

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4294-R

Appeal MA17-107 and MA17-110

City of Greater Sudbury

Reconsideration Order MO-4094-R

December 02, 2022

Summary: This is an IPC-initiated reconsideration of Reconsideration Order MO-4094-R. The City of Greater Sudbury (the city) had made a decision in response to an access request, granting access to the requested records, including a proposal prepared by an affected party. The affected party and another third party appealed those decisions. In Reconsideration Order MO-4094-R the adjudicator confirmed a finding that the city has custody or control of the proposal. Reconsideration Order MO-4094-R was reopened after the adjudicator found there was a defect in the adjudication process leading to it. In this further reconsideration order, the adjudicator finds that the city does not have custody or control of the proposal. Accordingly, the requester does not have a right of access to it under section 4(1). Appeals MA17-107 and MA17-110 are allowed in respect of the proposal and the city is ordered to withhold it from the requester.

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

Orders Considered: Orders MO-3646-I, MO-4024-R, and MO-4094-R.

OVERVIEW:

[1] At issue in this reconsideration order is a written proposal that is a record at issue in both Appeals MA17-107 and MA17-110. This reconsideration order disposes of the two appeals by separate appellants arising from a request to the City of Greater

Sudbury under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

...access to and copies of general records related to a named organization of which the city is a member. In particular, the request was for the named organization's meeting agendas and minutes circulated to members between a specified time period.

[2] The requester also requested the following related information from the city:

- General records related to the named organization;
- All records related to items described as a "Forestry Project" and "Forestry Strategy" in the named organization's financial reports for a specified number of years; and
- All records regarding revenue, expenditures, consulting fees, other supplies and expenses, donations, accounts receivable, other revenue and accounts receivable-other for a specified number of years.

[3] In response, the city located responsive records and notified third parties under section 21(1) of the *Act*. Following notification, the city then issued a decision to the requester and the third parties, granting the requester full access to the responsive records.

[4] The history of proceedings before the Information and Privacy Commissioner of Ontario (IPC) is somewhat convoluted but the only issue that remains before me is whether the city has custody or control of the proposal. That history, briefly, is as follows.

[5] Two third parties appealed the city's decision to disclose the records to the IPC. Appeal files MA17-107 and MA17-110 were opened and the files were assigned to a mediator. The sole record at issue in Appeal MA17-110 is the proposal. This proposal was also one of hundreds of records at issue in Appeal MA17-107. I note for clarity that the appellants in MA17-110 and MA17-107 are different organizations but the record remaining at issue in both appeals is the same record.

[6] The appeals did not resolve at mediation and the files were moved to the adjudication stage. Appeal MA17-110 was assigned to an adjudicator who decided to conduct an inquiry and sought the representations of the third party appellant. The third party appellant provided representations and the file was put on hold pending the resolution of Appeal MA17-107.¹

¹ There have been no orders issued in appeal MA17-110, other than interim rulings on the sharing of the third-party appellant's representations.

[7] Appeal MA17-107 was assigned to a different adjudicator. In Interim Order MO-3464-I, the adjudicator found that the city had custody or control of the records at issue and made a finding on the application of the third party information exemption at section 10(1) to certain records. She reserved her decision on the application of section 10(1) to two records because certain parties (including the appellant in MA17-110) had not yet been given notice of the appeal.

[8] Appeal MA17-107 was then assigned to me to continue with the adjudication of the remaining issues. I provided the two affected parties with an opportunity to submit representations on the possible application of section 10(1). One of the affected parties, the appellant in Appeal MA17-110, sought a reconsideration of Interim Order MO-3646-I on the basis that it had not been notified of the appeal earlier. That party took the position that its record (the proposal) was not in the city's custody or control. This is the same position that party took in its Appeal MA17-110.

[9] Following my review of the reconsideration request, I determined in Reconsideration Order MO-4024-R that I would reconsider the custody or control finding in Interim Order MO-3464-I because of the lack of notice. I provided the affected party with an opportunity to submit representations on the issue of custody or control of the remaining records at issue but did not receive representations. I issued Reconsideration Order MO-4094-R where I upheld the decision in Order MO-3464-I that the city had custody or control of the proposal.

