

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2771

Appeal MA10-361

City of Vaughan

July 30, 2012

Summary: The appellant sought certain records from 2006 and 2007 relating to the cellular/blackberry invoices from two telephone companies for two individuals (the former mayor and a former employee of the mayor's office). The city located some responsive records and provided partial access to them, denying access to portions of them on the basis of section 14(1) (personal privacy). The city also stated that some of the responsive records were not in its custody or control. The appellant appealed the city's decision, and also claimed that additional records should exist, raising concerns about the adequacy of the city's search. This order determines that information about the locations to which calls were made or received is not personal information and ought to be disclosed, but that the telephone numbers of individuals contacting the mayor's office is the personal information of those individuals. This order also determines that some of the searches conducted for records were not reasonable, and orders further searches to be conducted. In addition, it determines that the city has control of the former mayor's detailed invoices, and the city is ordered to obtain copies of the invoices and issue an access decision.

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), 4(2), 14(2)(h) and 17.

Orders and Investigation Reports Considered: P-120, P-239, MO-2750.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence) (Minister of National Defence)*, 2011 SCC 25.

OVERVIEW:

[1] The appellant made a lengthy request to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to detailed information relating to cellular/blackberry devices for five named individuals for certain defined time periods. After the city issued an interim decision and a fee estimate, the appellant narrowed the request to the following:

1. Cellular/blackberry invoices from [two named companies] for [two named individuals, being the former mayor, and a former employee of the mayor's office (the former employee)] from September 2006 to 2007;
2. Cheque requisitions and expense reimbursement forms submitted by either of [the two] individuals for cellular/blackberry charges for the same period; and
3. Records regarding the following possible additional phone-related charges accrued by either of [the two] individuals for the same period: termination, upgrades, transfers, suspensions.

[2] In response to the narrowed request, the city located responsive records and provided partial access to them. The city denied access to the remaining portions of the records on the basis of the exemptions in sections 10 (third party interests), 11 (economic interests) and 14(1) (personal privacy) of the *Act*. The appellant appealed the city's decision to this office, and also appointed a representative to act on his/her behalf (hereafter the appellant).

[3] During mediation, the parties agreed that parts 2 and 3 of the narrowed request are no longer at issue in this appeal.

[4] Also during mediation, the appellant confirmed that she is no longer appealing the city's decision to withhold access to the portions of the records containing certain personal information (such as certain home addresses and personal phone numbers), and the portions of the records containing this information were removed from the scope of the appeal. In addition, the appellant advised that she is not appealing the city's decision to deny access under sections 10 and 11 of the *Act* to any account numbers listed on the invoices. As a result, sections 10 and 11 are no longer at issue in this appeal.

[5] The appellant did confirm that she continues to appeal the city's decision under section 14(1) of the *Act* to withhold the portion of the records noted on certain invoices under the heading "itemized calls," which lists the call information "from" and "to" and the "number called."

[6] In addition, the appellant indicated that she believed additional responsive records (being itemized invoices for the former mayor) should exist. When this information was provided to the city, the city conducted a further search for records and subsequently advised that no further records were located. The city also stated that additional records which may be responsive to the request are not in the city's custody or control.

[7] The appellant confirmed that she wished to appeal the city's decision that the records are not in the city's custody or control, and maintained her position that the searches conducted for responsive records were not reasonable.

[8] As a result of the mediation process, the following records and issues remain:

- 1) whether the withheld portions of the detailed cellular/blackberry invoices from a wireless company (company B) for a mobile device used by the former employee from September 2006 to 2007 are exempt from disclosure under section 14(1) of the *Act*;
- 2) whether the detailed cellular/blackberry invoices from a second wireless company (company R) for a mobile device used by the former mayor from September 2006 to 2007 are in the custody or control of the city; and
- 3) whether the searches for the detailed cellular/blackberry invoices for the identified mobile devices were reasonable.

[9] Mediation did not resolve the appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. A Notice of Inquiry identifying the facts and issues in this appeal was sent to the city and one affected party. The adjudicator was unable to contact another affected party. The city provided representations on the issues, and the affected party who was contacted indicated that he would not be submitting representations. The city's representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*, and the appellant also provided representations in response to the Notice of Inquiry.

[10] This file was subsequently transferred to me to complete the inquiry process.

