Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3281

Appeal MA14-378

The Corporation of the City of Oshawa

January 22, 2016

Summary: The City of Oshawa (the city) received a request for access to all communications between a named councillor and an individual who was subsequently retained by the city to investigate alleged wrongdoing on the part of the city and its staff. The city identified one responsive record, an email from the councillor to the investigator, but denied access to it on the basis that it was not in its custody or under its control. The requester appealed. In this order, the adjudicator finds that the record at issue is under the city's control, and orders it to issue an access decision to the appellant.

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

Orders Considered: Orders M-813, MO-2842, MO-2821, and MO-2749.

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 (CanLII), [2011] 2 SCR 306.

OVERVIEW:

[1] At a City of Oshawa (city) council meeting on May 21, 2013, council passed a motion to appoint a named lawyer to investigate allegations of misconduct on the part of city employees and departments in relation to the city's acquisition of a property. A few hours prior to the meeting, a city councillor had emailed the lawyer from the

councillor's own personal email account, asking for the lawyer's feedback on a draft motion appointing him as investigator.

[2] This appeal relates to a subsequent request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "all communication" between the councillor in question and the lawyer who was appointed to investigate (the investigator), between March 1 and October 1, 2013.

[3] The city responded to the request as follows:

> All records responsive to your request, should they exist, would have been generated by the councillor in their personal capacity or as an elected official and not as an officer or employee of the City of Oshawa. Accordingly, access cannot be granted as the records are not within the custody and control of the City.

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

[5] During mediation, the appellant contended that at least one record should exist and is in the custody or under the control of the city. The appellant referred to a public letter from the office of the Ombudsman Ontario, which specifically identifies an email dated May 21, 2013 from the councillor to the investigator. The city, however, maintained its position that the email is not within its custody and control.

[6] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I sought and received representations from the city and the councillor in question as an affected party, followed by the appellant. The city and the councillor then made representations in reply.[1] Representations were shared among parties in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*, with portions of the appellant's and councillor's representations withheld as they met the confidentiality criteria set out in *Practice Direction 7*.

[7] In this order, I find that the record at issue is under the city's control, and I order the city to make an access decision in response to the appellant's request.

RECORD:

[8] The record at issue is an email from the councillor to the investigator dated May

[1] During the reply stage of adjudication (that is, after the deadline for the appellant's representations had passed), the appellant submitted further material in support of his previously filed representations. I reviewed the additional material and determined that it is not relevant to the issue to be decided in this appeal. I have, therefore, not considered that material in my adjudication of this matter.

21, 2013, including an attached draft motion.

ISSUE:

[9] The issue in this appeal is whether the record is "in the custody" or "under the control" of the city under section 4(1) of the *Act*.

DISCUSSION:

[10] 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 . . .

[11] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is either in the custody or under the control of an institution; it need not be both.[2] "Custody" and "control" are not defined terms in the *Act*.

[12] It is important to note that 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.[3] 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). In this appeal, the sole issue is whether the record at issue is in the custody or under the control of the city.

[13] The term "institution" is defined in section 2(1), and includes a municipality. The definition of "institution" does not specifically refer to elected offices such as a municipal councillor.

[14] In *St. Elizabeth Home Society v. Hamilton (City),*[4] the Ontario Superior Court of Justice described the relationship between a municipal council and its elected members as follows:

> It is [a] 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

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[2] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[3] Order PO-2836.
[4] (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

> 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.

[15] In Order M-813, the adjudicator reviewed this area of the law and found that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or
- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.

[16] The courts and this office have taken a broad and liberal approach to the custody or control question.[5]

Factors relevant to determining "custody or control"

[17] This office has developed the following list of factors to consider in determining whether or not a record is in the custody or under the control of an institution.[6] The list is not intended to be exhaustive. Some of the listed factors may not be relevant in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?[7]
- What use did the creator intend to make of the record?[8]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[9]

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[5] *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.
[6] Orders 120, MO-1251, PO-2306 and PO-2683.
[7] Order 120.
[8] Orders 120 and P-239.
[9] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

- Is the activity in question a "core", "central" or "basic" function of the institution?[10]
- Does the content of the record relate to the institution's mandate and functions?[11]
- 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?[12]
- If the institution does have possession of the record, is it more than "bare possession"?[13]
- 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?[14]
- Does the institution have a right to possession of the record?[15]
- Does the institution have the authority to regulate the record's content, use and disposal?[16]
- 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?[17]
- To what extent has the institution relied upon the record?[18]
- How closely is the record integrated with other records held by the institution?[19]

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[10] Order P-912.
[11] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.
[12] Orders 120 and P-239.
[13] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[14] Orders 120 and P-239.
[15] Orders 120 and P-239.
[16] Orders 120 and P-239.
[17] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[18] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[19] Orders 120 and P-239.

