CITATION: City of Ottawa v. Ontario, 2010 ONSC 6835
DIVISIONAL COURT FILE NO.: 201/10
DATE: 20101213

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, MOLLOY and DALEY JJ.

B E T W E E N:	)	
	)	
CITY OF OTTAWA	)	Priscilla Platt and Brad Elberg, for the
Applicant	)	Applicant
	)	
- and -	)	
	)	
	)	
ONTARIO (INFORMATION AND PRIVACY COMMISSIONER) and JOHN DUNN	)	David Goodis and Allison Knight, for the Respondent Ontario (Information and Privacy Commissioner)
Respondents	)	
	)	John Dunn, in person
	)	
	)	
	)	**HEARD**: December 7, 2010 in Toronto

MOLLOY J.:

REASONS FOR DECISION

A. INTRODUCTION

[1] When a government employee uses his workplace email address to send and receive personal emails completely unrelated to his work, are those emails subject to disclosure to members of the public who request them under freedom of information legislation? That is the central issue raised by this judicial review application.

[2] The City of Ottawa was of the view that the personal emails of one of its employees were not within its "custody or control" within the meaning of the applicable legislation and refused a request to disclose them. On appeal, the Information and Privacy Commissioner took the opposite view, ruled that the emails were subject to the legislation, and ordered the City to process the application for disclosure. The City of Ottawa seeks judicial review of that decision (Order MO-2408, which is dated April 9, 2009).

[3] This case turns on the interpretation of s. 4(1) of the *Municipal Freedom & Protection of Privacy Act*[1] ("MFIPPA" or "the Act"), which states:

> 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,
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> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
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> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[4] For the reasons that follow, I find that emails of this nature do not fall within the scope of the Act. The adjudicator erred in law in finding to the contrary and her decision is therefore set aside. The fundamental error underlying the Adjudicator's decision is her failure to consider the purpose and intent of freedom of information legislation in determining the scope of the Act and whether it applied to the private communications of individuals who happen to be employed by government.

B. FACTUAL BACKGROUND

[5] The factual background is not in dispute.

[6] The City of Ottawa permits incidental personal use of its email system by its employees, subject to certain conditions. One of the conditions imposed is that the City retains the right to monitor its IT systems, including email, at any time and without notice "for security breaches and non-compliance with City policies and procedures, as well as for network management reasons." The City's Responsible Computing Policy also specifies that electronic information and IT assets remain the property of the City. However, employees are not required to retain personal emails sent and received by them and can delete them whenever and as they see fit.

[7] Rick O'Connor worked for the City of Ottawa as a City Solicitor. In his spare time, he volunteered on the Board of Directors of the Children's Aid Society ("CAS"). There is no connection between Mr. O'Connor's volunteer work for CAS and his work for the City. Mr. O'Connor used his work email address to send and receive emails relating to his CAS volunteer work. He segregated such emails in a separate file folder, but they were stored within that folder on the City's email server. There is no other connection between the City and those emails and nothing improper in Mr. O'Connor's use of his work email for this purpose.

[8] On October 23, 2007, the respondent John Dunn made a request under the *Municipal Freedom & Protection of Privacy Act*[2] ("MFIPPA" or "the Act") seeking disclosure by the City of

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[1] R.S.O. 1990, c. M.56

[2] R.S.O. 1990, c. M.56

Ottawa of all "emails, letters and faxes" sent or received by Mr. O'Connor to and from anyone at CAS[3] since February, 2007.

[9] The City Clerk responded on December 6, 2007, stating that: the communications did not relate to Mr. O'Connor's duties as City Solicitor, but rather to his role with CAS; the documents were not within the City's custody or control and fall outside the scope of MFIPPA; and therefore the City would not be processing his request.

[10] Mr. Dunn appealed to the Information and Privacy Commissioner ("IPC") and a hearing was conducted before Adjudicator Catherine Corbin. By this point, the original request (which had led to the identification of 417 pages of records as falling within the category of documents sought), had through the process of mediation and without prejudice consensual disclosure, been reduced to six pages. All are emails sent by the Executive Director of CAS to various CAS personnel including Mr. O'Connor. None have anything to do with the business of the City of Ottawa.