RECORDS:

[11] The records at issue which were withheld under section 14(1) are the withheld portions of the detailed cellular/blackberry invoices from an identified wireless company (company B) for a mobile device used by the former employee in the mayor's office from September 2006 to 2007.

ISSUES:

- A. Do the withheld portions of the detailed cellular/blackberry invoices of the former employee contain "personal information" as defined in section 2(1)?
- B. Would disclosure of the personal information constitute an unjustified invasion of personal privacy under the mandatory exemption under section 14(1)?
- C. Are the detailed cellular/blackberry invoices for a mobile device used by the former mayor in the city's custody or under its control?
- D. Did the city conduct a reasonable search for responsive records?

DISCUSSION:

Issue A. Do the withheld portions of the detailed cellular/blackberry invoices of the former employee contain "personal information" as defined in section 2(1)?

[12] The city takes the position that the withheld portions of the detailed invoices for company B, which consist of the telephone numbers, as well as the location (ie: municipality) to or from which the call was made, is personal information as defined by the *Act*. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[13] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[14] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(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.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] 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.¹

[16] 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.²

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)

[18] The city submits that the withheld portions of the detailed cellular telephone invoices of the former employee contain the personal information of identifiable individuals. It states that these records are company B's invoices for a city-issued cellphone (issued to the former employee). The city states:

At the time the records were generated, [the former employee] was a City employee in the Mayor's office.

The redacted portions of the ... invoices at issue are the itemized call lists containing the call information (to/from) and the number called. ...

Section 2(1)(d) of [the *Act*] provides that the address or telephone number of an identifiable individual is personal information.

The City believes that it is reasonable to expect that individual may be identified if the information is disclosed. [Order PO-1880]

The City believes that while the ... invoices do not list the names of individual callers, there are many and varied ways to ascertain the caller's name and address if you have the telephone number.

The City believes that the telephone numbers of individuals listed on the City's ... invoices are personal information under section 2(1).

The City believes that the identity of callers to the Mayor's staff or the identity of those receiving calls from the Mayor's staff is personal information. ...

The City believes that if an individual's telephone number is defined as personal information, it is reasonable that telephone calling activity relating to that telephone number would also be considered personal information.

The City is unable to determine the purpose for the calls. It is impossible to determine if the calls were made in a personal, professional, official or business capacity. ...

Given the City's inability to determine the nature of the calls, in an abundance of caution to protect the privacy of individuals who have been in contact with the City, the call history was redacted under section 14.

[19] The appellant takes the position that these telephone numbers do not constitute "personal information." She states that they do not identify an individual, and that although section 2(1)(d) states that "personal information" includes the telephone

number of the individual, the telephone numbers that are identified would already be public, available through telephone books, online searches, etc. She also states that any unlisted telephone numbers would not be listed in the invoices.

[20] In addition, the appellant refers to the business identity information in the definition of personal information set out above, and states that the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity is not "personal information."

[21] The appellant also refers to company B's website, which states:

Publicly available information, such as a public directory listing of your name, address, telephone number and electronic address, is not considered personal information.

[22] The appellant also addresses a number of the arguments made by the city as follows:

The City states that the ... invoices do not list names of individual callers but do list the telephone numbers. The City assumes or states that all numbers are to persons of the public and not City employees, members of council, public organizations or businesses even though many of the calls were made during the day and [the former employee] has a publically available land line. On this note, employee cell phone numbers are also a matter of public record. Callers calling a land line or cell phone would be aware of this. Most residential phone numbers are public and in fact few persons go out of their way to remove their public number.

The City seems to dismiss the fact that in many cases the details may relate to numbers who have called or have been called by [the former employee] on several occasions, for example, [the former employee] contacting the Mayor's cell phone. One would expect that [the former employee] would have called or been called by [the former mayor] and as such [the former mayor's] cell phone, would appear on several occasions. Both cell phone users would be covered for such business calls.

The City states that it is impossible to separate the calls from personal, professional, official or business capacity. However, there are only two separations that should have been made, that is, personal or business (which would include official, professional and business). ...

... one would expect that the calls would include calls made to elected officials, most notably the Mayor, City employees and organizations. The City never even took the time to separate such calls. ...

Analysis and findings

[23] To begin, I note that the city, in severing the detailed invoices, provided the appellant with seven of the categories of information relating to each detailed invoice entry, and withheld three categories. The appellant was provided with specific information relating to each telephone call made to or from the mobile device concerning the date, time and type of call, as well as the duration, rate, amount charged, and whether or not it was a long distance call. The city withheld the specific telephone number, and the place (ie: municipality) to which the call was made or from which it originated.