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[20]

[18] The following factors may be relevant where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[21]

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record?[22]

- Who paid for the creation of the record?[23]

- What are the circumstances surrounding the creation, use and retention of the record?[24]

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?[25]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?[26] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

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[20] Order MO-1251.
[21] Order PO-2683.
[22] Order M-315.
[23] Order M-506.
[24] Order PO-2386.
[25] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[26] Orders M-165 and MO-2586.

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?[27]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[28]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[29]

[19] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[30]

[20] The test for control has also been recently considered by the Supreme Court of Canada. In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[31] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1) Do the contents of the document relate to a departmental matter?

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

Background facts in this appeal

[21] The background to this matter is set out in a public letter of the provincial Ombudsman, filed as part of the representations in this appeal. The office of the Ombudsman's letter was a result of that office's investigation into allegations that, prior to the May 21, 2013 council meeting referenced above, certain councillors had met in a closed meeting, contrary to the provisions of the *Municipal Act*.

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[27] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).
[28] Order MO-1251.
[29] Order MO-1251.
[30] *City of Ottawa v. Ontario,* cited above.
[31] 2011 SCC 25, [2011] 2 SCR 306 (hereinafter *National Defence*).

[22] The Ombudsman's letter states:

> On May 21, 2013, council passed a resolution in open session to appoint an independent investigator, [the named investigator], to review allegations made about individual employees and city departments by the city's Auditor General in Report AG-13-09, dated May 16, 2013, and to present his findings as soon as possible to council in an open session.
>
> On August 23, 2013, [the named investigator] issued his final report, which was presented to council at its meeting on September 3, 2013. In his report, [the named investigator] made eight recommendations to council. These were voted on separately during the September 3 meeting.
>
> During the September 3 meeting, council passed motions to eliminate the Office of Auditor General and not to renew the contract for the Auditor General, which was due to expire on September 6, 2013.
>
> **Alleged Closed Meetings on or about May 21, 2013**
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> Our Office received a complaint alleging that six to eight members of Council met prior to the May 21, 2013 meeting to discuss the appointment of [the named investigator].
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> Council's public meeting minutes of May 21, 2013 indicate that the resolution to appoint [the named investigator] was introduced by [two named councillors], and ultimately passed by a 5-4 vote. Two council members were absent for the vote.
>
> Our review determined that on May 18, 2013, [three named councillors] met in the Councillor Boardroom at City Hall to discuss allegations made about individual employees and city departments by the city's Auditor General in Report AG-13-09, dated May 16, 2013. They also discussed the need to hire a third party to investigate the allegations.
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> During the discussions, [the named councillor] put forward the name of [the named investigator] because he is a leading expert in the field of municipal law and had previously conducted some work for the city in the past. [The named councillor] informed our Office that given the seriousness of the issue, she contacted [the named investigator] to inquire about his immediate availability to conduct an investigation, subject to council's approval. According to [the named councillor], [the named investigator] agreed and suggested that council consider granting

him the powers of an Integrity Commissioner to assist with his investigation.

On May 20, 2013, [three named councillors] met again to discuss the final wording of the motion they wished to propose to council concerning appointing [the named investigator]. At 2:22 p.m. on May 21, 2013, [the named councillor] emailed [the named investigator], providing him with a draft copy of the proposed motion and requesting that he identify any problems with the language prior to 5:00 p.m., when the meeting was scheduled to begin. [A named councillor] informed our Office that he drafted the motion, but was absent for the May 21, 2013 council meeting, so [two named councillors] introduced the motion.

Other members of Council informed our Office that they were not present on May 18, 2013, with [the three named councillors] and were not contacted by any of these councillors to discuss the motion to appoint [the named investigator]. The Mayor told our Office that, although he was at City Hall on May 18, 2013, and did witness the gathering of the three councillors, he did not participate in any discussion with them in relation to the issue.

In finding that the discussion among the three councillors did not constitute a "meeting" for the purposes of the *Municipal Act*, the office of the Ombudsman stated:

The *Municipal Act, 2001* does not create an absolute prohibition against members of council discussing city business outside chambers. As the Ombudsman has noted in previous reports, it is a healthy thing in a democracy for government officials to share information informally before making policy decisions. To expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.