C. THE DECISION OF THE ARBITRATOR

[11] The Arbitrator's analysis of the issue before her covers approximately four pages of her decision, of which two pages are extensive quotations from two other IPC decisions.

[12] The Arbitrator began her analysis by referring to established authority that a "purposive approach must be taken to 'custody or control' questions" under s. 4(1) of the Act. That is a correct statement of the law, but this statement is the extent of her analysis of it.

[13] The Arbitrator then correctly noted that possession of documents is not necessarily determinative, stating that bare possession of documents is not sufficient in the absence of responsibility for the care and protection of them. She cited with approval, the decision of former Commissioner Sidney Linden in Order 120 and set out a list of factors he identified as relevant to the consideration of whether an institution has "care or control" of a document.

[14] Next, the Arbitrator cited as being particularly relevant the decision in Order PO-1725, which involved a request for access to an electronic agenda of an employee at the Premier's office, which contained both governmental and personal appointments.

[15] Finally, the Arbitrator considered the relevant factors identified by Commissioner Linden and concluded that the weight of those factors supported a finding that the emails in this case were within the custody and/or control of the City. In particular, the Arbitrator found it persuasive that: (1) the City had physical possession of the emails on its server; (2) the City had the authority to regulate the email system and could not divest itself of its responsibility by choosing not to exercise control over a particular type of record; and (3) since the City has the right to monitor the emails on its system for unauthorized use, any emails on the system at any given time are within the City's control, even if the City has not actually accessed or used them.

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[3] Various individuals and addresses are specified in the request, but all appear to be CAS related and to involve Mr. O'Connor.

D. STANDARD OF REVIEW

[16] In *Walmsley v. Ontario (Attorney General)*[4] the Ontario Court of Appeal held that a standard of correctness applied to a determination by the IPC that certain documents were within the control of the Ministry of the Attorney-General and therefore subject to FFIPA. The documents were actually in the possession of individual members of the Judicial Appointments Advisory Committee, a body which provides advice to the Attorney-General on the suitability of candidates for appointment as provincial court judges. The IPC found the members of the committee were agents of the Ministry and that the Ministry therefore had control of the documents. In imposing a correctness standard of review, the Court of Appeal reasoned that this was a question going to jurisdiction and not one requiring specialized expertise to interpret.

[17] *Walmsley* was decided prior to the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*[5], a case which fundamentally changed the law with respect to the standard of review of administrative tribunals by collapsing the previous three standards into two – correctness and reasonableness. In doing so, however, the Court held that it did not intend to alter the level of deference afforded to tribunals previously and stated that where the standard of review has already been settled with respect to a particular question, it is not necessary to revisit the issue in subsequent cases. Further, in *Dunsmuir* the Supreme Court held that the standard of correctness will continue to apply to questions of jurisdiction and general questions of law outside the specialized expertise of the tribunal.[6]

[18] Post-*Dunsmuir*, the Divisional Court considered the appropriate standard of review from a decision of the IPC in *Ministry of the Attorney-General v. Toronto Star*,[7] a case involving the interpretation of a provision stating that FFIPA does not apply to a record in relation to an ongoing criminal prosecution. In that case, this Court ruled that a correctness standard should be applied because it involved a matter of general law of significant importance to the administration of criminal justice and did not fall within the specialized expertise of the IPC. Similarly, in *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*[8], the British Columbia Supreme Court applied the principles in Dunsmuir and imposed a standard of correctness on judicial review of a tribunal decision as to whether certain documents were within the custody or control of Simon Fraser University.

[19] The respondents concede that a standard of correctness applies to the legal interpretation of the term "custody or control". However, the respondents characterize the decision in this case as one involving mixed facts and law and the weighing of various factors in coming to a conclusion, and therefore submit that the applicable standard of review is reasonableness.

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[4] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 at 618 (C.A.)

[5] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190

[6] *Dunsmuir*, at paras. 57 and 59-60.

[7] *Ministry of the Attorney-General v. Toronto Star*, 2010 ONSC 991 (Div.Ct.)

[8] *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1481.