[24] The city has not provided representations in support of its position that the place (ie: municipality) to which the call was made or from which it originated, is personal information. In the circumstances, I find that this information is not personal information for the purpose of the *Act*. The fact that the former employee called or received calls from a particular municipality is not the personal information of an identifiable individual, nor would it reveal any personal information. Accordingly, I find that this information is not personal information, and will order that it be disclosed to the appellant.

[25] With respect to the telephone numbers that have been severed from the detailed invoices, to begin, I find that this information is not the personal information of the former employee. Although the city provides some representations suggesting that these telephone numbers may contain the personal information of the former employee, in the absence of specific representations, I find that telephone numbers called by or received by the former employee are not the personal information of the former employee.

[26] However, in the circumstances of this appeal, I am satisfied that the telephone numbers of individuals who were in contact with the mayor's office would reveal information of a personal nature about the individuals to whom those telephone numbers belong – namely – that they were in telephone contact with the mayor's office on a particular date and time. Telephone calls can be made to the mayor's office for a wide variety of reasons, including general city business and very personal concerns or complaints. In that regard, I am satisfied that, generally speaking, the fact that an individual called the mayor's office or received a call from the mayor's office could reveal personal information about that individual.

[27] I also accept the representations of the city that there are "many and varied ways to ascertain the caller's name and address" if the telephone number is known. In that regard, in the circumstances, disclosure of the telephone number could reveal the identity of the individual who was in contact with the mayor's office.

[28] The appellant states that an individual's telephone number is already known, and that therefore disclosure of the telephone numbers at issue would not reveal any personal information. Although I agree that telephone numbers are generally known, it is not the telephone number alone that is at issue in this appeal, but the fact that the telephone number was in contact with the mayor's office.

[29] Accordingly, I find that the telephone numbers of individuals who contacted the mayor's office on certain dates and times would reveal information of a personal nature about those individuals, and constitutes personal information for the purpose of the *Act*.

Severance

[30] Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt from disclosure. The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

[31] The appellant has stated that, even if the telephone numbers of individuals contacting the mayor's office constitute the personal information of those individuals, not all of the telephone calls were to or from individuals. Some of the numbers would be public organizations or businesses, and would not contain personal information. Other numbers are likely other city telephone numbers, including the mayor, city employees and other city organizations. The appellant argues that these numbers could be severed and disclosed, as they would not reveal any personal information.

[32] With respect to numbers that may be public organizations or businesses, I find that these numbers are not reasonably severable from the other numbers in the record. The records at issue date from late 2006 and early 2007, and there are hundreds of telephone numbers at issue. I find that it is not reasonable to research each of these numbers, and determine the owners of the numbers at that time to determine whether the holder of the number was an individual or a business. In addition, it may not be possible to determine the reasons for the telephone call to the mayor's office based solely on the number (ie: if a number is of a home business), and any other method of determining the reasons for the call in 2006 or 2007, such as contacting the number and making inquiries, would not be reasonable in the circumstances. Accordingly, I find that attempting to sever the information based on whether the number is a business or professional number is not be reasonable in the circumstances.

[33] However, I accept the appellant's position that calls made to or from telephone numbers that relate to the city including the mayor, city employees and other city organizations, would not constitute personal information for the purpose of section 2(1). I also find that, although it may take time and effort, it would be possible to

review the listed withheld telephone numbers and identify calls made to or from telephone numbers that relate to the city.

[34] In light of my finding, and because fees may apply to the severing of this information, I will not order the city to conduct this severing exercise at this time. The appellant is invited to notify the city if she wishes to pursue the listed telephone numbers relating to the city, including the mayor, city employees and other city organizations. The city would then be able to identify any fees that might apply to the severing of this information.

Issue B. Would disclosure of the personal information constitute an unjustified invasion of personal privacy under the mandatory exemption under section 14(1)?

[35] I have found above that the withheld telephone numbers (except for those that relate to the city) of individuals who contacted the mayor's office on certain dates and times constitute the personal information of those individuals.

[36] Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception which may apply in the present appeal is that set out in section 14(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[37] Section 14(1)(f) is an exception to the section 14(1) prohibition against the disclosure of personal information. In order to establish that section 14(1)(f) applies, it must be shown that disclosure of the personal information at issue in this appeal would not constitute an unjustified invasion of personal privacy (see, for example, Order MO-1212).