[10] Following Reconsideration Order MO-4094-R, I again sought representations from the affected party on the application of section 10(1) but did not receive any.²

[11] While completing my inquiry into the remaining record at issue, the proposal, I reviewed the file materials³ before me and determined that there may have been a

² At this point, there were two affected parties with records at issue. One of the affected parties (the appellant in Appeal MA17-110) brought an application for judicial review in respect of the orders in relation to the proposal. I granted an interim stay with respect to the adjudication of the proposal but I proceeded to continue with my inquiry into the issue of access to the other affected party's records. Accordingly, in Interim Order MO-4169-I, I found that section 10(1) did not apply to the other affected party's records and ordered the city to disclose this record to the requester. Following Interim Order MO-416-I, I decided not to grant a full stay on the adjudication of the remaining record at issue and continued with my inquiry. At this time, the affected party (the appellant in Appeal MA17-110) withdrew its judicial review application.

³ In reviewing my correspondence with the parties, it came to my attention that on June 9, 2021, after I invited representations on the issue of custody or control, counsel for the affected party whose proposal remains at issue, referred to the fact that he would not be submitting representations on the issue of custody or control because his "...client's position on the jurisdiction of the IPC has been previously shared." While counsel for the affected party did not directly reference his client's representations on the custody/control issue made in the related file involving the same record at issue (Appeal MA17-110) or even the fact that when he spoke about the "jurisdiction of the IPC" he meant the "City of Greater Sudbury's custody or control of the record at issue", I decided that this set of circumstances raised the issue of whether there was a fundamental defect in the adjudication process in Reconsideration Order MO-4094-R.

fundamental defect in the adjudication process which resulted in Reconsideration Order MO-4094-R and I sought the parties' representations on whether the I should initiate a reconsideration of my decision in Reconsideration Order MO-4094-R. I received representations from the affected party whose proposal is at issue. In a decision to the parties, I informed them that I had decided to initiate a reconsideration of Reconsideration Order MO-4094-R. I also advised them that I had now been assigned the related Appeal MA17-110, that that file had been reactivated and that I would consider the two files together. I then sought representations from the parties.⁴ As noted above, the only issue remaining before me in both appeals is whether the city has custody or control of the proposal.

[12] In this decision, I find that the city does not have custody or control of the proposal. I allow both Appeals MA17-107 and MA17-110 in respect of the proposal and order the city to withhold it.

RECORD:

[13] The record remaining at issue is the affected party's proposal.

DISCUSSION:

[14] The sole issue in this reconsideration decision is whether the city has custody or control of the affected party's proposal. There is no dispute that the city had possession of the record when it issued its decision to grant access to it. The question is whether this possession amounts to custody or control of the proposal for the purposes of section 4(1).

[15] Section 4(1) provides for a general right of access to records that are in the custody or under the control of an institution governed by the *Act*. It 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 . . .

[16] Under section 4(1), the right of access applies to a record that is in the custody **or** under the control of an institution; the record need not be both.⁵

[17] There are exceptions to the general right of access set out in section 4(1).⁶ The record may be excluded from the application of the *Act* by section 52, or may be

⁴ The affected party had already made submissions on the custody or control issue in the context of Appeal MA17-110. I invited the parties to make representations and to comment on the affected party's representations. The requester submitted representations while the city did not.

⁵ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁶ Order PO-2836.

subject to an exemption from the general right of access.⁷ However, if the record is not in the custody or under the control of the institution, none of the exclusions or exemptions need to be considered since the general right of access in section 4(1) is not established.

