Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2824

Appeal MA11-151

City of Toronto

December 28, 2012

Summary: The city received a request for access to information, including correspondence and memos, relating to two registered lobbyists and a named councillor. The city took the position that these records are not in its custody or under its control and are, therefore, not subject to the *Act*. In this case, the adjudicator decided that the records, if they exist, are not in the custody or control of the city and are not subject to the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(b) (definition of an institution) and 4(1) (right to access); *City of Toronto Act, 2006*, S.O. 2006, c. 11, schedule A, sections 165 to 169.

Orders and Investigation Reports Considered: Orders M-813, MO-2821, Privacy Complaint Report MC10-75 and MC11-18.

Cases Considered: *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.), *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605).

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information for a

particular time frame related to two registered lobbyists and a named councillor (the councillor and/or the affected party). The request specifically stated:

> I am seeking any letters, emails, notes to file, reports, Post-it notes, records of meetings or other documentation between [the named city councillor], or staff in his office, and [two named registered lobbyists].

[2] In response, the city issued a decision letter which read, in part:

> Records created and maintained by City Councillors and their staff are not covered under the provisions of [the *Act*]. Access, therefore, cannot be provided to the records you have requested.
>
> Staff in the Office of the Lobbyist Registrar have advised that information relating to the lobbying of City Councillors is publicly available on its website….

[3] After receiving the response, the appellant contacted the city and asked to be provided with the specific section of the *Act* the city relied on to state that the records are not covered by the provisions of the *Act*. The city's response letter read, in part:

> The *Act* does not specifically state that councillors' papers are not subject to its provisions. Rather, the Information and Privacy Commissioner/Ontario [the IPC] has determined in a number of orders that, except in unusual circumstances, a councillor is not an officer or employee of an institution and, in general, councillors' constituency records are considered "personal," not in the custody or control of the institution. Therefore, they are not subject to [the *Act*].

[4] This letter from the city also enclosed copies of guidelines prepared for city councillors by the City of Toronto and the City of Ottawa, which make reference to the identified orders of the IPC.

[5] The appellant appealed the city's decision.

[6] During mediation, the city maintained its position that the records created and maintained by city councillors and their staff are not within the city's custody or control and are not covered under the provisions of the *Act*. The appellant's position is that the requested records are not constituency records and that they relate to the councillor's official responsibilities as a member of council. He therefore argues that they are subject to the *Act*.

[7] As a result, the sole issue in this appeal is whether the requested records (if they exist) are within the custody or control of the city, and therefore subject to the *Act*.

[8] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process. I sought and received representations from the city, the affected party and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] In this order I find that the requested records are not in the custody or control of the city, and are not subject to the *Act*.

DISCUSSION:

[10] The city and the affected party take the position that the requested records are not in the custody or control of the city.

[11] Section 4(1) of the *Act* 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 …

[12] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody *or* under the control of an institution; it need not be both.[1]

[13] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[2] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[14] In Order M-813, Adjudicator Laurel Cropley reviewed the law relating to the status of municipal councillors and the records they hold. She began her analysis by noting that:

> It is clear from the wording of section 4(1) that in order to be subject to an access request under the *Act*, a record need only be in the custody **or** under the control of an institution (Order P-994).
>
> Under the *Act*, an "institution" is defined as:
>
> (a) a municipal corporation, including a metropolitan, district or regional municipality or the County of Oxford,

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

> (b) a school board, public utilities commission, hydro electric commission, transit commission, suburban roads commission, public library board, board of health, police commission, conservation authority, district welfare administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act*,
>
> (c) any agency, board, commission, corporation or other body designated as an institution in the regulations.
>
> The wording of the *Act* does not specifically refer to elected offices, such as a municipal councillor, as falling within the definition of "institution".
>
> In my view, in the circumstances of this appeal, there are two situations in which the records may be subject to an access request under the *Act*. In the first case, if the Councillor were found to be an "officer" of the City, he would be considered to be a part of the institution, and records maintained by him in conjunction with this position would thus be subject to the *Act*. Such a finding would end the analysis and it would not be necessary to go on and consider the second situation. A contrary finding, however, would not automatically remove records from the application of the *Act*. Rather, it would then be necessary to consider the second situation.
>
> In the second case, even if the Councillor were found not to fall within the purview of the *Act*, records held by him personally may still be subject to the *Act* if it is determined that they are also within the custody or under the control of the City (Order P-239).