[20] In my view, the heart of this issue is a jurisdictional question - whether the Act has any application at all to the documents in question. Moreover, this is a legal question of broad significance for thousands of individuals across the province, going well beyond the interests of the particular parties before the court. This is a question of law that attracts the correctness standard, as has been determined in *Walmsley* and, more recently, *Ministry of the Attorney-General v. Toronto Star*.

F. ANALYSIS

What is the purpose and intent of the legislation?

[21] Although the Arbitrator recognized that the correct legal approach in determining the meaning of "custody or control" must be a purposive one, she did not actually take a purposive approach to the issue before her. Indeed, apart from merely stating the principle, she gave no consideration to the intent and purpose of the legislation as part of her analysis in determining what "custody or control" means in relation to the subject documents. This, in my view, is a fundamental legal error.

[22] The act itself contains no definition of the words "custody" or "control," which makes context and legislative intention even more important. As a starting point, it is worth noting that the modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[9] (Emphasis added)

[23] The first indication of legislative purpose (as it relates to this case) is within the Act itself, and in particular in s. 1(a) which states:

> The purposes of this Act are,
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> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
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> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
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> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information;

[24] Although this provision emphasizes the broad importance of access to information and requires that exemptions to that access be circumscribed, it does not provide much information about

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[9] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26, citing with approval Driedger's *Construction of Statutes* (2nd ed., 1983 at p. 87)

the underlying purpose of providing for access to government information. Fortunately, there is considerable information about that in government reports upon which the legislation was based, and there is considerable analysis of the issue in the case law. From these sources, it is clear that the legislative intent is inextricably linked to enhancing the democratic process.

[25] Prior to the enactment of freedom of information legislation in Ontario, the government appointed a commission ("the Williams Commission") to study the issue and it was upon the recommendations of that Commission that the first Ontario legislation was based.[10] In its 1980 report, the Williams Commission identified four major rationales for public sector access to information legislation, as follows:[11]

> (i) Accountability: Increased access to information "about the operations of government" would increase the ability of members of the public to hold their elected representatives accountable. Also, the accountability of the executive branch would be enhanced if members of the legislature were granted access to "information about government."
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> (ii) Public Participation: An informed citizenry is better able to participate in the formulation of public policy. When government policy-making has included the participation of a wide spectrum of citizens and pertinent and accurate information, public perception that the decisions have been fairly made will be enhanced.
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> (iii) Fairness in Decision Making: Access to information about administrative decisions that may affect individuals gives those affected a fair opportunity to present their side on an informed basis and ensures fairness in decision making.
>
> (iv) Personal Privacy: A person's right to access the information government is compiling on him may reduce the intrusiveness of some government record-keeping practices.

[26] The fourth of these considerations is not relevant in this case. However, it is clear from the first three purposes listed that enhanced participation in the democratic process is a primary focus of freedom of information legislation.

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[10] The first legislation came into force in 1988 and applied to the provincial government. The current provincial scheme is under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA"). MFIPPA was modelled on FIPPA and has virtually identical language, including with respect to "custody or control." The municipal scheme first came into force in 1991.

[11] Ontario, *Report of the Commission on Freedom of Information and Individual Privacy/ 1980*, vol. 2 (Toronto: Ontario Government Book Store, 1980) at pp. 77-79

[27] This theme has been noted in the case law. In *Dagg v. Canada (Minister of Finance)*[12] the Supreme Court of Canada held that the "overarching purpose" of access to information is to "facilitate democracy" and stated (at para. 63) that "rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable." LaForest J. held at paras 61-62:

> [61] The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
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> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
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> See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at p. 6.
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> [62] Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-79:
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> > There are not two stores of politically relevant information, a larger one *shared* by the professionals, the whole-time leaders and persuaders, and a much smaller one *shared* by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]

How does a purposive approach inform the interpretation?

[28] Having determined that the intent of the legislature in enacting the Act was to enhance democratic values by providing its citizens with access to government information, the next stage

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[12] *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 per LaForest J. at paras. 61-62, adopted by the majority on this point at para 1.

of the analysis is to consider how a purposive interpretation of the statutory language used might inform the interpretation of the Act. Would interpreting the term "custody or control" as including private communications of employees unrelated to government business do anything to advance the purpose of the legislation? Conversely, would interpreting the language of the Act as not applying to the private communications of employees interfere with a citizen's right to fully participate in democracy? The answer to both questions must, in my view, be "No."

