Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3808

Appeal MA16-721

City of Toronto

July 26, 2019

Summary: The appellant submitted a request to the City of Toronto (the city) for access to emails and briefing notes by a named city councillor and their executive assistant that contained certain keywords. The city issued an access decision stating that the responsive email records were not in its custody or under its control as required by section 4(1) for the *Act* to apply to them. The city also advised that councillors and their staff do not prepare briefing notes. The appellant disputes the city's decision regarding whether it has custody or control over the councillor's email records. The appellant also maintains that additional responsive records should exist. In this order, the adjudicator dismisses the appeal after determining that any responsive records, if they exist, would not be in the city's custody or under its control as required by section 4(1) of the *Act*. Given her conclusion that any responsive records that may exist would not be subject to the *Act*, the adjudicator decides that it is not necessary to consider the reasonableness of the city's search.

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 a request pursuant to the *Municipal*

Freedom of Information and Protection of Privacy Act (the *Act*) for the following:

> All emails and briefing notes written between April 1, 2016 and October 5, 2016 by [a named councillor] and [a named Executive Assistant to the named councillor] that contain [one or more of nine keywords] in them.

[2] The city issued an access decision stating that no records exist that are responsive to the request. It indicated that staff of the named councillor's office conducted a search for records with the city's custody or control and advised they were unable to locate any responsive records.

[3] The requester, now the appellant, appealed the city's access decision to this office.

[4] At the intake stage of the appeal process, the city issued a supplemental decision following an additional search by staff of the named councillor's office. In its supplemental decision, the city indicated that two responsive "email blasts to constituents" had been located. The city took the position that the two email blasts constitute the councillor's constituency records, which are not in the city's custody or control. Accordingly, the city maintained that the two records were not subject to the *Act*.

[5] During the mediation stage of the appeal process, the appellant advised that he is not interested in email blasts to constituents. He advised that he is seeking emails from the councillor and/or the councillor's executive assistant that contain the names and terms stated in his request, as well as emails exchanged between the councillor and/or the executive assistant and the parties named in his request. The city advised that the appellant's desired scope was covered by their request to the councillor's office, as they asked for councillor emails relating to the keywords listed in the appellant's request. The city further stated that the responsive records, if they exist, would be constituency records and not within the city's custody or control.

[6] The city also explained that briefing notes and memos to council are prepared by city staff and not by councillors. The appellant confirmed that he understood the city's position regarding the briefing notes and memos, but he wished to pursue access to the requested emails.

[7] Mediation did not resolve this appeal and it was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The adjudicator began an inquiry by seeking representations from the city and an affected party, the named councillor, initially. The non-confidential portions of those representations were shared with the appellant, who was invited to provide written representations. The appellant did not provide representations for the adjudicator's consideration.

[8] The appeal file was then transferred to me to complete the inquiry. For the

reasons that follow, I find that any additional responsive records, if they exist, would be constituency records that are not within the city's custody or control and, therefore, that they are not subject to the *Act*. Given that the appellant would not have a right of access under the *Act* to any responsive records that may be identified through further searches, I determine that it is not necessary to consider the issue of reasonable search and dismiss the appeal.

RECORDS:

[9] The records at issue are any e-mails sent or received by a named councillor and her executive assistant that contain any of the keywords referenced in the request.

DISCUSSION:

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

[10] 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 . . .

[11] 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.[1]

[12] 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.[2] 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 15 and section 38).

[13] The courts and this office have applied a broad and liberal approach to the custody or control question.[3]

[14] Based on the above approach, this office has developed a list of factors to

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[1] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[2] Order PO-2836.
[3] *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.

consider in determining whether or not a record is in the custody or control of an institution, as follows.[4] The list is not intended to be exhaustive. 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]
- 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]

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[4] Orders 120, MO-1251, PO-2306 and PO-2683.
[5] Order 120.
[6] Orders 120 ad 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.
[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.

- 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]

[15] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[19]

[16] 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?

Representations

[17] The city submits that there is no basis for concluding that the responsive records, if they exist, would be under its custody or control for the purpose of section 4(1) of the *Act*. In support of this position, the city maintains that it does not control the personal records of individual councillors, has no right to obtain such records, and could not provide access to those records if they were to exist.