[15] After reviewing several sections of the *Municipal Act*,[3] court decisions and academic writing, Adjudicator Cropley determined that "except in unusual circumstances, a member of municipal council is generally not considered to be an "officer" of a municipal corporation." She then reviewed examples of "unusual circumstances" where a councillor might also be considered an "officer" of a municipal council, and stated:

> An example of an unusual circumstance would be where a municipal councillor of a small municipality has been appointed a commissioner,

[3] Order M-813 was issued in 1996 and the Adjudicator's analysis pertained to the *Municipal Act*, R.S.O. 1990, Chap M.45. The *Municipal Act, 2001* (currently in force) significantly amended the former act. However, it is clear, from my review of the current act that the amendments do not change the status of municipal councillors.

> superintendent or overseer of any work pursuant to section 256 of the *Municipal Act*. In this regard, the authorities indicate that this would be an extremely unusual situation, and where it occurs, the councillor would be considered an "officer" only for the purposes of the specific duties he or she undertakes in this capacity. In these cases, a determination that a municipal councillor is functioning as an "officer" must be based on the specific factual circumstances.

[16] This approach has been followed in subsequent orders of this office.[4] Relying on the analysis in Order M-813, Adjudicator Donald Hale found in Order MO-1403 that "the mayor of a municipality is an 'officer' of that municipality for the purposes of the *Act* while municipal councillors are not."

[17] These earlier orders have determined that if the councillor is found to be an "officer" of the city, the records maintained by him in conjunction with this position would be subject to the *Act*. If the councillor is found not to be an "officer" of the city, records held by him may still be subject to the *Act* if it is determined that they are also within the custody or under the control of the city.

[18] I agree with and adopt the reasoning in these orders.

[19] Furthermore, although these decisions referred to the *Municipal Act*, and it is the *City of Toronto Act, 2006* [5] (*COTA, 2006*) which governs this city, I find that the same principles apply. *COTA, 2006* appears to distinguish between members of council on the one hand and officers and employees of the city on the other, and I have not been referred to any specific definition of "officers and employees" of the city in *COTA, 2006*. Although it may be possible for a member of city council to also be appointed an officer or employee of the city, as indicated in Order M-813 this would have to be based on specific factual circumstances.

[20] Applying this analysis, I will consider the following two issues in deciding whether the requested records of the municipal councillor are in the custody or under the control of the city: 1) was the councillor functioning as an "officer" of the city in the circumstances of the appeal; and 2) are the records held by the councillor in the custody or under the control of the city.

Was the councillor functioning as an "officer" of the city in the circumstances of this appeal?

[21] The city relies on the previous orders of this office cited above and states that neither the councillor nor the lobbyists are officers or employees of the city. The city submits that the requested records relate to the councillor's actions in dealing with

[4] Orders MO-1403 and MO-1967.
[5] S.O. 2006, c. 11, schedule A.

matters brought to his attention by members of the public in his role as an individual "constituent representative." The city asserts that records relating to a constituency matter or records relating to a councillor's role as an elected representative would not be considered to be under the custody or control of a municipality.

[22] Referring to the appellant's arguments in appealing its decision, the city submits that there is no support for the allegation that the records at issue would relate to the councillor's responsibilities with respect to the city's business, in his role as a member of Council.

[23] The affected party's representations echo those of the city. In particular, he notes that absent the type of unusual circumstances contemplated in previous orders, "communications between the councillor and others, including lobbyists, would be personal and private to the councillor."