[18] The courts and the IPC have applied a broad and liberal approach to the custody or control question.⁸ In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.⁹

[19] The IPC considers the following non-exhaustive list of factors when deciding if a record is in the custody or under the control of an institution.¹⁰

- Was the record created by an officer or employee of the institution?¹¹
- What use did the creator intend to make of the record?¹²
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹³
- Is the activity in question a “core,” “central” or “basic” function of the institution?¹⁴
- Does the content of the record relate to the institution’s mandate and functions?¹⁵
- Does the institution have physical possession of the record, because its creator provided it voluntarily or pursuant to a statutory or employment requirement?¹⁶
- If the institution does have possession of the record, is it more than “bare possession”? In other words, does the institution have the right to deal with the

⁷ Found at sections 6 through 15 and section 38 of the *Act*.

⁸ *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

⁹ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

¹⁰ Orders 120, MO-1251, PO-2306 and PO-2683.

¹¹ Order 120.

¹² Orders 120 and P-239.

¹³ Order P-912, upheld in *Ontario Criminal Code Review Board v. Hale*, cited above.

¹⁴ Order P-912.

¹⁵ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, cited above, and Orders 120 and P-239.

¹⁶ Orders 120 and P-239.

record in some way and does it have some responsibility for its care and protection?¹⁷

- 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 their duties as an officer or employee?¹⁸
- Does the institution have a right to possession of the record?¹⁹
- Does the institution have the authority to regulate the record's content, use and disposal?²⁰
- Are there any limits on the ways the institution may use the record? If so, what are those limits, and why do they apply to the record?²¹
- To what extent has the institution relied on the record?²²
- How closely is the record integrated with other records held by the institution?²³
- What is the usual practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature?²⁴

[20] This list is not exhaustive. Some of these factors may not apply in a specific case, while other factors not listed above may apply.

Affected party's representations

[21] To reiterate, I sought representations from all the parties in the appeal. I have representations from the affected party (the appellant in Appeal MA17-110) and the requester only. The city and the appellant in Appeal MA17-107 did not submit representations.

[22] The affected party submits that the city has nothing more than bare possession of the record.

[23] The affected party explains that it is a federally incorporated and privately controlled firm that specializes in public affairs and communications planning. The

¹⁷ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁸ Orders 120 and P-239.

¹⁹ Orders 120 and P-239.

²⁰ Orders 120 and P-239.

²¹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

²² *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above, and Orders 120 and P-239.

²³ Orders 120 and P-239.

²⁴ Order MO-1251.

affected party notes that the record is a commercial proposal that it prepared as part of its business and its intended audience consisted of private corporations, industry associations and non-governmental organizations. The affected party states:

The record's creation was exclusively outside the public sphere and without any intent to be shared with any government agency or institution at any level, including the city. The records²⁵ at issue here concern an industry that is a provincially regulated industry, and which is not regulated at the municipal level.

[24] The affected party notes that the commercial proposal for services that is contained in the record is in draft form and was never circulated to its potential customers.

[25] The affected party also explains how the record came in to be in the possession of the city. The affected party says that it has previously been engaged by the named organization that is the subject of the access request to provide specific services to it, and having done so it has gained insight into areas of opportunity relating to Northern Ontario.

[26] In September 2015, the affected party shared the record on a restricted and confidential basis with individuals, one of them being the director and officer of the named organization that is the subject of the access request. The purpose of sharing the record with these individuals was to solicit feedback on the strategy contained in the record. The affected party submits that it does not know the exact details of how the record became a part of the city's record holdings but it assumes that someone to whom it provided the record breached their confidentiality obligations and improperly provided the record to the city. The affected party submits that the city then improperly identified the record as a record of the named organization which is the subject matter of the access request before me. The affected party states:

In any event, [the affected party] did not provide the record to the city, and no other [affected party] employee or contractor did so. Furthermore, [the affected party] and its employees or contractors did not give permission or otherwise acquiesce to the record being provided directly or indirectly to the city.

[27] The affected party submits that it first learned of the city's possession of the record when the city gave it notice that it was considering disclosing the record. The affected party states that once it learned of the city's possession of the record it asked the city to destroy the record.