Our review determined that three of the eleven council members met privately on two occasions prior to the May 21, 2013 meeting, to informally discuss their views on the Auditor's report and the need to retain an independent investigator. There is no evidence to suggest that a quorum of council was present during these discussions. Our review determined that the pre-May 21 private meetings and discussions among three members of council were of an informal nature and did not come within the scope of the *Municipal Act.*

The city's representations

[23] All parties made extensive representations. Although this order does not repeat every one of the parties' arguments, the parties can be assured that I have read and considered their representations in their entirety.

[24] The city advises in its representations that at the open session of the May 21, 2013 city council meeting, which commenced at 6:30 p.m., the following motion was moved:

> That the recommendation contained in Report AG-13-09 [the Auditor General's report] be replaced with the following:
>
> Whereas the City's Auditor General has made serious allegations about both individual employees and City departments in Report AG-13-09; and,
>
> Whereas these concerns include issues from 2007 to 2013; and,
>
> Whereas it is critical that these allegations be immediately investigated;
>
> Therefore be it resolved that a full investigation be undertaken by an independent expert authority with the direction that a comprehensive report be prepared clearly outlining the findings, conclusions and any recommended actions judged necessary in the best interest of the Corporation and the citizens of Oshawa; and,
>
> That the inquiry report be presented as soon as possible in an open session of Council, subject to applicable law, thereby enabling full public disclosure of findings and recommended actions; and,
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> That in view of his recognition as one of the top authorities in municipal law in Canada [the named investigator] be appointed to undertake this investigation; and,
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> That for the purposes of this investigation so authorized by Council, [the named investigator] shall also have the powers and duties of an Integrity Commissioner as set out in Sections 223.3 to 223.5 of the *Municipal Act, 2001,* as amended, with respect to the subject matter of his investigation, including the conduct of employees and officers of the City; and,
>
> That [the named investigator] be provided with absolute co-operation from all staff, including all information, public or confidential, relative to the allegations or other matters, as he deems necessary to complete his inquiry; and,

> That all documents, files, correspondence, voice mail messages, and other records potentially related to this inquiry be preserved; and,
>
> That the costs of the inquiry be charged to the appropriate account, as determined by the Director, Finance Services/Acting Treasurer; and,
>
> That [the named investigator] commence immediately and present a status report on his investigation to City Council no later than the Council meeting of June 25, 2013; and,
>
> That the Minister of Municipal Affairs, and any other authorities [the named investigator] deems appropriate, be advised that this investigation has been committed to and authorized by the Council of the City of Oshawa.

[25] As stated above, city council passed the motion by a 5-4 vote.

[26] The city submits that, following receipt of the appellant's request for information under the *Act*, and as part of its obligations under the *Act,* it requested from the named councillor copies of all records potentially responsive to the request. The named councillor voluntarily provided a hard copy of the May 21, 2013 email to City Clerk Services. The city reviewed the record and determined that it is not subject to section 4(1) of the *Act* because it is not a record "in the custody" or "under the control" of the city.

The city's discussion of the factors relevant to determining custody or control

[27] The city refers to *St. Elizabeth Home Society v. Hamilton (City),*[32] cited above, and submits that the named councillor is not an officer or employee of the city. It submits that while a mayor is an officer of a municipal corporation pursuant to section 226.1 of the *Municipal Act, 2001,* it is only in "unusual circumstances" that a councillor is considered an officer of a municipality, and therefore part of the institution for the purposes of the *Act.*[33] It submits that there are no "unusual circumstances" (such as the named councillor being appointed a commissioner or overseer of any work for the city) that would support viewing the named councillor as an officer of the city. Council had not assigned any specific responsibility to the named councillor and the named councillor had no express authority to act on behalf of the city in this situation.[34]

[28] With respect to the use that the named councillor intended to make of the record, the city states that it can only speculate on its intended use, as the named

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[32] *Supra*.
[33] The city refers to Order MO-2807.
[34] The city refers to Order M0-2821.

councillor generated the record in her capacity as an individual constituent representative and not pursuant to a council direction or an assigned responsibility.

[29] The city asserts that interactions between individual councillors and individual 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. It submits that while the city has the authority, when directed by council, to retain an Integrity Commissioner by virtue of the provisions of the *Municipal Act, 2001*, the named councillor generated the record in her role as an individual constituent representative. The city submits that the record does not relate to the city's mandate and functions but rather to the independent and personal actions of the named councillor in the context of her political or personal activities. Therefore, the city submits, the record does not relate to a "city matter" in the sense referenced by the Supreme Court of Canada in *National Defence.*[35]

[30] As to physical possession of the record, the city acknowledges that the named councillor provided a hard copy of the record to city Clerk Services, but submits that she only did so in response to Clerk Services' request, pursuant to its obligations under the *Act*, for any records potentially responsive to the access request. She did not do with the intent that city Clerk Services or any officer or employee would carry out any activity in relation to the record. As such, the city submits that it has at most bare possession of the record.