[24] The affected party also points out that the analysis of this issue does not turn on who the councillor met with; rather, it depends on the capacity in which the councillor was acting and authorized to act at that time. He confirms that during the relevant time, he had no express authority as an individual councillor to act for the city. The affected party attaches an affidavit of the City Clerk supporting his position.

[25] In the appellant's representations, he acknowledges the findings in Order M-813, but seeks to distinguish them from the circumstances in the current appeal, because the record at issue in that appeal was "correspondence between a councillor and an actual constituent of that councillor." He then points out that the lobbyists whose records are requested in this appeal do not live in the councillor's ward and are not his constituents.

[26] The appellant also argues that a councillor is part of civic government and is an officer and/or employee of the city. He also takes the position that the requested documents do relate to city business, and that the lobbyists were trying to persuade councillors in different parts of the city to take a particular position on a public interest issue. He submits that this is "obviously city business." In his letter of appeal, he also indicates that the councillor would have voted on the issues which the lobbyists were involved in, both as a member of City Council and as a member of a community council.

[27] The appellant also argues that although councillors may not have the authority to act on behalf of the city, they do vote on matters of public interest and any communications which "inform those decisions" (except for personal constituency matters) should be public.

[28] In addition, the appellant expresses his concerns about the lack of transparency in what he describes as the "chain of decision-making that results in public policy." It is apparent from my review of the appellant's representations that he acknowledges there

are legitimate personal privacy reasons to exempt communications between a councillor and a constituent. He does not believe, however, that lobbyists have a personal interest in protecting their communications as it is "their job to influence public policy to the advantage of their clients." The appellant takes the position that information of this nature ought to be subject to the *Act* and accessible.

Analysis and findings

[29] Having considered the representations of the parties, I am satisfied that at the time the affected party communicated with the lobbyists he was not acting as an officer of the city.

[30] In Order M-813, Adjudicator Laurel Cropley reviews in some detail certain statutes that clearly distinguish between "members" of a council or board, and its "officers" or "employees. *COTA, 2006* appears to similarly distinguish these positions.

[31] In this appeal, regardless of whether he was sitting as a member of council or a member of a committee, I find that the councillor had no express authority to act for the city. Absent the "unusual circumstances" referenced above, councillors act for the city only when in a properly constituted quorum. As set out in the court decision in *St. Elizabeth Home Society v. Hamilton*,[6] referred to by the city and the affected party:

> It is an equally long-standing principle of municipal law that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. Elected members of council are not employed by or in any way under the control of the local authority while in office ... *Individual council members have no authority to act for the corporation except in conjunction with other members of council constituting a quorum at a legally constituted meeting; with the exception of the mayor or other chief executive officer of the corporation, they are mere legislative officers without executive or ministerial duties.* [para.264] [emphasis added]

[32] In addition, based on the evidence provided, I find that the circumstances of this appeal do not result in the "unusual circumstances" where the named councillor might also be considered an "officer" of the municipality. The evidence provided, including the affidavit evidence of the City Clerk, confirm that Council had not assigned any specific responsibility to the councillor during the relevant time.

[33] Although the appellant seeks to make a distinction between records received from an actual constituent residing in a councillor's ward as opposed to communications from lobbyists, I agree with the affected party that the analysis of whether or not a

[6] *St. Elizabeth Home Society v. Hamilton* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

councillor is an "officer" does not turn on who the councillor communicates with. Rather, the question requires an examination of the capacity in which the councillor is acting. As I found above, the evidence establishes that none of the unusual circumstances referred to in the case law apply.

[34] Lastly, the appellant indicates his interest in obtaining access to communications between councillors and lobbyists, whose job is to lobby on behalf of their clients. He raises concerns about the transparency in "decision-making that results in public policy" as it relates to communications of this nature. I address this general concern below. I also note that the requirements that lobbying activities be registered allows both public office holders and the public to know who is attempting to influence municipal government.

[35] In the circumstances, I am not persuaded that the named councillor was functioning as an officer of the corporation during the relevant time period, which would result in his records falling within the ambit of the *Act*. Accordingly, I find that the councillor was not functioning as an officer of the city when he communicated with the two individuals referred to in the appellant's request.