[29] The fatal flaw in the reasoning of the Arbitrator is that she did not even ask herself these questions. Further, in considering the various relevant factors that inform the interpretation of what constitutes "custody or control" she did not consider those factors in the context of whether such an interpretation would enhance participation in the democratic process.

[30] The Arbitrator in this case adopted the criteria established in Order 120 by former Commissioner Sidney Linden as being relevant considerations for determining whether the requirements of custody or control are met. Commissioner Linden emphasized that this was not meant to be an exhaustive list, but that these are merely the kinds of questions that could be considered in making such determinations. His 10-item list is a useful one and it is relevant to consider each item on the list in the context of the legislative purpose and intent.

(1) Was the record created by an officer or employee of the institution?
(Mr. O'Connor was a recipient of the emails, but most were created by someone at CAS. To the extent anything was created by Mr. O'Connor it was outside the context of his role as an employee of the institution, such that access to the document would not appear to relate to the democratic municipal process)

(2) What use did the creator intent to make of the record?
(The documents were never intended to be used by the City or for any municipally related purpose.)

(3) Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
(The City had possession of the emails. However, there was no requirement for the employee to use the City's email server. He voluntarily chose to do that for convenience. He also could have deleted the emails at any time without any involvement of the City. Therefore, the City's possession occurred by happenstance.)

(4) 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?
(No. The possession is entirely unrelated to City business)

(5) Does the institution have a right to possession of the record?

(Only to the extent that the employee chooses to use the City's email. The employee is not required to provide the document itself to the City and can delete it from the electronic server at any time.)

(6) Does the content of the record relate to the institution's mandate and functions?
(No. The emails have no bearing whatsoever on the processes of City government and cannot provide any information to citizens about the functioning of municipal government)

(7) Does the institution have the authority to regulate the record's use?
(The City has authority to regulate the use of its email server and the nature of the emails sent by employees using that server. However, the City has no authority to regulate the use of the document itself.)

(8) To what extent has the record been relied upon by the institution?
(Not at all. There is nothing about the documents that can provide any glimpse into how the City operates.)

(9) How closely has the record been integrated with the other records held by the institution?
(The emails are stored in a separate file folder on the City's email server and would not be accessible to other City personnel, except as required by the City to monitor for maintenance and security purposes or to determine whether employees are complying with guidelines for proper email and internet use.)

(10) Does the institution have the authority to dispose of the record?
(Only in the sense that it has ultimate control over the server upon which the record is stored)

[31] Thus, in my opinion, an examination of these factors from the perspective of scrutinizing government action and making government documents available to citizens so that they can participate more fully in democracy, points overwhelmingly to the conclusion that the documents cannot be said to be within the control of the City. The Arbitrator did not err in considering these factors to be relevant to her determination of what constitutes custody or control. She did err, however, in failing to consider those factors contextually in light of the purpose of the legislation.

[32] The respondents argue that the broadest possible interpretation must be given to the qualifying language for the application of the Act and that any concerns about the personal nature of the material or privacy concerns should be left to be considered under the exemption sections of the legislation. I disagree. The Act itself[13] and case authority interpreting it emphasize the necessity of construing exemptions narrowly in order to promote the intention of the legislation. Such an

[13] Section 1 (b) of MFIPPA

approach is based on the presumption that disclosure of the documents would support the democratic purpose and should only be applied when the documents in question properly fall within the legislation. Further, the exemption provisions dealing with personal information and privacy issues are concerned more with the content of documents being personal in nature, whereas the objection to production in this case goes to the nature of the document itself, and not necessarily any sensitivity relating to its content. In my view, the analysis as to the applicability of the Act is properly conducted at this preliminary stage, while recognizing that a conclusion that the City had custody or control of these emails is not determinative of disclosure as exemptions might apply depending on their content.