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[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] The city notes that the definition of "institution" under section 2 of the *Act* does not include elected offices. The city also notes that past orders of this office have specifically determined that absent "unusual circumstances," councillors are not typically considered "officers" or "employees" of a municipality such that their records would be under the city's custody or control.[21] The city explains that this principle has been incorporated into its guidance document for councillors entitled "A Guide to Access and Privacy for Councillors" (the City Guide), which was prepared to assist councillors in understanding and complying with the *Act*. Specifically, section 3.3 of the City Guide states, in part:

> Documents and records received or created interacting with constituents are considered personal. Constituency records generally relate to issues the Councillor is dealing with involving one or more members of the public who live or own a business within the Councillor's ward. Constituency records may include letters, emails, faxes, telephone messages, and mailing lists.
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> Constituency information is not subject to *MFIPPA*. The IPC has confirmed that, except in unusual circumstances, a councillor is not an officer or employee of the City. Councillor's constituency liaison records are considered "personal" and are not subject to MFIPPA.

[19] The city submits that the appellant has provided no basis for finding that the councillor had the authority to communicate or undertake actions on behalf of the city in relation to any of the keywords in the access request. The city also submits that it did not assign any specific responsibilities to the named councillor relating to the keywords in the appellant's request. Accordingly, the city submits that there are no "unusual circumstances" present in this appeal that would bring responsive records within the city's custody or control.

[20] The city maintains that neither part of the *National Defence* test for determining whether an institution has custody or control of records in the hands of elected representatives is met in this case. In support of this position, the city maintains that while city council and its committees considered matters related to the keywords in the request at legally constituted meetings, the named councillor was not responsible for city council's decision on the matters. Accordingly, the city maintains that any responsive email records would be the councillor's personal or political records, which would not relate to a departmental matter and which the city could not reasonably expect to obtain a copy of upon request.

[21] Responding to the other custody or control questions set out above, the city

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[21] Order M-813.

explains that councillors are responsible for staffing their offices, and have full carriage of the recruitment and decision-making process. The city maintains that while all staff are city employees who receive records management training and follow the guidelines within the City Guide, they are political staff and not members of the public service.

[22] The city submits that it has no knowledge of the use the creator intended to make of the records, if they exist, and that it has not relied upon the records for any purpose. The city maintains that any of the councillor's interactions with members of the public outside of their role as a member of city council would not constitute a "core, central, or basic" function of the city, and that responsive records would relate to the councillor's "political" or "personal" activities. Accordingly, the city would not have the authority to regulate the content, use, or disposal of the responsive records.

[23] The city maintains that it does not have possession, or a right to posses, the records, if they exist, nor have they been integrated with other records within the city's custody or control. The city submits that its practice with respect to councillor's private records is "entirely consistent with the IPC's published guidance" in respect of the *Act*.

[24] The named councillor maintains that, consistent with past IPC jurisprudence,[22] her correspondence with individual constituents is not subject to the *Act*. In support of this position, the councillor explains that she was not acting as an officer or employee of the city, or discharging a special duty assigned by council, and therefore any responsive emails that were sent or received by her office were sent or received as part of her political function. She also maintains that any responsive records are not under the custody or control of the city for any other reason, as confirmed by the city's submissions. Accordingly, she maintains that there are no "unusual circumstances," such as those considered in Order MO-3287, that would bring her constituency records within the custody or control of the city.

[25] The councillor submits that she receives funding from the city to operate her constituency office, but all of her staff report directly to her, take direction only from her, and do not have other roles or duties at the city. She refers to Order MO-3471 in support of her position that both she and her staff are distinct from the city as an institution.

[26] The councillor also explains that some communications are conducted using the office equipment provided by the city and the city's email server. Regardless of the medium and equipment used, the councillor says that it is her and her staff's understanding that those communications are not subject to the *Act*.

[27] As noted above, the appellant did not provide representations.

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[22] For example, Orders MO-2821 and MO-3287.

Analysis and findings

[28] Having considered the parties' submissions, I am satisfied that records responsive to the appellant's request would not be within the city's custody or under its control pursuant to section 4(1) of the *Act*. In reaching this conclusion, I considered whether the named councillor would have been acting as an officer or employee of the city when the records were created, and then turned to other relevant factors.

Would the records have been created by an officer or employee of the institution?

[29] As stated above, the *Act* applies only to records that are in the custody or under the control of an institution. 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.

[30] In St. Elizabeth Home Society v. Hamilton (City),[23] 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 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*.

[31] Having reviewed the parties' submissions, I find that there are no "unusual circumstances" present that would indicate that the named councillor was acting as an officer or employee of the city. Both the city and the councillor submit that no "unusual circumstances" are present and there is no other evidence available that suggests that the councillor was assigned a special duty by city council in relation to the keywords identified in the request.