[31] The city also submits that it is relevant that the named councillor generated the record from a personal email account and that, but for the appellant's request and the named councillor's subsequent voluntary provision of the record to the city, the city could not have obtained the record. As well, the city submits that it has not relied at any time on the record. The record exists solely in hard copy form in a confidential City Clerk Services file opened exclusively in relation to the appellant's request and has not been integrated with other records held by the city. The city relies on Order MO-2824 where the requester sought access to correspondence and memos relating to two registered lobbyists and a named councillor. The adjudicator in that case found that the records created and maintained by city councillors were not within the city's custody or under its control.

[32] With respect to the test articulated in *National Defence*, [36] the city submits that the facts in this appeal are analogous to those in Order MO-2842, discussed further below, where the adjudicator applied the two-part test and found that the city did not have control over records relating to communications between a named city councillor and outside parties about the possibility of bringing an NFL team to Toronto. The city

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[35] *Supra.*
[36] *Supra.*

also relies on Order MO-2878, in which the adjudicator found that the city did not have control over councillor e-mails relating to the appellant's property because it had no authority to compel their production or to otherwise regulate the councillor's use and disposal of them. The adjudicator found that the records were the councillor's constituency records, and related to his role as an individual constituent representative.

[33] In summary, the city reiterates that the named councillor generated an email from her own personal email account in relation to the ability and availability of the investigator to act as an Integrity Commissioner should the matter be raised at council and should council pass such a direction. The city submits that the named councillor is not an employee or an officer of the city and generated the record without council direction or express authority. It submits that council's direction to engage an Integrity Commissioner does not make the named councillor's initial personal email a record under the custody or control of the city. The council direction to hire the investigator did not retroactively expressly authorize the named councillor to act on behalf of the city.

Representations of the named councillor

[34] The councillor who authored the email was notified of this appeal as an affected party and made representations. The councillor is in agreement with the city's position that the record is not in its custody or control.

[35] The councillor submits that prior to the May 21, 2013 council meeting, during her review of the materials in preparation for the meeting, she reviewed the Auditor General's Report AG-13-09 and noted some allegations relating to other senior city staff and procedures. In light of the seriousness of those allegations, she spoke with two other members of council to verify whether their understanding of the report was similar to hers. She and the other councillors agreed to reread the Auditor General's report and then consider how best to recognize his concerns while ensuring fairness and respect for all staff in the process.

[36] The councillor explains that the three councillors discussed possible ways to investigate the allegations. Based on her personal knowledge of the widely-accepted expertise of a particular municipal law specialist and Integrity Commissioner, she recommended to her two colleagues that she contact that lawyer to explore whether the allegations would be something he would consider examining and, considering the urgency of the investigation, whether he could be available immediately.

[37] The councillor submits that her email to the lawyer was sent from her personal iPad, not her city computer, and was not sent using the city's server. She submits that she is known for her full preparation for meetings and was working independently, with no authorization or consent from council.

[38] The councillor also submits that once council approved the motion to retain the lawyer as an investigator, the City Clerk was made responsible for all contact with him. The councillor did not see him or speak to him during the investigation, and only made contact with him at the two open council meetings at which he presented his reports.

The appellant's representations

[39] The appellant submits that, contrary to the city's position, councillors are "employees" of the city within the definition in the *Employment Standards Act* and pursuant to by-law 39-2005, which governs remuneration of the city's councillors.

[40] The appellant further submits that following the release of the investigator's report, members of council received a copy of a lengthy rebuttal report issued by the Auditor General. Although the city did not make the rebuttal report available to the public, the appellant's understanding is that its contents raise serious questions about the investigator's independence, objectivity and competence. The appellant submits that the city had an obligation at that point to explore the nature of the investigator's engagement to ensure that his independence and objectivity had not been compromised by a personal relationship with the councillor or by virtue of being a partner in a law firm that had been providing significant services to the city for a long period of time.

[41] The appellant submits that the named councillor's communication with the investigator was a core, central, or basic function of the city in this case, as she communicated on behalf of a group of senior councillors including the Deputy Mayor, as the Mayor appeared to have a conflict. He submits that the matters discussed between the named councillor and the investigator were central to core functions of the city as they related to a significant acquisition of real estate for $5.9 million when the Auditor General had apparently determined that the property was worth significantly less. The appellant submits that it was the Auditor General's report which prompted the named councillor's email to the investigator, and that the details of that email may have had a significant impact on the purpose and outcome of the investigation that followed. The appellant submits that the record is an integral part of the hiring of the investigator to investigate the Auditor General's allegations, and that his hiring was approved by city council and authorized through a city bylaw.