[38] In applying section 14(1)(f), sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

[39] The city refers to the factor in section 14(2)(h) of the *Act* in support of its position that the personal information should not be disclosed.

[40] Section 14(2)(h) reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

[41] The city states:

... when members of the public call or accept a telephone call from either their elected representative [or] a member of City staff, they do so with an expectation of privacy.

Section 14(2)(h) of the *Act* provides that release of personal information supplied by the individual in confidence constitutes an unjustified invasion of personal privacy.

The City believes that individuals assume that the making or receiving of telephone calls is an inherently private matter.

The City further believes that individuals have the rights as citizens of the municipality to communicate with their elected representatives and/or municipal staff without that communication being public knowledge.

[42] The appellant disputes the city's position that individuals contacting the Mayor's office do so with an expectation of privacy. She refers to the city's Integrity Commissioner's webpage which states:

Notice of Collection: Notice to people writing to the City of Vaughan — The Municipal Code authorizes the City of Vaughan to collect personal information in any communication with City Council or its committees. The City collects this information to enable it to make informed decisions on the relevant issue(s). If you are submitting letters, faxes, e-mails, presentations or other communications to the City, you should be aware that your name and the fact that you communicated with the City will become part of the public record. The City also makes your communication and any personal information in it — such as your postal address, telephone number or e-mail address — available to the public. If there is a health and/or public safety reason, you may expressly request

the City not make your postal address, telephone number or email address available to the public.

[43] The appellant states that it is "common practice to share public numbers within the City, for example, passing on a message of a caller from the public from one staff to another." The appellant also states that these phone numbers would be subject to any public access request.

Analysis and findings

[44] With respect to the appellant's suggestion that sharing the telephone numbers of individuals who call the city within the city is evidence that the personal privacy interests do not apply, I disagree. The institution as a whole has an obligation to collect, use and dispose of personal information in accordance with the *Act*. The exchange of telephone numbers between employees would be a necessary part of fulfilling the city's role in serving the public, and this activity is consistent with section 32 of the *Act*.

[45] Insofar as the collection notice referred to by the appellant notifies the public about communications with *City Council or its Committees*, I agree that the public would have no privacy expectations, other than those identified in the collection notice. However, this collection notice is specific to the business and role of city council and the requirements in the *Municipal Act* that council business be open and transparent, with specific exceptions relating to closed meetings and, as the collection notice states, in certain cases where health and/or safety concerns are expressed.

[46] Since the nature of the calls cannot be determined from the information contained on the records, it cannot be concluded that they do or do not pertain to city council or its committees. However, as I indicated above, telephone calls to the mayor's office can be made for a wide variety of reasons, including general city business and very personal concerns or complaints. It is reasonable to expect that telephone calls made to a city employee may well relate to matters that would not necessarily go the council or its committees.

[47] I accept the city's submission that individuals communicating with city employees or elected representatives would have a reasonable expectation that their personal information would remain confidential (at least unless and until such time as a matter they raise goes before council or its committees). Accordingly, I find the factor in section 14(2)(h) to be relevant in the circumstances. Moreover, the appellant's submissions do not raise any factors that support a finding that the personal information should be disclosed. In the absence of evidence to the contrary, I find that disclosure of the personal information would constitute an unjustified invasion of privacy and is, therefore, exempt under section 14(1).

Issue C. Are the detailed cellular/blackberry invoices for a mobile device used by the former mayor in the city's custody or under its control?

[48] The city takes the position that the detailed cellular/blackberry invoices from company R for the former mayor from September 2006 to 2007 are not in its custody or control.

[49] 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 ...

[50] 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.⁴

[51] 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.⁵ 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).

[52] The courts and this office have applied a broad and liberal approach to the custody or control question.⁶

[53] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.⁷ 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?⁸
- What use did the creator intend to make of the record?⁹

⁴ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁵ Order PO-2836.

⁶ *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.

⁷ Orders 120, MO-1251, PO-2306 and PO-2683.

⁸ Order P-120.

⁹ Orders P-120 and P-239.

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹⁰
- Is the activity in question a “core”, “central” or “basic” function of the institution?¹¹
- Does the content of the record relate to the institution’s mandate and functions?¹²
- 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?¹³
- If the institution does have possession of the record, is it more than “bare possession”?¹⁴
- 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?¹⁵
- Does the institution have a right to possession of the record?¹⁶
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁷
- 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?¹⁸
- To what extent has the institution relied upon the record?¹⁹
- How closely is the record integrated with other records held by the institution?²⁰

¹⁰ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.

