Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3680

Appeal MA17-414

The Corporation of the Municipality of Brighton

October 25, 2018

Summary: The Corporation of the Municipality of Brighton (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all of a councillor's emails between January 1 and March 31, 2017 in which the councillor was alleged to have conducted "municipal business." The municipality denied access on the grounds that the request was vague and that, in any event, it did not have custody or control over the requested emails. The requester appealed. The adjudicator upholds the municipality's decision and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders M-813, MO-2821, MO-3471 and MO-3608.

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] 2 SCR 306.

OVERVIEW:

[1] The appellant submitted a proposal for funding of a service contract to the Municipality of Brighton (the municipality). The proposal was opposed by certain councillors and ultimately rejected by a council vote. Following the vote, the appellant made a request to the municipality under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an individual councillor's emails during

the period preceding the vote.

[2] The request was for:

> Copies of any and all emails between Jan 1 – March 31, 2017 where [named councillor] conducted municipal business regarding [the appellant], economic development or tourism either sent or received through any and all of the email addresses used by [named councillor].

[3] The municipality issued a decision denying access for two reasons. First, the municipality wrote that the request was vague, because it failed to properly identify emails which could be viewed as records belonging to the municipality. Second, the municipality relied on section 4(1) of the *Act* to say that, in any event, the requested records were not within its custody or under its control and could therefore not be produced.

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

[5] Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry. During the inquiry, representations from the requester, the municipality and the named councillor were received and shared in accordance with *Practice Direction 7*.

[6] The only issue in this appeal is whether the requested records are in the custody or under the control of the municipality under section 4(1) of the *Act*.

[7] For the reasons that follow, I find that the requested records are not within the custody or control of the municipality. I uphold the municipality's decision and dismiss the appeal.

DISCUSSION:

[8] Section 4(1) of the *Act* reads, in part, that:

> Every person has a right of access to a record or part of a record in the custody or under the control of an institution unless…

[9] 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.[1]

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

[10] 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 in 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.[3]

[11] The courts and this office have applied a broad and liberal approach to the custody or control question.[4] For records to be in the custody or under the control of an institution, there must be some right to deal with the records and some responsibility for their care and protection.[5]

Factors relevant to determining "custody or control"

[12] This office has developed a 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, and while some of the listed factors may not apply in a specific case, 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]
- 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]

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[2] Order PO-2836
[3] These exemptions are found at sections 6 through 15, and section 38 of the *Act*.
[4] *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.
[5] Orders P-239 and MO-2993.
[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.
[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.

- 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]

- 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]

[13] The following factors may apply 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*?

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[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.
[20] Order MO-1251.
[21] Order PO-2683.

- 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?

- 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]

[14] 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

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[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.
[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.

legislation.[30]

[15] 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?

Representations

The appellant's representations

[16] The appellant made a proposal to the municipality for funding of a service contract to provide local tourism and economic development services. It submits that the proposal was initially approved at a regular council meeting, but then voted down at a budget meeting after the named councillor allegedly disseminated misinformation, mischaracterizing the request as a grant rather than a service contract. It says that this misinformation was also then disseminated by a constituent acting on behalf of a community association, and was shared with another councillor who then changed his vote to vote against the service contract.

[17] The appellant submits that unusual circumstances exist in this case because its proposal was initially approved, but later voted down.[32] This, it says, bears further investigation and that, in an era of "fake news," disclosure of the councillor's emails is necessary to both expose the degree of alleged misinformation disseminated and to maintain the transparency of municipal processes.

[18] On the question of custody or control, the appellant submits that a councillor should not be permitted to hide behind a personal email account when conducting council business. The balance of the appellant's representations focus on the reasons that the disclosure of the councillor's emails would, in its view, be of compelling public interest.

The municipality's representations

[19] The municipality submits that the appellant's request is too vague to be satisfied: that the records being sought are incapable of being classified as records of municipal

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[30] *City of Ottawa v. Ontario,* cited above.
[31] 2011 SCC 25, [2011] 2 SCR 306.
[32] Other material provided by the appellant suggests that the service contract was tentatively and conditionally included in the budget.

business because a municipal councillor does not have the authority to conduct municipal business on his or her own. It submits that the very nature of the request for emails in which the councillor conducted municipal business is an impossibility unless the individual councillor was delegated authority for the municipality by council. In the absence of such delegation, no one member of council is capable of conducting municipal business by virtue of the operation of the *Municipal Act*, 2001.