[42] The appellant submits that rather than acting on her own in contacting the investigator, the named councillor was acting with the agreement or encouragement of the other two councillors. He submits that in essence, the three councillors were acting as a *de facto* executive of council officers, and that this is an "unusual circumstance" supporting the view that the named councillor was acting as an officer of the city in this instance. He submits that the named councillor commands a great deal of respect from less experienced councillors, and that this influence is another element of the unusual circumstances supporting the view that she was acting as an officer of the city.

[43] The appellant also notes that the email was not between a councillor and a city resident. Rather, he submits that the email was directly related to the city business, as a response to the Auditor General's allegations contained in report AG-13-09. He submits that the councillor enlisted the professional expertise and opinion of the investigator to assist with the wording of a motion that was intended to bring about his engagement by the city.

[44] The appellant further submits that even if the named councillor's iPad was not connected for use on city servers, she should have known that she was conducting city business on her iPad.

[45] The appellant submits that the motion that was passed by council on May 21, 2013 states that all documents, files, correspondence, voice mail messages, and other records potentially related to the inquiry are to be preserved. He submits that the councillor's email record is a "document potentially related to this inquiry" and is, therefore, now under the control of the city.

[46] With respect to the Supreme Court of Canada's two-part test for control in *National Defence*, the appellant submits:

1. The record relates to a departmental matter, namely it relates to the Auditor General's report, AG 13-09, and the allegations contained within, and the councillor forwarded the draft motion for review by the investigator, a motion which ultimately secured his engagement by the city.

2. The institution can reasonably expect to obtain a copy of the record in question upon request, as the named councillor has already provided the record upon request of the city's Clerk Services department. The named councillor's voluntary release of the document in question shows that the city can expect, and has obtained the record through a simple request.

[47] Thus, the appellant submits, the two-part test for control is met.

The city's reply representations

[48] In reply, the city reiterated its position as follows:

> 1. The named councillor, working without express or implied direction or authority from Oshawa city council, emailed the lawyer to canvas his ability and willingness to act as an Integrity Commissioner in relation to allegations and concerns raised in Report AG-13-09, but only in the event that Oshawa city council authorized same.
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> 2. The councillor generated the email on her own device and did not

use the city's computer server.

3. The councillor provided a hard copy of the record to city Clerk Services only in response to the city's request pursuant to the *Act*, and but for her voluntary provision of the record, the city could not statutorily or contractually compel the named councillor to produce the record.

4. The councillor, who is neither an employee nor an officer of the city, created a record, the use or destruction of which the city does not govern, without express or implied authority or direction from City Council, on her own device not using the city's computer server. The city's bare possession of the record is not determinative of the control issue.

Reply representations of the named councillor

[49] The councillor takes issue with the appellant's allegations about the "Deputy Mayor". She submits that the title was rotated alphabetically, on a quarterly cycle, through all members of council during their term of office. She submits that this simply means that one councillor is designated to stand in for the Mayor if he is unable to fulfill his duties. She submits that none of the three councillors was representing the Mayor, and denies the appellant's assertion that the Mayor had a conflict on the Auditor General's report.

[50] The councillor also denies that she had a "personal relationship" with the investigator, noting that she had not seen or talked to him for nine or ten years. She submits that city council debated the appointment at great length, and then made the democratic decision to proceed.

[51] In summary, the named councillor submits:

- Councillors are neither officers nor employees of the city;
- She created the record for her personal use in preparation for a council meeting;
- Her actions were not related to the city's power or duty, as she was simply fulfilling her personal responsibility for preparing for a meeting;
- The institution does not have a right of possession to the record;
- The content of the record does not relate to the institution's mandate and functions;

- The institution does not have the authority to regulate the record's use or to dispose of it;
- The record has not been relied upon by the institution;
- The record is not integrated with other records held by the institution.

Analysis and findings

[52] As noted above, the adjudicator in Order M-813 found that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

> • Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the institution; or
>
> • Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.

[53] I begin, therefore, by considering whether councillor was acting as an officer or employee of the city when she created the record.

Was the record created by an officer or employee of the institution?

[54] I find that the named councillor is not an employee of the city. The court stated in *St. Elizabeth Home Society v. Hamilton (City)*[37] that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. The appellant appears to assume that because city councillors receive their remuneration from the city, they are employees of the city. However, in law, there are many working relationships other than that of employer and employee.