[33] The respondents further submit that the interpretation urged by the applicant requires an impermissible "reading in" of words not included in the legislation. Again, I disagree. The respondents point to examples of American legislation considered by the Williams Commission which had specific provisions restricting the application of the legislation to "information relating to the conduct of the people's business,"[14] or "retained by a public body in the performance of an official function."[15] The respondents submit that the failure of the Legislature to adopt this type of language indicates an intention to cast the net of inclusion more broadly. There is no support for that proposition in the language of the Williams Commission report itself, which refers repeatedly to the purpose of the legislation as relating to documents about the functioning of government.

[34] Applying a purposive interpretation to the words "custody" and "control" and concluding that they do not extend to the circumstances in this case does not involve reading anything into the statute. It is merely an interpretation of the legislation based on already established criteria, but bearing in mind the purpose of the legislation.

[35] The Children's Aid Society is not an agency subject to freedom of information legislation. Mr. O'Connor, in his personal capacity, is also not subject to having his personal documents seized and passed over to any member of the public who requests them. The communications between CAS and Mr. O'Connor have no connection whatsoever to the functioning of government nor to the business affairs of the City of Ottawa. It follows that providing public access to such documents does nothing to enhance participation in municipal affairs and prohibiting access does nothing to impair democratic values. Quite simply, these documents have nothing to do with municipal government and are not remotely connected to anything the legislation was intended to encompass. Further, the seizure of such documents by the City and the delivery of them to a third party would be antithetical to the privacy rights of individuals, which is another goal the legislation seeks to protect.

Is there a difference between emails and paper documents?

[36] Counsel advise that there has been no judicial determination to date as to the applicability of freedom of information legislation to personal employee emails that happen to be in the bare possession of a government institution. However, in most respects I can see little difference between

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[14] *California Public Records Act*, Cal.Gov.Code 6250-6270 [enacted 1968]

[15] *Michigan Freedom of Information Act*, MCL 15.231 [enacted 1977]

the personal communications and documents of employees that are stored in paper form in their government-owned filing cabinets and desks and those that are stored in electronic form in their government-owned computer systems.

[37] It can be confidently predicted that any government employee who works in an office setting will have stored, somewhere in that office, documents that have nothing whatsoever to do with his or her job, but which are purely personal in nature. Such documents can range from the most intimately personal documents (such as medical records) to the most mundane (such as a list of household chores). It cannot be suggested that employees of an institution governed by freedom of information legislation are themselves subject to that legislation in respect of any piece of personal material they happen to have in their offices at any given time. That is clearly not contemplated as being within the intent and purpose of the legislation.

[38] The question then is whether information stored electronically should be treated any differently. I do not see any rational basis for making such a distinction.

[39] There is, however, one difference in how the employer might treat electronic records somewhat differently and that relates to the security concerns posed by employees' use of email and the internet while at work. Understandably, employers who allow employees to use their electronic servers for personal matters will typically have policies to ensure that these electronic media are not being used in a manner that is inappropriate or illegal or that compromises the security of the entire system.

[40] In this case, the City of Ottawa had a Responsible Computing Policy which addressed, among other things, the personal use of IT services and assets by its employees. There were under stable restrictions on such use, none of which arise in this case. In order to ensure compliance with the policy, and for network management reasons, the City stipulated that it had the right to access its IT assets and information at any time and that monitoring may be done at any time without notice and without the knowledge of the individual users. Employees were therefore warned that if they had privacy concerns they should refrain from using the City's IT services to store or transmit personal-use information.

[41] It was the City's policy with respect to management of its IT services that led the Arbitrator to find that the personal emails of Mr. O'Connor were actually in the custody of the City. The Arbitrator held that the policy meant the City: (1) had physical possession and the right to possession of the emails; and (2) the City had the authority to regulate the use and disposal of the records on its system. In my view, those factors are not determinative of control given the purpose for which the City retained the right to monitor its system, as contrasted to the underlying purpose of freedom of information legislation.

[42] Employers from time to time may also need to access a filing cabinet containing an employee's personal files. That does not make the personal files of the employee subject to disclosure to the general public on the basis that the employer has some measure of control over them. The nature of electronically stored files makes the need for monitoring more pressing and the actual monitoring more frequent, but it does not change the nature of the documents, nor the nature

of the City's conduct in relation to them. It does not, in my view, constitute custody by the City, within the meaning of the Act.