[20] Relying on provisions of the *Municipal Act*, 2001 and the *Municipal Elections Act*, 1996, the municipality submits that a municipal employee is not eligible to be elected, or hold office, as a member of council and that a councillor cannot, by statute, be an employee of the municipality.[33] It says that no records exist whereby the named councillor could have conducted municipal business and that any argument that the record is in the custody or under the control of the municipality is greatly diminished, given the fact that elected councillors are not employees of the municipality.

[21] The municipality also submits that while a municipality may have a contractual or statutory right to regulate the emails of its employees, such a right does not extend to unelected officials who are not employees of the municipal corporation.

[22] Finally, the municipality denies that, if they exist, the requested records are in its custody or under its control. It submits that it at no time obtained or expected to obtain a copy of the councillor's emails from his personal account and that the mere fact that some emails might be located on an email server under the care, custody and control of the municipality does not render the records capable of being produced in accordance with the specific language contained in the access request.

The councillor's representations

[23] The councillor submits that he uses two email accounts: a personal one ending in @hotmail.com, and another that he calls his council account, ending in @brighton.ca. He submits that he uses both to conduct council, not municipal, business. Specifically, he submits that he uses his personal account for day-to-day personal business, but also to receive and respond to questions raised by constituents, to inform constituents of his personal opinions on various issues that come before council, and to exchange information with other councillors.

[24] He uses his council account exclusively for council business, which, in addition to the exchange of information with constituents and councillors noted above, includes receiving and responding to questions and issues raised by municipal staff.

[25] In his representations, the councillor denies that he acted as an officer or employee of the municipality or that he was tasked with any delegated authority by the municipality to conduct municipal business.

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[33] Sections 5 and 258(1)(i) of the *Municipal Act*, 2001, S.O. 2001, c. 25.

[26] Finally, he submits that during the period preceding the budget vote, as with any contentious issue that comes before council, he received emails from constituents expressing their personal concerns and opinions and that, as an elected official, he considers those concerns in making decisions on issues that come before council. He denies that the municipality at any time relied on emails that he exchanged using either his personal or council accounts to conduct any municipal business.

Analysis and Findings

[27] Because the appellant's main argument is that there is a compelling public interest in disclosing the councillor's emails, I will address this issue first, on a preliminary basis. Specifically, the appellant submits that there is a compelling public interest in disclosure of the emails because the provision of tourism and economic services and municipal transparency are of interest to the community. Further, to disclose the emails would allow the appellant to investigate and understand the degree of alleged misinformation disseminated by the councillor that resulted in the negative budget vote. The evidence of misinformation before me is limited to the allegation that the councillor and the constituent acting on behalf of a community association mischaracterized the proposal as a grant rather than a service contract.

[28] The public interest override in section 16 of the *Act* allows for disclosure of information that would otherwise be exempt under certain sections of the *Act* where there is a compelling public interest in disclosure of that information. It does not apply to section 4(1), which, as noted above, deals with the custody or control of records. Whether or not there is a public interest in disclosure of records is irrelevant to the question of whether an institution has custody or control over records under section 4(1) of the *Act*.

[29] I now turn to the question of custody or control. For the following reasons I find that the municipality does not have custody or control of the requested records. It is clear from the appellant's representations that the emails it seeks are those relating to the appellant and the service contract proposal in a three-month period leading up to the budget vote.

[30] The terms "custody" and "control" are not defined in the *Act*. The term "institution" is defined in section 2(1), and includes a municipality. It does not specifically refer to elected offices, such as that of a municipal councillor.

[31] In *St. Elizabeth Home Society* v. *Hamilton (City)*,[34] the Ontario Superior Court of Justice considered the relationship between a municipal council and its elected members. The court held that records of city councillors are not generally considered to be in the custody or under the control of the city because an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. The court wrote as follows:

[34] (2005), 148 AW.C.S. (3d) 497 (Ont. Sup. Ct.)

> It is a long-standing principle of municipal law that an elected member of 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.

[32] In Order M-813, the adjudicator reviewed this area of 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.