Are the records held by the municipal councillor in the custody or under the control of the city?

[36] Having found that, in the circumstances of this appeal, the councillor was not an officer of the city, I must now determine whether the requested records are nonetheless in the custody or under the control of the city.[7]

[37] The courts and this office have applied a broad and liberal approach to the custody or control question.[8]

[38] 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.[9] 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?[10]
- What use did the creator intend to make of the record?[11]

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[7] See Orders P-239 and M-813, for example.
[8] *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.
[9] Orders P-120, MO-1251, PO-2306 and PO-2683.
[10] Order P-120.
[11] 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?[12]

- Is the activity in question a "core", "central" or "basic" function of the institution?[13]

- Does the content of the record relate to the institution's mandate and functions?[14]

- 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?[15]

- If the institution does have possession of the record, is it more than "bare possession"?[16]

- 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?[17]

- Does the institution have a right to possession of the record?[18]

- Does the institution have the authority to regulate the record's content, use and disposal?[19]

- 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?[20]

- To what extent has the institution relied upon the record?[21]

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[12] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.
[13] Order P-912.
[14] *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.
[15] Orders P-120 and P-239.
[16] Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.
[17] Orders P-120 and P-239.
[18] Orders P-120 and P-239.
[19] Orders P-120 and P-239.
[20] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.
[21] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.

- How closely is the record integrated with other records held by the institution?[22]

- 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?[23]

[39] Moreover, in determining whether records are in the "custody or control" of the city, the above factors must be considered contextually in light of the purpose of the legislation.[24]

[40] In addition to the above factors, the Supreme Court of Canada[25] has recently articulated a two-part test to determine 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.

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

Representations

The city's representations

[42] The city reiterates its submissions that none of the individuals named in the request (the councillor and the two lobbyists) are officers or employees of the city, and that the city has no knowledge of the identity of the creator of the councillor's records, or of the use the creator intended to make of the records. It states that individual councillors are "mere legislative officers" without executive or ministerial duties, and that records relating to a constituency matter or records concerning a councillor's role as an elected representative would not be considered to be under the custody or control of a municipality.

[43] With respect to the nature of the records requested, the city states that the documents do not relate to a responsibility of the city, but instead relate to the councillor's actions in dealing with matters brought to his attention by members of the

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[22] Orders P-120 and P-239.
[23] Order MO-1251.
[24] See *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605), para 31.
[25] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 [*National Defence*].

public in his role as an individual "constituent representative." The city states that the interactions between individual members of Council and members of the public are not core, central or basic functions of the city as an institution, but are the "personal matters" of the individual councillor.

[44] The city also argues that it does not have possession of the records, and that if any records exist, they would be constituency records of the councillor; as such the city has no right to obtain these documents, to regulate their use, content or disposal, or to compel the councillor to produce them to the city.

[45] The city confirms that it has not relied on the records; nor have they been integrated with other city records. The city notes that its customary practice is to deal with councillors' records in accordance with the handbook of practices outlined in the IPC's guide entitled *Working with the Municipal Freedom of Information and Protection of Privacy Act: A Councillor's Guide*.

The affected party's representations

[46] The affected party states that the case law supports a conclusion that the requested records would be in the nature of "personal" or political/constituency records, and therefore not subject to the *Act*. On this basis, the affected party asserts that the city has no right to obtain or control these types of records.

[47] In addition, noting that he had not been assigned any specific responsibilities of the municipality during the relevant time, nor was he an *officer* of the city, the affected party maintains that the city would have no authority over their use or content. He also maintains that the city would have no reason for reliance on the requested records because they would not relate in any way to the core, central, or basic function of the city or to any aspect of the city Council's mandate and functions. For the same reasons, the affected party submits that he could not have been acting as an *agent* of the city in respect of interactions with registered lobbyists.

