] The city submits that the records at issue in these appeals arose from matters outside of the named councillors' official responsibilities as part of the city. The city notes that various orders of this office have found such records to be constituency records that are not in the custody or under the control of a municipality.

[21] The city submits that past orders of this office have found that custody of a record is not determined solely on the basis that a record touches on matters "within the city's mandate." Rather, the context of the document, and whether it relates to a councillor's official function as part of the municipality, must also be considered.[21] In the context of these appeals, the city submits that the records at issue do not relate to a "core, central, or basic" function of the city, nor were they created in furtherance of a statutory power or duty of the city as an institution. Accordingly, the city submits that the requested email records do not relate to city business, nor do they relate to the affected parties' role as members of city council.

[22] Rather, the city maintains that the records were created by the affected parties in their role as elected officials. The city submits that the emails reflect the affected parties' "personal/political/constituency" actions as individuals separate from their duties as members of city council. The city maintains that the responsive records contain the words or phrases included in the appellants' access requests; however, they are unrelated to matters in which the city is involved as an institution. The city further maintains that any records reflecting city business have already been disclosed to the appellant.

[23] The city submits that it has not relied on the records at issue, nor have they been integrated with any records that are held by the city. In support of this position, the city explains that it assigns councillors two separate email addresses to ensure segregation of various records. One address is intended for emails relating to city business and a councillor's official responsibilities as a member of city council. The second address is to be used for emails relating to a councillor's personal, political, and constituent-relations communications. The city maintains that while it has custody or control over records relating to city business, it does not have custody or control over emails relating to councillors' personal, political, or constituency actions.

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[21] The city cites Orders MO-2807 and MO-3471.

[24] The city claims that it only has "bare possession" of the records at issue, and that it is not entitled to demand that the records be produced, nor does it have a right to possess the records, or to regulate their content, use, or disposal. In support of this position, the city explains that the affected parties provided the city clerk's office with copies of the records for the purposes of preparing a fulsome response to the appellant's access requests and ensuring an orderly disposition of the appeals. The city maintains that in providing the records for those specific purposes, the affected parties did not intend to also provide the city with custody or control of the records for the purpose of providing access. Accordingly, the city submits that the records are not in its custody or control within the meaning of section 4(1).

[25] The affected parties refer to past decisions of this office, which they argue demonstrate that records belonging to city councillors are generally not found to be in the custody or under the control of a municipality.[22] The affected parties maintain that the records at issue were sent, or received, as part of their political functions in representing their constituents, and not on behalf of the city.

[26] The affected parties also maintain that while their staff are paid for by the city, they are selected and instructed by them, and they do not have other roles or duties at the city. Accordingly, they maintain that their offices should be treated "as a whole" and "distinct from the offices of the city as an institution."[23]

Analysis and findings

[27] I have reviewed all of the records at issue in these appeals and I conclude that they are not in the city's custody or under its control. I begin by considering whether the named councillors and/or their staff were acting as officers or employees of the city when the records were created, and then turn to other relevant factors.

Were the records created by an officer or employee of the institution?

[28] As stated above, the *Act* applies only to records that are in the custody or under the control of an institution.[24] The terms "custody" and "control" are not defined terms in the *Act*. The term "institution" is defined in section 2(1) and includes a municipality, but it does not specifically refer to elected offices, such as that of a municipal councillor.

[29] In *St. Elizabeth Home Society v. Hamilton (City),*[25] the Ontario Superior Court held that records of city councillors are not generally considered to be in the custody or under the control of a city because an elected member of a municipal council is not an

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[22] For example, the affected parties refer to Orders MO-2821, MO-3471, and MO-3287.
[23] The affected parties cite Order MO-3471.
[24] Section 4(1).
[25] (2005), 148 AW.C.S. (3d) 497 (Ont. Sup. Ct.)

agent or employee of the municipal corporation in any legal sense. In Order M-813, Adjudicator Laurel Cropley concluded that only in "unusual circumstances" is a councillor considered to be an officer of a municipality and therefore part of the institution for the purposes of the *Act*.

[30] Having reviewed the parties' submissions and the records at issue, I find that there are no "unusual circumstances" present in these appeals that would indicate that the affected party councillors should be considered officers of the city. There is no evidence, for example, that any of the communications contained in their emails resulted from a special duty assigned by city council.

[31] Regarding the affected parties' staff, I refer to Order MO-3471, in which Senior Adjudicator Gillian Shaw held that, for the purpose of custody or control of records, a city councillor's staff are "more appropriately considered to be an extension of the councillor himself than employees of the city. In other words, the councillor's office is considered as a whole." As the affected parties point out here, Adjudicator Shaw held that while the city pays the salaries of a councillor's staff, those staff are not part of the city's public service as they are selected and instructed by the councillor.

[32] I agree with this reasoning and adopt it for the purpose of these appeals. Accordingly, I find that for the purposes of custody and control of the records, the affected parties' offices must be considered as a whole such that their staff are effectively extensions of the councillors themselves, rather than city employees.

[33] On this basis, I find that the affected parties and their staff were not acting as officers or employees of the city when the records were created.