¹¹ Order P-912.

¹² *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders P-120 and P-239.

¹³ Orders P-120 and P-239.

¹⁴ Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

¹⁵ Orders P-120 and P-239.

¹⁶ Orders P-120 and P-239.

¹⁷ Orders P-120 and P-239.

¹⁸ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

¹⁹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.

- 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?²¹

[54] In addition to the above factors, the Supreme Court of Canada²² has recently articulated a two-part test for institutional control of a record:

1. whether the record relates to a departmental matter, and
2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

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

Representations

[56] The city begins by indicating that it located the summary pages of the invoices for the former mayor for the relevant time period because these summary pages of the invoices were submitted to the city by the former mayor for reimbursement. These summary pages of the invoices, which identify the total monthly amounts the city paid for the former mayor's cellular telephone use, were disclosed to the appellant and are not at issue in this appeal.

[57] The records that are at issue and which the city claims are not in its custody or under its control are the detailed invoices relating to those summary pages. The city's representations address many of the custody and control factors listed above. I have set out below the major points raised by the city in respect of its position that it does not have custody or control of the detailed invoices sent to the former mayor by company R:

- The detail pages of invoices relating to the former mayor are not contained in his supplier file (maintained by the city). Rather, the company R account was in the former mayor's name and was mailed to his home.
- The former mayor was required to submit the company R expenses to the city for reimbursement in accordance with the Council Budget/Expenditure Policy.

²⁰ Orders P-120 and P-239.

²¹ Order MO-1251.

²² *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25

- According to section 4.1.13 of this policy, members of Council must retain supporting invoices and documentation (ie. the detail pages), but the city has never requested them and the policy does not require him to provide them in order to obtain reimbursement. Nor does the policy delineate the purpose for requiring that councillors retain them.
- The policy does not indicate the circumstances under which the detail pages can be requested and the city has never retained copies of them; nor can it regulate the content, use or disposal of them.
- The detail pages of the invoices do not pertain to a core, central or basic function of the city and there is no contract between the city and company R. The detail pages of invoices relate to the contractual relationship between the former mayor and company R.
- Since the city was not a party to the contract, it has no standing to request records from company R.
- Reimbursement of expenses is an administrative process, which does not strictly relate to departmental matters.

[58] The appellant has also submitted representations on this issue. However, in light of my findings below, it is not necessary for me to address them in this order.

Analysis and findings

[59] As stated above, the courts and this office have applied a broad and liberal approach to the custody or control question.²³ 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.²⁴

[60] On my review of the parties' representations in this case, I am satisfied that the city does not have custody of the detail pages of the invoices which break down the specific information pertaining to calls made to or from the former mayor's cellular/blackberry. I accept the city's submissions that the contract existed between company R and the former mayor, and that the detailed invoices indicating the specific calls made to or from the cellular/blackberry device were sent directly to him at his home address. I accept the city's submissions that the former mayor was required to

²³ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited at note 3 above, *Canada Post Corp. v. Canada (Minister of Public Works)*, cited above at note 3 above, and Order MO-1251.

²⁴ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at note 1 above.

submit only the summary pages of the invoices to the city in order to obtain reimbursement for expenses incurred in his capacity as mayor.

[61] However, based on the representations of the parties and the wording of the section 4.1.13 of the Council Budget/Expenditure Policy, I find that the city does have control of those records.

[62] Section 4.1.13 of the Policy provides as follows:

Reimbursement of expenditures for cellular telephone phone charges, 407 charges and mileage. It shall be the responsibility of each Member of Council to retain supporting invoices and documentation. Please note, under Canada Customs and Revenue Agency guidelines, mileage from home to and from the place of work is considered personal mileage and therefore is not an allowable expense.

[63] In a recent order of this office, Adjudicator Bernard Morrow directly addressed the application of this policy to 407 ETR invoices held by a municipal councillor, and which the city had stated were not in its custody or control. Adjudicator Morrow found in MO-2750 that the records were in the city's control, and stated:

[The city] ... has control of these records based on the clear directive wording of section 4.1.13 of the policy and the application of the two-part test for institutional control articulated by the Supreme Court of Canada in *Minister of National Defence*.