[48] The affected party indicates that, consistent with the city's customary practice in relation to possession or control of records of this nature, councillors maintain "personal records" separately from city records. The affected party confirms that his constituency records are not integrated with other records held by the city, as they form part of his private records and are maintained separately from the records under the city's custody or control.

[49] The affected party submits that these record-segregation practices reflect the law and the common understanding of both the city and councillors that the *Act* does not apply to the personal records of councillors, including records of meetings with lobbyists.

The appellant's representations

[50] Portions of the appellant's representations are set out above. In addition, the appellant submits that the records would be located in a city hall office on city hall computers and are, therefore, in the city's custody and control. With respect to the indicia of control, the appellant states that the requested records relate to city business. He states:

> The city councillor is paid by civic taxpayers, works in city hall, interacts daily with city staff, often giving them instructions and is, in any reasonable interpretation, part of civic government. The documents I seek relate to city business — exemptions granted to some billboard companies after discussions between some councillors and lobbyists for those companies. The documents, if they exist, are in a city hall office, likely on the hard drive of a computer bought by taxpayers. To call these "private records" is to suggest — conveniently but nonsensically, I submit — that councillors notes are not about city business. In this case, that is exactly what they are about. The city wants to portray official communications about important matters that directly affect taxpayers and life in the city as if they are councillors' private diary entries. …

[51] The appellant acknowledges that some correspondence between councillors and constituents would likely contain "personal information" and be exempt under the *Act*, but states that this exemption does not provide councillors with "blanket immunity" under the *Act*.

[52] The appellant refers to the city's position that the records are constituency records and states:

> These lobbyists do not live in [the affected party's] ward and therefore are not his constituents. He was being lobbied on public interest issues affecting matters in [a named region of Toronto] outside his particular ward, and on which he voted as a member of [that region's] community council. Lobbyists trying to persuade councillors in different parts of the city to grant exemptions to a bylaw, enriching sign companies and leaving previously illegal signs in place, is obviously city business. …
>
> The documents in question obviously relate directly to the councillor's role as a member of council. Why else would lobbyists have communications with a councillor? Their job is to influence public policy to the advantage of their clients. What could possibly be the "personal matters" between lobbyists and a councillor voting on issues that directly impact the fortunes of the lobbyists' clients?

> … Councillors seek and receive information, make decisions and, ultimately vote on city business. These communications are part of that chain.

[53] The appellant also submits that the city does regulate information held by councillors. By way of example, the appellant notes that the city issues reports which may be deemed confidential, with penalties for councillors if they divulge their contents.

[54] The appellant also refers to a city council handbook distributed prior to 2010, which he states advises councillors that records which are not between themselves and their constituents may be subject to the *Act*, and the appellant states that this undermines the city's arguments. The relevant portion of this handbook reads:

> Constituency records generally relate to issues the councillor is dealing with involving one or more members of the public that either live or own a business within the Councillor's ward. …

[55] He argues further that the city uses information held by councillors, as there is a constant stream of information between councillors, staff and external bodies regarding city business. He concludes by stating:

> To grant a blanket exemption on all communications involving councillors, reeves and other elected municipal officials is, in my submission, contrary to the spirit and letter of the *Act* and a dangerous precedent for democracy.
>
> Councillors, in any sane reading of the facts, are involved in city business with individuals who are not their constituents. These communications form part of the chain of decision-making that results in public policy that affects us all. Exemptions for personal information within a released document exist as always.
>
> To allow [the city] to throw a cone of silence over all those communications would be a most unfortunate and disturbing decision by a body with the mandate of the IPC.

Preliminary observations

[56] To begin, I wish to address some of the general arguments and concerns identified by the appellant.

[57] The appellant indicates his general concern that these records ought to be accessible, should not be covered by a "blanket exemption," and that the city should not be able to throw a "cone of silence" over the requested records. He identifies his

concerns about the actions of lobbyists whose role is to try to persuade councillors in different parts of the city to make certain decisions in favour of their clients. He does not believe that lobbyists have a personal interest in protecting their communications as it is "their job to influence public policy to the advantage of their clients." His representations suggest that he believes that lobbying is not necessarily in the public interest, but rather, is a vehicle for advancing private interests.