[55] In Order M-813, the adjudicator concluded that only in "unusual circumstances" is a councillor considered an officer of a municipality and therefore part of the institution for the purposes of the *Act*. I agree with the city's submission that there are no "unusual circumstances" present in this appeal such that the councillor should be considered an officer of the city. I do not have any evidence before me that council had assigned any specific responsibility to the named councillor to act on behalf of the city in exploring the availability of the investigator to undertake an investigation on behalf of the city.

[56] I reject the appellant's submission that the three councillors were acting as a *de*

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[37] *Supra*.

facto executive of council "officers", and that this is an unusual circumstance supporting the view that the named councillor was acting as an officer of the city in this instance. The fact that the named councillor is respected by less experienced councillors may or may not have influenced the other two councillors to agree that contacting the investigator was an appropriate action to take, but does not change the fact that she was not acting on behalf of the city or with the city's express authority. The Ombudsman found that the three councillors informally discussed their views on the Auditor General's report and the need to retain an independent investigator, and that no quorum of council was present during these discussions. The evidence before me is consistent with those conclusions. I also reject the appellant's arguments that the presence of the Deputy Mayor during the discussions constitutes an unusual circumstance supporting the view that the named councillor was acting as an officer of the city.

[57] In support of his argument that the three councillors were acting as a *de facto* "executive", the appellant has submitted evidence of the voting patterns of the three councillors. However, I do not accept that the fact that these councillors may have tended to vote alike constitutes an "unusual circumstance" such that the named councillor should be considered an officer of the city.

[58] Since the councillor was not acting as an employee or officer of the city at the time in question, she is not, in the circumstances, considered to be part of the city. However, that does not end the analysis of whether the record at issue is in the control of the city and therefore subject to the *Act*. I must now consider whether the record is in the custody or under the control of the city on the basis of established principles.

Is the record in the custody or under the control of the municipality on the basis of established principles?

Previous orders applying the factors in determining custody and control of councillor communications

[59] Several previous orders of this office, some of which the city relies on, have considered the factors set out above and have found that city councillors' communications were not in the custody or under the control of the city in the circumstances of those appeals.[38]

[60] In Order MO-2821, the question was whether communications between City of Toronto councillors about cycling issues were under the control of the city. The adjudicator found that, although it was arguable that the records met the first part of the two-part test articulated by the Supreme Court of Canada, because they related to

[38] See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

a "city matter", the second part of the test was not satisfied. In finding that the city could not reasonably be expected to obtain the records on request, the adjudicator relied on the following factors:

- although the councillors were members of a city committee, the records do not relate to the discharge of any special authority to act on behalf of the city with respect to the work of the committee or otherwise;

- the records were not forwarded to city staff and were not integrated with city records; and

- the city did not assert any authority over the content, use or disposal of the records.

[61] The adjudicator also commented as follows on the nature of the records that are held by municipal councillors:

> Before concluding, I wish to address the question of "constituency" records. The parties made reference to this description of councillor records, as prior decisions of this office have found councillors' constituency records to be excluded from the *Act*. One of the factors the appellant relied on in her Appeal Form is that the records do not involve any individual constituent. She suggests, therefore, that the records must therefore be "city records."
>
> Although the distinction between "constituency records" and "city records" is one framework for determining custody or control issues, it does not fully address the activities of municipal councillors as elected representatives or, as described in *St. Elizabeth Home Society*, above, "legislative officers." Records held by councillors may well include "constituency records" in the sense of having to do with an issue relating to a constituent. But they may also include communications with persons or organizations, including other councillors, about matters that do not relate specifically to issues in a councillor's ward and that arise more generally out of a councillor's activities as an elected representative.
>
> The councillors have described such records as "personal" records but it may also be appropriate to call them "political" records. In any event, it is consistent with the scheme and purposes of the *Act*, and its provincial equivalent, that such records are not generally subject to access requests. In *National Defence*, the Court stated that the "policy rationale for excluding the Minister's office altogether from the definition of "government institution" can be found in the need for a private space to allow for the full and frank discussion of issues" and agreed with the

> submission that "[i]t is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records" that Parliament sought to protect by not extending the right of access to the Minister's office.
>
> 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.

[62] In Order MO-2842, the appellant requested records relating to communications between a named city councillor and outside parties about the possibility of bringing an NFL team to Toronto. The city took the position that any records in the possession of the named councillor that may exist are not within the city's custody or control. Applying the test in *National Defence*, the adjudicator in that case found that even if the records could arguably relate to a "departmental or city matter", the city did not have the authority to regulate their use or content and could not reasonably be expected to obtain a copy of them upon request. The adjudicator found that the records related to the councillor's role as an individual constituent representative and were in the nature of "political" rather than "city" records.