[33] By contrast, records of municipal officers or employees are generally considered to be in the custody or control of the municipality, unless there are factors to support a finding that they are not.[35]

[34] Unless a councillor is also an officer of the municipality,[36] this office has determined in many cases that councillors' communications are not in the custody or under the control of the municipality for the purposes of the *Act*. These findings are based on distinguishing official records of a municipality from councillors' constituent, personal or political records. In Order MO-3471, the adjudicator identified the approach taken by this office to records held by municipal councillors as follows:

> Based on consideration of [the above-noted] factors, several previous orders of this office have found that the city councillors' communications were not in the custody or under the control of the city in the circumstances of those appeals.[37] For example, in Order MO-2821, communications between City of Toronto councillors about cycling issues were found not to be under the control of the city. The adjudicator in that appeal distinguished between city records, on one hand (which would be

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

[36] Even if an elected official is also an officer of a municipality, their constituent, personal or political records have also been found to be outside of the custody or control of the municipality and not subject to the *Act*. See, for example, Order MO-2993.

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

subject to the *Act*), and personal or political records, on the other (which would not), and found the records at issue to fall into the latter category.

[35] The adjudicator in Order MO-2821 made the following findings regarding the nature of records held by municipal councillors:

> 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.
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> 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 place 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.
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> 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 findings do not affect other transparency or accountability mechanisms available with respect to those activities.

[36] I find no reason in this case to depart from the reasoning in previous orders of this office and described above. With its representations, the appellant included copies of some of the councillor's emails before the budget vote. For example, after the

appellant submitted its service contract proposal, the councillor solicited information from the appellant regarding its previous year's budget, salaries paid to its staff, and the amount of funding it received from another township. The appellant also included communication from a constituent acting on behalf of a community organization expressing concerns about the appellant's proposal, as well as an email from the councillor explaining his inquiries as an information-gathering exercise prior to casting his vote.

[37] In my view, the activity described by the appellant and in the materials provided falls within the political or constituency context. In attempting to inform himself about the nature of the appellant's operations and spending, by taking into account constituent concerns, and by exchanging information with a fellow councillor prior to casting a vote on a council meeting agenda item, the councillor was engaged in political or constituency activity typically expected of a councillor.

[38] There is no evidence before me that he was acting in any decision-making capacity on behalf of the corporation of the municipality as far as the budget vote was concerned, or that he had any more authority than that ordinarily associated with his duties as an elected official.

[39] Although his emails might relate to municipal business in a broad sense, the issue, for the purpose of determining custody or control, is not the subject matter of the emails, but whether the communication represents the exercise of a decision-making or executive function by the councillor on behalf of the municipality.[38] I find that, in this case, it did not.

[40] The appellant also submits that "[e]fforts made by Councillors to influence other Councillors regarding an upcoming vote are of interest to the community." In Order MO-3608, the adjudicator considered a similar issue when she dealt with a request for emails exchanged between a councillor and residents relating to the County of Lanark's roadside spraying program, a highly controversial practice in parts of that county. On the question of political or constituency records, she wrote:

> In terms of the use to which the emails were put, the appellant submits that the councillor used them to voice opposition to a proposed county program and to sway the council vote. However, this submission does not necessarily favour a finding that this is the type of record over which the county has custody or control. Emailed submissions to a councillor which are intended to influence the councillor's vote on an upcoming matter are, in my view, the sort of constituency or political record discussed in Order MO-2821, cited above, which is distinct from a record of the county as an institution.

[41] I agree with and adopt this reasoning to find that communications used to

[38] Order MO-3608.

possibly sway a council vote, as the appellant alleges happened in this case, are political records created as part of the exercise of the political process and not records of the corporation of the municipality used to conduct municipal business.

[42] Another factor considered by this office is whether the institution has possession of the records. I have no evidence to support a finding that the personal account was an account that would be located on the municipality's servers. However, and with respect to the council account in particular, the fact that the emails are or are not located on the municipality's servers is not determinative of whether the municipality has custody or control of the emails.[39] On the facts of this appeal, what is more significant is my finding that the emails were not generated by the councillor in the conduct of municipal business, but rather in his capacity as an elected official discharging his council duties.

[43] In conclusion, I find that the evidence does not establish that the emails, if they exist, would relate to the discharge by the councillor of any special authority to act on behalf of the municipality. In my view, the emails sought by the appellant in this appeal were created by an elected official while gathering information, communicating with constituents and other councillors, prior to casting a vote on an issue before council, and as a result, they fall within the realm of constituency or political records. I therefore find that the requested records are not in the custody or under the control of the municipality and dismiss this appeal.

ORDER:

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

Original Signed By: October 25, 2018
Jessica Kowalski
Adjudicator

[39] Orders MO-3281 and MO-3608.