[32] However, this conclusion alone does not end the analysis. Even if the named councillor was not acting as an officer or employee of the city, her records may still be found to be under the city's custody or control based on a review of the non-exhaustive list of factors set out in previous orders together with the two-part test from *National Defence*.

Other relevant factors

[33] 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.[24] Having reviewed the parties' submissions, I am satisfied and I find

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[23] (2005), 148 AW.C.S. (3d) 497 (Ont. Sup. Ct.)
[24] Order P-912.

that if any additional responsive emails exist, they would be of a personal, political, or constituency-relations nature, rather than related to city business. While the subject of the responsive records may relate to matters that were discussed at city council, including meetings at which the named councillor was present, the issue for determining custody or control is not the subject matter of the records, but whether the records represent the exercise of a decision-making or executive function by the councillor on behalf of the city.[25] In the context of this appeal, there is no evidence before me that the councillor was exercising any decision-making capacity on behalf of the city in relation to the keywords set out in the request.

[34] Another relevant factor is whether the institution has possession of the records.[26] Both the city and the named councillor submit that the city does not have possession of the responsive records, if any exist. Furthermore, the city submits that it does not have a right to posses the records, nor could it reasonably expect to be provided a copy of the records upon request. Accordingly, I am unable to conclude, based on the evidence before me, that the city has possession of, or even a right to possess, the responsive records, if they exist. This conclusion does not support a finding of custody or control by the city in relation to the responsive records.[27]

[35] Also relevant is how closely integrated the responsive records are with other records that are within the city's custody or control.[28] The city maintains that any existing responsive records have not been integrated with other records that are within the city's custody or control. The city also submits that it has no authority to regulate the content, use, or disposal of such records.[29] The councillor maintains that any responsive records are personal or political records, and that her staff operate under her direction only, and not that of the city. Based on this evidence, I am satisfied that any responsive records are the councillor's personal or political records, which are not integrated with other records under the city's custody or control.

[36] I have also considered the two-part test articulated in *National Defence*[30] for determining whether an institution has control of records that are in the hands of elected representatives. 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?

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[25] Order MO-3608.
[26] Orders 120 and P-239.
[27] Order MO-2824.
[28] Orders 120, P-239, and MO-1251.
[29] Orders 120 and P-239.
[30] 2011 SCC 25, [2011] 2 SCR 206.

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[37] 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 that the councillor was 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.

[38] I am also satisfied that the city could not reasonably be expected to obtain copies of any responsive records on request, as required by the second part of the *National Defence* test. This finding takes into account my earlier finding that the councillor's constituency records have not been integrated with city records and do not deal with city business. I have also considered the fact that the councillor is neither an officer nor an employee of the city, and that the city does not claim to have any authority over the content, use, or disposal of councillors' constituency emails.[31] Accordingly, I find that the second part of the test is not established in the circumstances of this appeal. As both parts of the test must be met, I find that the city does not have control of the councillor's responsive records, if they exist.

[39] Having considered the relevant factors and the test set out in *National Defence*, I find that any additional responsive records that have not yet been located and addressed in a decision by the city, if any exist, would consist of the personal, political, or constituency records of the councillor relating to her activity as an elected representative. Accordingly, I find that any such records would not be in the city's custody or under its control under section 4(1) and, therefore, that the appellant would not have a right of access to those records under the *Act*.

[40] Regarding emails sent or received by the councillor's executive assistant, 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." 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. I agree with this reasoning and adopt it for the purpose of this appeal.

[41] Accordingly, for the purpose of determining custody or control in this appeal, I find that the councillor's office must be considered as a whole, such that her staff are effectively extensions of the councillor herself, rather than city employees. On this basis, I find that any responsive email records that may have been sent or received by

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[31] Order MO-2821.

the councillor's executive assistant would also not be within the custody or under the control of the city.

[42] Given my finding that any responsive records, if they exist, would not be in the custody or under the control of the city, it is not necessary for me to review the reasonableness of the city's search. This is because, even if I were to find that the city's search was not reasonable, it would not be appropriate to require the city to conduct further searches when any records that might exist are not records that would be subject to the *Act*.[32]

ORDER:

I uphold the city's access decision and dismiss the appeal.

Original signed by
Jaime Cardy
Adjudicator

July 26, 2019

[32] Order MO-3287.