[28] The affected party reiterates that while the city has bare possession of the record it does not have control of it and provides representations on the factors set out

²⁵ While the affected party refers to "records at issue" there is only one record at issue – the proposal.

above.²⁶

[29] The affected party submits that its proposal was not created by the city or any officer or employee of the city, and it was not provided to the city or an employee of the city. The affected party reiterates that the record was created by its president and principal.

[30] The affected party submits that the purpose of its proposal was to provide a service to private corporations and/or industry associations or other non-governmental entities. The affected party reiterates that the proposal concerns an industry that is not municipally regulated and does not relate to any legislated mandate or function of the city.

[31] The affected party submits that the city does not have a statutory power or duty to carry out the activity that resulted in the creation of the proposal. Further, the affected party notes that the proposal is outside the scope of any city's core, central or basic functions.

[32] The affected party submits that its proposal does not relate to the city's mandate or functions and its proposal was not created for the purposes of informing the city of its strategies.

[33] The affected party submits that while the city has bare possession of the proposal it does not have any legal right to possess the proposal. The affected party submits that it appears that its proposal was provided to an individual employed by the city but that the city has no authority to regulate the proposal's content, use and disposal. The affected party notes that it asked the city to destroy all copies of its proposal in the city's possession.

[34] The affected party submits that it does not know how closely its proposal was integrated with the rest of the city's record holdings but given that the proposal does not relate to any of the legislated purposes of the city, it is unlikely that its proposal was well integrated into the city's record holdings.

Requester's representations

[35] The requester submits that the affected party's proposal was to be used by the municipality and various actors within the municipality. The requester contends that the city commissioned the affected party to create the proposal²⁷ on its behalf or on behalf of the organization named in its request to be ultimately used for municipal decision making. The requester submits:

²⁶ The affected party cites and refers to the findings in *City of Ottawa v. Ontario*, 2010 ONSC 6835, which contains a discussion of the concept of "bare possession".

²⁷ The requester refers to the proposal as a report. Having reviewed the record at issue, I confirm that it is a proposal.

The record was likely created for the purposes of the [affected party] to share with [the named organization], a non-governmental organization explicitly designed for the purpose of representing cities, towns and municipalities (as per the name). The City of Greater Sudbury is a member of [the named organization] and by extension the record was prepared as a study or as a research report for the [city].

[36] The requester further submits that the affected party is attempting to create a false distinction between the members of the named organization and the city. The city is a member of the named organization and in the requester's view, the affected party could reasonably expect that its proposal would be shared with other governments and municipalities who are also members of the organization. The requester submits that the affected party would be aware that the named organization and the city were sharing and using the record and the city could reasonably be expected to retain the record the record. The requester submits that the affected party directly supplied the record to the city via the named organization who had custody and control of the record at issue.

[37] The requester submits that it is improper for the city to use the named organization as a shield from FOI requests when conducting city activity including the commissioning of proposals (like the one at issue) that have to do with the operations of government and public policy.

[38] The requester disagrees that the record concerns provincial matters and is therefore not connected to municipal decision-making:

Provincial matters directly affect municipalities and municipal decision making. The powers of municipal governments are determined by the provincial government and the province directs, supports, and funds municipal activities...Even if the record relates to a provincial regulated industry, it could still concern decision making made by the city on various levels including economic development, property assessment, tax collection, water and sewage just to name a few.

[39] Finally, the requester submits that while it cannot speak to the nature of any confidentiality agreement between the parties or the whether the record at issue is within the scope of any core, central or basic function of the city, it contends that the record was for use within the municipality based on the other documents that have been disclosed as a result of their request.²⁸ The requester states:

Other documents disclosed in the FOI directly pertained to the business and economic interests and activities of municipalities in relation to the forestry industry. We believe that this document [the record at issue] is

²⁸ The requester was provided access to some records as a result of Interim Order MO-3646-I.

akin to the others disclosed in that the municipalities through [the named organization], including the City of Sudbury, have used these documents to make decisions at the municipal government level.

Analysis and finding

[40] Based on my review of the record and the parties' representations, I find that the city does not have custody or control of the affected party's proposal.