[63] In Order MO-2749, the adjudicator stated:

> Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. This office has recognized that municipal councillors perform both "constituency" functions, and official responsibilities as members of municipal council. When performing constituency work, past decisions have established that councillors are not "officers" and, accordingly, records related to their constituency work is not in the custody or control of an institution. However, records that arise out of the councillor's official responsibilities as a member of council or some aspect of council's mandate would be subject to the *Act*.

[64] As a result, the adjudicator found that email correspondence with a named city councillor about a laneway closing was in the custody or under the control of the city.

Factors relevant to determining "custody or control" / Two-part test in National Defence

[65] I will now consider the factors relevant to determining "custody or control". I will do so in the context of the two-part test of the Supreme Court of Canada, referred to by both the city and the appellant. As noted above, in *National Defence*,[39] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

> (1) Do the contents of the document relate to a departmental matter?
>
> (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[66] Before continuing, I acknowledge that the city has physical possession of the record. However, I accept the city's submission that this is only because it asked the councillor for it to prepare its response to the appellant's access request under the *Act*. For the purposes of my analysis, therefore, I will assume that the city's current physical possession of the record amounts to "bare possession" only.

[67] In its discussion of the concept of "control" for the purposes of freedom of information legislation, the majority in *National Defence* stated:

> As "control" is not a defined term in the *Act*, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "de jure" as well as "de facto" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The Canadian Oxford Dictionary defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "de facto" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the

[39] *Supra*.

> control of a government institution for the purposes of disclosure under the *Act*.[40]

[68] The Court also stated:

> Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* … The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.[41]

[69] I now turn to each element of the two-part test.

1) Do the contents of the record relate to a city matter?

[70] The record's content relates to the hiring of an investigator to review allegations made about individual city employees and city departments by the city's Auditor General in Report AG-13-09. In its representations, the city submits that it has the authority, when directed by council, to retain an investigator. I agree. I also agree with the appellant that the creation of the record at issue played an integral part in council's decision to retain the investigator in this case.

[71] I find, therefore, that the record relates to a city matter.

2) Could the city reasonably expect to obtain a copy of the document upon request?

[72] For the reasons below, I find that the city could reasonably expect to obtain a copy of the record upon request.

[73] I place considerable weight on the circumstances surrounding the creation and

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[40] *Ibid* at para 48.
[41] *Ibid* at para 56.

use of the record. According to the Ombudsman's letter, which is consistent with the representations of the city and those of the councillor, the latter emailed the investigator to provide him with the opportunity to identify any problems with the language in a draft copy of the proposed motion. The councillor submits that she emailed the investigator as part of her preparation for a council meeting. While I accept that this is the case, I also note that this part of her preparation involved settling on the terms of the investigator's potential engagement by the city. The motion that council passed, and which is reproduced above, not only proposes hiring an investigator, but names the investigator and contains detail about the scope of his work, and the timelines for same.

[74] The city submits that the record does not relate to its mandate and functions but rather to the independent and personal actions of the councillor in the context of her personal or political activities. It submits that the councillor's interaction with the investigator was a personal matter, and not a core function of the city. I disagree. The record contains, in effect, negotiations between the councillor and the investigator relating to the city's potential hiring of him. This relates directly to the city's mandate and functions.

[75] The city argues that the named councillor did not have the authority to bind the institution when she emailed the investigator for his feedback on the draft motion. As noted in the Ombudsman's report, the pre-May 21 private meetings and discussions among three members of council were of an informal nature and did not come within the scope of the *Municipal Act*. I agree that the councillor did not have council approval to hire the investigator. However, this alone is not determinative. The councillor's email to the investigator, sent mere hours before the council meeting at which the motion to retain him was passed, was an integral part of the hiring of the investigator.

[76] With respect to the use that the named councillor intended to make of the record, the city states that it can only speculate on the intended use as the named councillor generated the record in her capacity as an individual "constituent representative" and not pursuant to a council direction or assigned responsibility. However, it is clear from the uncontroverted background facts that the councillor used the record in order to confirm the investigator's agreement to the terms of his potential engagement by the city.

[77] I have also considered the extent to which the city has relied upon the record. The councillor's email asked for the investigator's feedback on a draft motion. The final motion, as reproduced above, contains detailed information about the terms of the investigator's engagement by the city. In other words, the councillor laid the groundwork for the city's decision to engage the investigator and the terms upon which it did so. The city submits that it has not relied on the record. While I accept the city's statement that the record has not been integrated with other records held by it, I find that its creation played a significant role in council's decision to hire the investigator in

the vote that took place later that day. In this respect, the city relied on the record in order to secure the engagement of the investigator, on the terms outlined in the final motion.