[34] However, this conclusion alone does not end the analysis. Even if the affected parties were not acting as officers of the city, their records can still be considered to be under the city's custody or control. This determination is made by considering the non-exhaustive list of relevant factors set out in previous orders together with the two-part test from *National Defence*.

Other relevant factors

[35] One relevant factor to consider is whether the records were created in the furtherance of city business, or for a purpose that is a "core", "central" or "basic" function of the city.[26] Having reviewed the records at issue, I find that they are of a personal, political, or constituency-relations nature that are not related to city business. While the subject matter of some of the emails may relate to city matters in a broad sense, the issue, for determining custody or control, is not the subject matter of the

[26] Order P-912.

emails, but rather whether the communications represent the exercise of a decision-making or executive function by the affected parties on behalf of the city.[27] In the context of these appeals, there is no evidence before me that the affected parties were acting in any decision-making capacity on behalf of the city.

[36] Another factor considered by this office is whether the institution has possession of the records.[28] Having considered the parties' submissions and the records at issue, I am satisfied that the city only has possession of the records because the affected parties provided them to the city to enable it to respond to the appellant's access requests. Presumably, the emails contained in both of the affected party councillors' email accounts reside on a city server; however, there is no evidence before me to support a finding that the city has a right to possess the records, nor that it has any corresponding authority to regulate their content, use, or disposal.[29] Accordingly, I find that the city's possession of the records amounts to "bare possession" only, which does not support a finding of custody or control on behalf of the city.[30]

[37] Other relevant factors are the city's customary practices and how closely integrated the records at issue are with other records that are within the city's custody or control.[31] The city's evidence is that it assigns councillors two email addresses for the purpose of isolating constituency records from those related to city business. I accept that while the city provided the affected party councillors with the email addresses in which the records at issue appear, it did so for the express purpose of segregating constituency records from other records relating to city business. Only the latter of these records would fall within the city's custody or under its control for the purposes of the *Act*. I am satisfied, therefore, that the city customarily requires its councillors to segregate emails relating to city business from those related to their own personal, political, or constituency matters, and that this practice appears to have been followed respecting most of the records at issue in these appeals.

[38] In examining the records, I note that while most were sent or received from the affected parties' email addresses intended for personal, political, or constituency matters, there are some emails that were sent or received from the email addresses intended for city business. However, the account in which the records were located is not determinative of whether the city has custody or control.[32] Given that I am satisfied that the city customarily requires its councillors to segregate emails relating to city business from those relating to constituency matters, I do not find that the occasional intermingling of accounts, as happened here, necessarily undermines a finding that the

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[27] Order MO-3608.
[28] Orders 120 and P-239.
[29] Orders 120 and P-239.
[30] Order MO-2824.
[31] Orders 120, P-239, and MO-1251.
[32] Order MO-3716.

records are nevertheless related to constituency matters, not city business. The content of the specific records provides persuasive evidence that they relate to constituency matters.

[39] I have also considered the two-part test articulated in *National Defence*,[33] for determining whether an institution has control of records that are not in its physical custody. For a finding of control to be made, both parts of the test must be met:

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?

[40] I have already found that while the subject matter of some of the records may relate to city matters in a broad sense, there is no evidence before me that the affected parties were exercising decision-making capacity on behalf of the city. On this basis, I am satisfied that the records are not related to city matters, but rather to matters of a personal, political, or constituency-relations nature.

[41] In any event, based on the facts and submissions before me, I am satisfied that the city could not reasonably be expected to obtain the records on request, as required by the second part of the *National Defence* test. My finding takes into account the fact that the records at issue are the affected parties' constituency records that have not been integrated with city records and which do not deal with city business. I have also considered the fact that the affected party councillors are neither officers nor employees of the city, and the city does not claim to have any authority over the content, use, or disposal of their constituency emails.[34] Accordingly, I find that the second part of the test for a finding of institutional control is not established in the circumstances of these appeals. As both parts of the test must be satisfied, I find that the city does not have control of the affected parties' emails.

[42] Having considered the relevant factors and the test set out in *National Defence*, I find that none of the records at issue are in the custody or under the control of the city, because they consist of the personal, political, or constituency records of the affected party councillors relating to their activities as elected representatives. For certainty, this finding also applies to the 13 pages of records identified by the city as non-responsive to the appellant's requests. Accordingly, since the right of access under the *Act* is conditional upon the records being in the custody or under the control of the city for the purpose of section 4(1), the appellant does not have a right of access under the *Act* to any of the records at issue.

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[33] 2011 SCC 25, [2011] 2 SCR 206.
[34] Order MO-2821.

[43] Given this finding, it is not necessary for me to determine whether the nine pages in Appeal MA17-383 and the four pages in Appeal MA17-384 fall within the scope of the requests and are responsive. Even if I were to conclude that the records were responsive to the requests, it follows from my finding, above, that there would nevertheless be no right of access to them under section 4(1) of the *Act*.

ORDER:

I uphold the city's decisions and dismiss the appeals.

Original Signed By: June 3, 2019
Jaime Cardy
Adjudicator