This approach is consistent with existing case authority

[43] In my opinion, this approach is fully consistent with the existing case law and with policy statements of the IPC itself.

[44] In a Guildeline issued in March 1997 entitled "Electronic Records: Maximizing Best Practices" the IPC noted that freedom of information legislation had been conceived when the full impact of information technology had yet to be felt. The purpose of these Guidelines was to suggest best practices for dealing with electronic records. In particular, the IPC considered what types of electronic records should be preserved by institutions and stated (at page 6) that emails "relating to the mandate or functions of the organization" should be considered a record for the purposes of the Act." At the same time, the guideline noted, "There is not doubt that in some cases e-mail bears no relation to the mandate or functions of the organization (for example, personal messages) or is so inconsequential that may not need to be retained for operational purposes." It is clear that, at least at this point, the IPC did not contemplate that personal emails of City employees would be covered by the Act.

[45] I believe the same principles emerge from the limited case authority available. In *David v. Ontario (Information and Privacy Commissioner)*[16] the Divisional Court considered whether documents in the possession of an independent investigator appointed by the City of Toronto could be said to be in the control of the City. The Court held that the investigator was not an employee or officer of the City and could not be characterized as an agent of the City because he was required to conduct his inquiry arms-length from the City. The Court therefore concluded that the documents held by the investigator were not in the control of the City, even though some of them were actually stored on a computer owned by the City. (It should be noted, however, that in that case the computer had been allocated to the inquiry and was not accessible to persons outside the inquiry staff.)

[46] A similar conclusion was reached by the Court of Appeal in *Walmsley* in dealing with documents in the possession of individual members of the Judicial Appointments Committee. The Court held that although the content of the documents related to work for the Ministry (as the Committee acted in an advisory capacity to the Ministry), they could not be said to be within the control of the Ministry for the purposes of the Act. One of the factors influencing the court in reaching that conclusion was the fact that the Legislature could not have intended that simply by giving advice to the Attorney-General individuals would be subjected to the access provisions and also the recordkeeping aspects of the Act. The Court also held, at p. 619:

> The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they could create, use or maintain or what use to make of the documents they do possess. The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these

[16] *David v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4351, 217 O.A.C. 112 (Div.Ct.)

> documents, nor was there any basis for finding that the Ministry had a property right in them.

[47] The factual background in *Walmsley* is quite different from the situation in this case. The City in this case has some limited control over the documents in the sense that it can dictate what can be created or stored on its server. However, this is merely a prohibition power, not a creation power. The City can prohibit employees from certain uses, but does not control what employees create, how or if they store it on the server, and what they choose to do with their own material after that, including the right to destroy it if they wish. Just as in *Walmsley*, when considered against the intent and purpose of the legislation, it cannot have been intended that the mere use of the email server for personal purposes results in employees being bound by the recordkeeping obligation of the Act in respect of their personal correspondence and documents.

[48] A useful test for determining "control" was suggested by the court in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*[17]. The issue was whether documents in the possession of the Prime Minister and certain Ministers could be said to be within the control of the government institutions to which they were connected and which were subject to federal freedom of information legislation. The Federal Court of Appeal imposed a two part test for determining whether such a document could be said to be within the control of the government institution: (i) whether the contents of the document relate to a departmental matter; and (2) whether the relevant government institution could reasonably expect to obtain a copy of the document upon request. The Court held that the document would only be in the control of the government institution if the answer to both questions is yes. Applying those same questions in this case would result in a finding that Mr. O'Connor's correspondence with CAS would not be in the control of the City of Ottawa because: (1) the contents do not relate to a City matter; and (2) the City could not expect to be given such documents merely by requesting them because they did not fall within the scope of Mr. O'Connor's employment.