[58] I note that the Office of the Lobbyist Registrar for the city discusses the issue of lobbying public officials and states:

> Lobbying public office holders is a common and legitimate activity. Registering lobbying activities allows both public office holders and the public to know who is attempting to influence municipal government.

[59] I also note that sections 165 through 169 of *COTA, 2006* authorize the city to monitor lobbying activities by requiring a system of registration and a code of conduct. These sections also authorize the city to appoint a Lobbyist Registrar to perform these functions on behalf of the city. Furthermore, section 169 of *COTA, 2006* states that the registrar may conduct an inquiry into compliance with the system of registration or the code of conduct, and also provides the registrar with the power to conduct an inquiry. This includes the power to examine witnesses and require evidence to be produced.[26]

[60] The appellant also refers to the nature of the records requested which involve the lobbyists in this appeal (namely - granting exemptions to a bylaw, enriching sign companies and leaving previously illegal signs in place). The appellant states that this is "obviously city business."

[61] I accept that, based on the subject matter of the records requested, the content of any records that may exist would relate broadly to matters in the city's mandate. The city clearly has an interest in bylaws that regulate signage in the city. Presumably, the reason the lobbyists may have communicated with the councillor is to express a view to the councillor about this issue. In this respect, it is *arguable* that the requested records relate to a city matter. However, this is not determinative of the issue of whether the records are or are not in the city's custody or control, and I must review the factors set out above to make this determination.

[62] I find support for this approach in the decision of the Supreme Court of Canada, in *National Defence*, referenced below. In that decision, the court stated that the determination of whether the content of a disputed record relates to a "departmental" (or, as in this case, a "city") matter is only the initial step in deciding whether an institution has "control" of a record. In *National Defence,* some of the records at issue related to "departmental" matters as they were about informal meetings between the

[26] See section 169 of *COTA, 2006* and section 33 and 34 of the *Public Inquiries Act, 2009* S.O. 2009, c. 33, s 6.

Minister of National Defence and senior officials about matters within the Minister's responsibilities. Ultimately, some were found to be in the "control" of the government institution and others not, based on an analysis of whether the government institution could reasonably be expected to obtain copies of them on request. Accordingly, I will review the indicia of custody and control to determine this issue.

[63] Lastly, I understand the appellant's interest in accessing records of this nature, and address these more general issues below. However, in this appeal the issue before me is neither whether exemptions apply to the records nor whether the records should be covered by the *Act*; rather, I must properly interpret the *Act* to determine whether the records are actually in the custody or control of the city and therefore subject to the *Act*.

Analysis and findings

[64] I found above that the affected party was not acting as an officer of the city at the time in question and he is not, therefore, an entity to which the *Act* applies. As I noted, however, that does not end the analysis of whether the requested records are subject to the *Act*. In determining this issue I have taken into account the submissions made by all parties and the indicia of custody and or control set out above.

[65] I have concluded, after considering the submissions made by the parties, that the requested records are not in the custody or control of the city.

[66] With respect to the list of factors to consider in determining whether or not a record is in the custody or control of an institution, I accept the position of the city and the affected party that the records were not created by an officer or employee of the city, that the city has not relied on the records, and that the city does not have a statutory power or duty to carry out the activity that resulted in the creation of the record.

[67] In addition, based on the statements made by both the city and the affected party, I am satisfied that any such records have not been provided to or integrated with records held by the city, regardless of whether they may have been received or created by the councillor at his municipal office. I have considered the possibility that some records, if they exist, are located on city property, such as the councillor's City Hall office, or on a computer server provided by the city. Even if some of the records are emails located on computer servers administered by city staff, I accept the submissions of the city and the councillor that such records are not integrated with city records and that the city does not regulate their content, use or disposal.