[41] In Reconsideration Order MO-4094-R, in the absence of representations from the parties, I confirmed the finding in Interim Order MO-3646-I that the city had possession of the record and that it related to a matter within the city's mandate therefore the city had custody or control of the record at issue.

[42] As I now have the benefit of the parties' representations, I can properly consider the factors set out above. In particular, I find the following:

- The proposal was not created by an employee or officer of the city. The proposal was clearly drafted by the affected party.
- The affected party intended the proposal to describe and sell its services to other organizations. It is unclear to me who the affected party's intended clients or customers are. While I find the requester's argument compelling that the city and/or the named organization were the affected party's intended client, it is not evident to me from the substance of the proposal that the city was the intended recipient of the proposal.
- It is not evident on the basis of the record or the parties' representations that the city has the statutory power or the duty to carry out the activity that resulted in the creation of the record.
- I find the content of the proposal relates, in a broad sense, to the city's mandate to encourage development and economic growth.
- Based on the affected party's representations, I accept that the affected party did not voluntarily provide the proposal to the city. I also find that the city's possession of the record is not a result of a statutory or contractual requirement.
- I find the city does not have more than bare possession of the record. Based on the record and the affected party's submission of how the record might have come in to the city's possession, I accept that the city does not have a right to deal with the record.
- I find that the city does not have a right to possess the record. I accept that the affected party's submission that the document was in draft format only and was not intended to be circulated or provided to other individuals.

- I find that the city does not have the authority to regulate the record's content, use and disposal.
- The affected party submits that it contacted the city and asked the city to destroy the record once it learned that the record was in the city's possession. As the record had been identified as responsive to the request and in the city's possession, I understand why the city did not destroy the record at that time. However, I accept that the fact that because the city did not create or commission the record, there are limits on the way the city could have used the record.
- As the city did not submit representations, I make no finding on how integrated the record was in the city's record holdings. I note that the proposal was integrated sufficiently for the record to have been identified as responsive to an access request under the *Act*.

[43] I find the factors suggest that the city does not have custody or control of the affected party's proposal; its possession of the record is bare possession only. While the subject-matter of the record, broadly speaking, relates to one part of the city's mandate, it was not commissioned by the city and does not reflect any decision-making or deliberations on the part of the city.

[44] In coming to my conclusion I am mindful that in determining whether the affected party's proposal is under the control of the city, I must consider the above factors contextually in light of the purpose of the *Act*. I am also mindful that the IPC takes a broad and liberal approach to issues of custody and control.

[45] The requester's position is that it would be improper for the city to shield itself from the *Act's* access regime when conducting city activities by claiming the record is not within its custody or control. To be clear, in this appeal, the city claimed the record at issue was in its custody and control and I find that there is no attempt by the city to shield itself from access requests.

[46] In any event, I find that the accountability purposes of the *Act* will not be furthered by a finding that the city has custody or control of the proposal. The record is a draft proposal that was not provided to or intended for the city, and in my view, its disclosure would not serve the transparency goal of the *Act*.

[47] I have also considered the requester's submission that the affected party's proposal was most likely prepared for the named organization which represents cities, towns and municipalities in the province. The requester notes that as the city is a member of the named organization, the affected party's proposal was likely commissioned for the city and the city was the intended recipient. As stated above, the city did not submit representations and did not dispute the affected party's allegation of how the proposal may have come in to its possession. And while I agree that the

proposal relates in a broad sense to one aspect of the city's mandate, I find that the other factors listed above weigh more heavily in favour of my finding that the city does not have custody or control of the affected party's proposal.

[48] As I have found the affected party's proposal is not in the city's custody or control, the requester does not have a right of access to it under section 4(1) of the *Act*.

ORDER:

I find the city does not have custody or control of the affected party's proposal. I allow both appeals with respect to the proposal and order the city to withhold it.

Original Signed by: _____

Stephanie Haly
Adjudicator

December 02, 2022 _____