The Supreme Court of Canada's two-part test, as set out in *Minister of National Defence*, is the accepted test for institutional control in Canada. I note that in past decisions, this office has taken a similar approach to the issue (see, for example, Orders P-120 and P-239). I accept the Supreme Court's test and apply it in this case.

With respect to part 1 of the test, I accept that the detailed invoices sought by the appellant relate to a departmental matter, as the contents of these records will reveal certain expenses incurred by the councillors while conducting city business. Further, I note that these expenses were reimbursed by the city to these councillors for performing city business. Accordingly, I find that part 1 of the test has been met.

I now turn to examine part 2 of the test. The city is a public institution and publicly funded. Accordingly, it has a duty to account for the expenditure of public funds. Section 4.1.13 of the policy exists to ensure that the city is able to account for the disbursement of public funds to members of council, as reimbursement for expenses they incur during the

course of conducting business in their role as councillor, and in the event it is asked to respond to an audit request. In my view, in order for the city to properly discharge its duty to account for the expenditure of public funds it would need to be able to distinguish between expenses incurred by a member of council for business rather than personal purposes. This can only be achieved by providing the city with the ability to obtain access to the detailed invoices, where it is necessary for it to do so.

While it is not clear whether the detailed invoices ever formed part of the city's record holdings, it is plain from the wording of section 4.1.13 of the policy that the city exercised control over these records by directing members of council to retain supporting invoices and documentation in the event they were required for audit or other accounting reasons. Based on the wording of section 4.1.13 of the policy, I am satisfied that the city could reasonably be expected to be entitled to obtain a copy of the records in question upon request from the councillors and, therefore, I find that part 2 of the test has been met.

To conclude, I find that the councillors' detailed 407 ETR invoices for the years 2007 and 2008 are in the city's control and I will order the city to obtain them from the councillors and issue an access decision with respect to these records.

[64] Both 407 ETR invoices and cellular phone invoices are addressed in section 4.1.13 of the Policy. I agree with and adopt the approach taken by Adjudicator Morrow in Order MO-2750, and find that it is equally applicable to the detail pages of the cellular/Blackberry invoices at issue. Based on the reasoning set out above by Adjudicator Morrow, I find that the detail pages of the company R invoices are in the city's control. Accordingly, I will order the city to obtain these invoices from the former mayor and to issue an access decision regarding them.

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

[65] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the city has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the city will be upheld. If I am not satisfied, further searches may be ordered.

[66] A number of previous orders have identified the requirements in reasonable search appeals.²⁵ In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

... the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[67] I agree with Acting-Adjudicator Jiwan's statement.

[68] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[69] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. In her representations, the appellant describes the city's policies and procedures with respect to reimbursement for cellular phone use for both employees and councillors, including the mayor. She also notes what she believes to be discrepancies in certain operation budget accounts, which she submits supports her position that additional records should exist. She suggests certain departments within the city that should have been searched based on her understanding of the city's operations.

[70] After reviewing the appellant's submissions, it is my understanding that she takes issue with the city's position that the former mayor's invoices were not obtained by the city in response to her request. As well, the appellant points out that the detailed invoices of the former employee for specific dates are missing from the records provided to her. With respect to the records relating to the former employee, the appellant states:

The City is missing in the case of [the former employee] (in the September 1st 2006 invoice — none), (in the October 1st 2006 invoice, various pages, based on the complete invoice provided for September 1st)

²⁵ see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

(in the November 1 invoice — none), (in the December 1 2006 invoice — the bulk of the invoice), in the January 1, 2007 invoice — none), (in the February 1st 2007 invoice — the whole invoice with the exception of the first page).

[71] The appellant submits that the missing records are easily obtainable from companies B and R in an electronic format "at no cost and with little inconvenience to the City or [the former mayor] as compared to searching for paper records."

[72] The city takes the position that it conducted reasonable searches for responsive records. It provides detailed representations and affidavits, and states:

Responsive records were determined to be [company R] invoices relating to [the former mayor] and [company B] invoices relating to [the former mayor's named office staff member].

Search requests were sent to the City's Financial Services department and Information Technology Management department. The responses to these search requests are detailed in the affidavits of [the named Acting Accounts Payable Supervisor] and [the named Manager of Client Services] ... which are included with these representations.