[78] Given these circumstances, I find that the city could reasonably expect to obtain a copy of the record from the councillor upon request. I find it unlikely that the councillor would refuse to provide it, given its particularly close nexus to council's decision to hire the investigator and the terms upon which he was hired.

[79] I do not have any specific information before me about the city's authority to regulate the record's content, use and disposal. However, in *National Defence*, the Supreme Court found that in order to create a meaningful right of access to government information, "control" should be given a broad and liberal interpretation. The Court further noted that, had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not.

[80] I find that the same reasoning applies in the context of the *Act*. While the power to dispose of the record at issue would be one factor tending to establish institutional control over the record, the absence of such a power does not automatically lead to a finding that the institution could not reasonably expect to obtain a copy of it. As noted by the Supreme Court, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include not only the legal relationship between the government institution and the record holder but also the substantive content of the record and the circumstances in which it was created. I find the latter factors of utmost importance in this appeal. The Supreme Court states that "control" means that a senior official with the government institution has some power of direction or command over a document, even if it is only on a partial basis, a transient basis, or a *de facto* basis. Given the content of the record and the circumstances under which it was created, I find that a senior official of the city would assert control over the record if, for example, there were ever any question about the negotiations that led to the investigator's retainer, and that the official could reasonably expect the councillor to provide the record to the city, if requested to do so.

[81] The city argues that it could not legally compel the councillor to provide the record. The parties did not refer me to any contracts, codes of conduct or policies that expressly or by implication give the city the legal right to possess or otherwise control the record, which was sent from the councillor's personal iPad. The Supreme Court has stated, however, that *de facto* (as opposed to *de jure*) control is recognized as control. Although a councillor is not considered to be part of the city for the purposes of the *Act*, neither is a councillor a stranger to the city; both are governed by the *Municipal Act*. Given this fact and particularly the very close nexus between the email and the terms upon which the city hired the investigator, I find that a senior city official could

reasonably expect the councillor to voluntarily provide the record to the city.

[82] I acknowledge that, as discussed above, many previous orders of this office have found that records created by city councillors are not in the control of the city. However, determining custody and control is a contextual exercise. None of the orders involved facts similar to those before me. Perhaps the closest parallels can be drawn between the facts in this appeal and those in Order MO-2842. Like the record in this appeal, the records in that appeal concerned councillor communications with a third party who was not a constituent. Those communications were for the purpose of exploring the possibility of bringing an NFL team to Toronto. The adjudicator in that case found that the records related to the councillor's role as an individual constituent representative and were in the nature of "political" rather than "city" records.

[83] However, there are important differences between the facts in Order MO-2842 and those in the present appeal. In Order MO-2842, the records (if they existed) related to a city matter that was speculative or hypothetical. In the present appeal, while the hiring of the investigator was contingent on a vote of council members, that vote was imminent. Moreover, the councillor's email played a crucial role in the negotiations resulting in the hiring of the investigator.

[84] Another significant difference, in my view, is the fact that, unlike in Order MO-2842, the record in this appeal relates to an agreement that materialized. Mere hours after the councillor sent the email, council made the decision to hire the investigator. While my conclusion may have been different had the motion not passed, that fact is that it did pass. In my view, this is a significant factor supporting a conclusion that the record, containing the councillor's negotiations with the investigator, is a "city" record, not a "political" record.

[85] I have not placed any weight on the appellant's argument that the record is a "document potentially related to this inquiry" within the meaning of the language in the motion. In my view, this language refers to documents relating to the events to be investigated, not documents relating to the investigation itself.

[86] I conclude, therefore, that the city could reasonably expect to obtain a copy of the record upon request. Therefore, the two-part test in *National Defence* is met, and the record at issue is a record under the control of the city within the meaning of section 4(1) of the *Act*.

[87] Finally, I reach the same conclusion if I consider the list of factors developed by this office, outside of the two-part test articulated in *National Defence*. Weighing the above factors contextually in light of the purpose of the *Act*, and for the above reasons, I find that the record is under the city's control.

ORDER:

1. I find that the record at issue is under the city's control within the meaning of section 4(1) of the *Act*.

2. I order the city to issue a decision letter to the appellant regarding access to the record at issue in accordance with the provisions of the *Act*, treating the date of this Order as the date of the request.

Original Signed by: January 22, 2016

Gillian Shaw
Adjudicator