[68] With respect to the issue of whether the content of any records relates to the institution's mandate and functions, I accept that, in a general sense, records of this nature may relate to issues that fall within the mandate of the city (ie. matters related

to signage). As set out above, based on the subject matter of the records requested, the content of any records that may exist would relate broadly to matters in the city's mandate. The city clearly has an interest in bylaws that regulate signage in the city, and it is arguable that the requested records relate to a "city matter."[27]

[69] I have also considered the appellant's arguments that the lobbyists do not live in the affected party's ward and therefore are not his constituents. Although I have no evidence regarding who the lobbyists represent, and whether these individuals and/or companies live in or own businesses in the councillor's ward, where individuals live or own businesses is not necessarily a relevant factor. Parties can decide to write to one councillor or a number of councillors on matters of interest to them. I am satisfied that the determination of where that party resides does not change the nature of those documents such that they become records in the custody and control of the city. Similarly, whether lobbyists correspond with their own or other councillors does not determine the custody and control issue.

[70] The appellant also argues that the city regulates information held by councillors, and uses the example of the penalties for councillors who divulge the contents of confidential reports provided to them. Clearly, the city can regulate the use of city records provided to councillors. It also has custody or control of records provided to staff from councillors and incorporated into its records. The records at issue in this appeal, however, are different in nature, as they relate to the councillor's role as an individual constituent representative.

[71] Although the appellant did not rely on it, I note that a recent Privacy Investigation[28] issued by this office reviewed the use of email information received by a municipal councillor, and addressed the issue of the custody or control of a particular email in the context of that specific privacy complaint. That complaint involved the City of Toronto and the Toronto Transit Commission (the TTC), and raised a concern that a municipal councillor had improperly used personal information contained in an email sent to him. The email was sent to the municipal councillor, who was also Chair of the TTC, and related to a public transportation service issue.

[72] In that report, investigator Mark Ratner considered a number of factors in deciding whether the city had custody of this record, including some of the authorities set out above. He then found that, for the purpose of the privacy investigation, the email was in the custody of the city, and was not solely or primarily a constituency record. He made that finding for a number of reasons including: 1) that the city had enacted a *Code of Conduct* governing the conduct of members of Council sitting on boards which addressed confidentiality concerns; 2) the record was in the possession of the city on a server maintained by the city; 3) the address to which the record was sent

[27] See also the manner in which the phrase "departmental matter" is referred to in the first part of the *National Defence* test.
[28] MC10-75 and MC11-18.

was not, in itself, determinative of the custody and control issue, and; 4) the record related to a matter that fell within the city's mandate and functions, and was sent to the councillor as the Chair of the TTC, who subsequently passed the record on to TTC staff for processing as a service complaint.

[73] Investigator Ratner also specifically addressed a concern raised by the city that this finding would mean that the city has custody or control of all constituency records. He stated:

> … I want to address the City's concerns that the result of my findings here would mean that the City would have custody or control over all records in the possession of a member of an agency, board, or commission with members appointed by City Council. I do not agree with this conclusion. *The determination of custody or control issues relating to councillors or other members of such agencies, boards or commissions will continue to depend on the substance and subject of the records at issue, in addition to other relevant factors.* [emphasis added]

[74] The circumstances in this appeal are different from those resulting in the privacy complaint, and involve a request for records relating to contacts between lobbyists and a councillor. No issues regarding improper use of confidential information are raised. Furthermore, contacts of this nature relate more directly to constituency matters, unlike public transportation service complaints made to TTC officials. I also note that investigator Ratner specifically found that the complainant in that privacy complaint had contacted the councillor in his capacity as Chair of the TTC, rather than as a constituent representative, and that the e-mail in question was not received by the councillor in relation to his duties as a constituent representative.

[75] The appellant also argues that the records are in the custody of the city because, if they exist, they would be located in a city hall office and likely on the hard drive of a city computer. I address this issue above. I also note that a number of previous orders and decisions have reviewed the issue of whether records stored on institutional computers are in that institution's custody. A recent decision of the Divisional Court[29] reviewed this issue in some detail. Although that case dealt with records which were clearly the "personal records" of an employee of the City of Ottawa, the following quotation is instructive:

> … 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

[29] *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605). This decision discussed the custody and control of both electronic and paper records, and reviewed certain factors that must be considered in conducting such a review.