A search for responsive records in the Financial Services department was undertaken by [the named Acting Accounts Payable Supervisor]. During the mediation process, a subsequent search was undertaken by [this individual]. [Reference to the attached affidavit]

A search for responsive records was not undertaken in the Information Technology Management department as responsive records are not held there. [Reference to another attached affidavit]

A portion of the responsive records, (summary pages from [company R] related to [the former mayor]) were located in his supplier file and were released in part to the appellant.

The redactions to the responsive records related to [the former mayor] are not at issue in this appeal. ...

A portion of the responsive records [company B invoices] related to [the former staff member] were located in the City's [company B] supplier file and were released in part to the appellant.

A second search was conducted for additional pages identified by the

appellant from the [company B] invoices and they were not located.

It is likely that additional pages to the [company B] invoices did exist, given that pages numerically before and after were located, but the identified pages were not located during either of the searches.

Findings

[73] As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether the city has conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the city's search for responsive records was reasonable in the circumstances, its decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[74] A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[75] I adopt the approach taken in the above orders for the purposes of the present appeal.

[76] In this appeal, the city located some responsive records. When the appellant indicated her belief that additional records should exist, the city conducted further searches. The city has identified where and by whom the searches were conducted, and explains why searches were not conducted in certain areas. The city also acknowledges that certain records relating to the former employee should exist, but that it could not locate them in the places where they would reasonably be expected to be held. In addition, although the city searched for and located some records pertaining to company R, it acknowledges that it did not attempt to obtain other records (the detailed invoices) from the former mayor as it took the position that they were not within its custody or control.

[77] After considering the submissions made by both parties, I find that the city's searches through its own record holdings were reasonable, as the searches were

conducted by experienced staff in locations where records would reasonably be expected to be held.

[78] That being said, I find that the city did not go far enough in its efforts to obtain records that it identified as being missing from its record holdings, particularly since it acknowledges that certain records relating to the former employee should have been in the files that were searched.

[79] Moreover, the city states that, in the course of its searches, it did not request company R records from the former mayor, as it takes the position that any records which are in the possession of the former mayor are not in the custody or control of the city. I addressed the issue of the custody or control of these records above, and found that the city has control of the detail pages of the invoices sent to the former mayor by company R. Accordingly, I have considered the city's submissions in this context.

[80] In my view, the appellant's suggestion that the city contact company B to obtain any missing records is a reasonable approach to address the invoices that are missing from the former employee's supplier file. Given that the city had a contract with company B relating to the cellular phone that it provided to the former employee, it would, presumably, be entitled to obtain any missing invoices outlining charges incurred for its use. Even if the city were required to pay a fee to obtain the missing invoices (which it acknowledges had previously been sent to it), this is not an unreasonable expense to ensure a complete file relating to the use of city funds. Accordingly, I will order the city to contact company B to obtain the missing records identified by the appellant above.

[81] With respect to the records relating to company R and the former mayor, I accept the city's submissions that it does not have a contractual relationship with company R and would, therefore, be unable to request copies of the invoices that were sent to the former mayor. However, as I indicated above in my discussion of custody and control, the city retains control over the detail pages of the invoices that support the summary reports provided by the former mayor by virtue of section 4.1.13 of its Council Budget/Expenditure Policy. It is clear that the city did not seek to obtain these records from the former mayor. In the circumstances, I find that the city's search for company R records relating to the former mayor was not reasonable, and will order the city to conduct a further search for them. As I indicated above, I will order the city to contact the former mayor and request the detail pages of invoices from him.

ORDER:

1. I order the city to disclose to the appellant the portions of the withheld cellular/Blackberry records of the former employee which identify the place (ie: municipality) to which the calls were made or from which they originated. I order

the city to provide this information to the appellant by **September 3, 2012** but not before **August 27, 2012**.

2. I uphold the city's decision to withhold the portions of the withheld cellular/Blackberry records of the former employee which identify the specific telephone numbers.
3. The former mayor's detailed invoices from company R are in the city's control, within the meaning of section 4(1) of the *Act*, and I order the city to obtain copies of these records from the former mayor and issue an access decision on those records to the appellant, treating the date of this order as the date of the request.
4. I order the city to contact company B to obtain the missing detailed invoices relating to the months of October, 2006, December, 2006 and February, 2007, and to issue an access decision on those records to the appellant, treating the date of this order as the date of the request.
5. I remain seized of this matter in order to ensure compliance with Provisions 3 and 4.

Original signed by: _____
Frank DeVries
Adjudicator

_____ July 30, 2012