[49] In Order P-1069 dated November 30, 1995, the IPC held that CAS records are not subject to FIPPA merely because the Ministry of Community and Social Services has a general supervisory and monitoring role over the CAS. In coming to that conclusion, the Adjudicator relied on the fact that the Ministry's right of access to CAS records was limited to requiring financial accountability and periodic administrative reviews to ensure compliance with the *Child and Family Services Act*. There is a direct parallel between that case and this one. In the case before us the City has a right to monitor and supervise the use of its email server to ensure compliance with policies. However, that is also a limited right of access. Applying the same reasoning as in Order P-1069, CAS records should not be subject to the Act merely because they have been sent to an individual who has stored them on an electronic data base subject to monitoring by the City to ensure compliance with its own policies.

[50] The case closest on its facts to the case before this Court is also an IPC decision, Order PO-1947-F dated September 13, 2001, a decision of Arbitrator Liang. At issue were records that had

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[17] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2008 FC 766 (T.D.), aff'd. 2009 FCA 175 at para. 8.

been prepared by employees in relation to a Minister's constituency affairs. The records were in the bare possession of the Ministry of Tourism because they were physically stored in the Ministry's office. However, Arbitrator Liang held they were not in the "control" of the Ministry because they were not created by employees "in respect of matters within the mandate of the Ministry or to be used in the Ministry," had been "kept in separate files" and "had not been integrated with other Ministry records." Applying that same reasoning, Mr. O'Connor's CAS files were kept on the City's email server and in that respect could be said to be in the bare possession of the City, but they were not created in respect of matters within the mandate of the City, they were kept in a separate file, and they were not integrated with other City records. The same policy reasons would apply to exclude these records from the operation of MFIPPA. Indeed, if anything, there are stronger policy reasons for excluding the documents in this case than there were in the Ministry of Tourism case.

[51] Finally, it is relevant to address the IPC decision in Order PO-1725, which was so heavily relied upon by the Arbitrator in this case. In that case, the requester sought access to the electronic agenda of an employee at the Premier's office. The same agenda contained both governmental appointments and personal appointments. The entire agenda was found to be within the control of the government institution. In my view, the critical distinction between that case and this one is the extent to which personal and governmental information were combined within the electronic agenda. That is not the situation in this case. That said, it does not follow that personal emails not filed in a separate folder (as was the case here) are necessarily subject to the operation of the Act. Much will depend on the individual circumstances of each case, but generally speaking, I would expect very few employee emails that are personal in nature and unrelated to government affairs to be subject to the legislation merely because they were sent or received on the email server of an institution subject to the Act.

G. CONCLUSION AND ORDER

[52] In my opinion, the Arbitrator erred in law in concluding that the records in this case can be said to be within the custody or control of the City of Ottawa. Applying a correctness standard, this is a sufficient basis to set aside her decision.

[53] However, I have also considered whether the decision could stand if a reasonableness standard is applied, as advocated by the respondents. Applying that analysis, however, I come to the same conclusion. *Dunsmuir* establishes that a decision can be said to be reasonable if it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[18] In my view, it is not reasonable for emails belonging to a private individual to be subject to access by members of the public merely because they are sent or received on a government owned email server. That is not a sensible or logical result whether as a question of fact or a question of law. The implications for the many thousands of employees who work in government offices across this country are staggering. I do not consider this decision to fall within the range of reasonable possible outcomes described by the Supreme Court in *Dunsmuir* as necessary to meet the reasonableness standard. By either analysis – correctness or reasonableness – the decision cannot stand.

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[18] *Dunsmuir*, at para. 47

[54] Accordingly, I would grant the application, set aside the decision of the Arbitrator, and confirm the decision made by the City of Ottawa denying the request for access to these documents. The parties are agreed that there should be no order with respect to costs.

MOLLOY J.
I agree: JENNINGS J.
I agree: DALEY J.

Released: December 13, 2010

CITATION: City of Ottawa v. Ontario, 2010 ONSC 6835
DIVISIONAL COURT FILE NO.: 201/10
DATE: 20101213

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, MOLLOY and DALEY JJ.

B E T W E E N:

CITY OF OTTAWA

Applicant

- and -

ONTARIO (INFORMATION AND PRIVACY COMMISSIONER) and JOHN DUNN

Respondents

REASONS FOR JUDGMENT

JENNINGS J.
MOLLOY J.
DALEY J.

Released: December 13, 2010