> 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.

[76] I take a similar approach to responsive records that might exist in this appeal. I find that, because records of this nature relate to the councillor in his role as an individual constituent representative, the city does not control what the councillors create or receive, how or if they store them on the city's server, and what they choose to do with the material after that, including the right to destroy it if they wish. As a result, to the extent that records of this nature may be in the possession of the city because they are located either in hardcopy at the office of the municipal councillor, or electronically on the city's server, I find that such possession amounts to "bare possession" and that the records are not in the custody of the city in these circumstances.

[77] I also find that the city does not have control over records of this nature. I am satisfied that the city has no authority to compel their production or to otherwise regulate the affected party's use and disposal of them. They are the affected party's constituency records, and relate to his role as an individual constituent representative.

[78] I find further support for this finding in the decision of the Supreme Court of Canada in *National Defence*, referred to above. In that decision, the Supreme Court discussed the unique position that ministers hold, which is not dissimilar from the positions held by municipal councillors. The court articulated the following 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.

[79] Applying this two-part test, even if records of this nature could arguable relate to a "city matter" in a broad sense, I have found that the city does not have the authority to regulate the use or content of any such records, and I am satisfied that the city could not reasonably be expected to obtain a copy of such records upon request.[30] The circumstances therefore do not fulfill the second part of the test in *National Defence* for a finding of institutional control, and I am satisfied that the city does not have control of the requested records.

[30] Unlike the situation in Order MO-2750, where the municipality's policies directed that certain invoices be retained by councillors for reimbursable expenses, and where the municipality was entitled to obtain copies of those invoices on request.

[80] Lastly, I wish to address the appellant's general concerns about accountability and transparency.

[81] The parties have described the requested records as "personal" or "constituency" records, but it may also be appropriate to call them "political" records or records relating to the councillor's role as an "elected or constituent representative." In any event, it is consistent with the scheme and purposes of the *Act* that such records are not generally subject to access requests. In *National Defence*, the Supreme Court of Canada addressed similar concerns regarding transparency and accountability of government. The court noted that although ministers are not part of the "government institution," their records may still be subject to the federal *Access to Information Act* if those records are within the government's control. However, the court also stated:

> Conversely, if a document is under the control of the Minister's office and *not* under the control of the related, or any other, government institution, it does not fall within the purview of the *Access to Information Act*. If one views this result as creating a factual 'presumption of inaccessibility', or alternatively an implied exemption for political records, in my respectful view, it is a consequence that inevitably flows from the fact that Ministers' offices are not government institutions within the meaning of the Act…

[82] My finding that the "political" records at issue in this appeal are not in the custody or control of the city and therefore not covered by the *Act* is consistent with the analysis in *National Defence*. The wording and intention of the *Act* is clear. For records to be subject to the *Act*, they must be in the city's custody and control, not simply in the custody or control of an elected representative. Absent special circumstances which would bring these "political" records within the city's custody or control, councillor's records of this nature fall outside the scope of the *Act*, and such a finding does not detract from the principles of the *Act*. As Senior Adjudicator Sherry Liang recently stated when considering the policy approach taken by the court in *National Defence* and a similar request for councillor's records:

> The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministers, do not have responsibility for a government department and are more like MPP's or MP's without a portfolio. A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the *Act*. A finding that the city, as an institution covered by the *Act,* is not synonymous with its elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my

> determinations do not affect other transparency or accountability mechanisms available with respect to those activities.[31]

[83] As a result of the above, I find that the requested records in this appeal are not in the custody or under the control of the city, and are therefore not subject to the *Act*.

ORDER:

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

Original Signed by: December 28, 2012
Frank DeVries
Adjudicator

[31] Order MO-2821.