Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4560

Appeal MA21-00010

The Corporation of the City of Kingston

August 28, 2024

Summary: The city received a request for electronic communications of elected officials and city staff during two city meetings. The city claimed that portions of the communications are subject to solicitor-client privilege (section 12) and should not be disclosed. The city also claimed that it did not have custody or control over certain records. In this order, the adjudicator upholds the city's claim that portions of the records are subject to solicitor-client privilege. He also finds that the city has custody or control over communications between city staff but not over communications between elected officials, including the mayor. The adjudicator upholds the city's decision in part and orders it to issue a decision regarding access to communications between city staff.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 4(1) and 12, *Municipal Act, 2001*, SO 2001, c 25, section 226.1; *Planning Act*, RSO 1990, c P.13; *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, section 8.

Orders Considered: Orders M-813 and MO-2821.

Cases Considered: *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23, [2010] 1 S.C.R. 815; *St. Elizabeth Home Society v. Hamilton (City)*, 2005 canlii 46411 (Ont. Sup. Ct.); *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835; *Hawkesbury (Town of) (Re)*, 2021 ONOMBUD 7.

BACKGROUND:

[1] During the COVID-19 pandemic, city council and committee meetings were held virtually and during these meetings participants used electronic communications, including Microsoft Outlook and Microsoft Teams (Teams) messages, to communicate with each other.

[2] This appeal involves a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to records of electronic exchanges between and amongst identified elected officials and city staff during two separate city meetings. One was a meeting of the planning committee and the other a city council meeting. Recordings of the meetings were posted and accessible for viewing on YouTube.

[3] In response, the city granted partial access to responsive records. In its first access decision, the city took the position that withheld information from certain exchanges amongst city staff was exempt under section 12 (solicitor-client privilege) of the *Act* or excluded from the scope of the *Act* under the exclusion at section 52(3)3 (labour relations and employment-related matters). The city also took the position that it did not have custody of or control over other records under section 4(1) of the *Act*. These were certain exchanges between city staff and all communications between councillors or from the mayor at both meetings.

[4] The requester (now the appellant) appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt to resolve the appeal.

[5] During mediation the appellant agreed to remove certain records from the scope of the appeal. This included one of the records withheld by the city under section 12 as well as all the records that were being withheld by the city under section 52(3)3. Accordingly, those records and the application of section 52(3)3 of the *Act* are no longer at issue in the appeal.

[6] During mediation, the city also located additional records of communications between city staff and issued supplementary decisions disclosing portions of them to the appellant. The city took the position that the portions of the communications it did not provide were personal discussions amongst city staff and not within the city's custody or control. In addition, the city also relied on sections 11(c) and (d) (economic and other interests) of the *Act* as well as section 12, to withhold portions of these communications.

[7] Mediation did not resolve the appeal and it was moved to adjudication.[1]

[1] Although the previously assigned adjudicator raised the potential application of the personal privacy exemptions in the *Act* and representations were sought on that issue, in this order I will only be addressing the issues of custody and control and the potential application of the solicitor-client exemption at section 12 of the *Act*.

Representations were exchanged between the parties.[2] In its representations, the city advised that it was no longer relying on section 11 of the *Act* to withhold responsive information. Accordingly, the potential application of that exemption is also no longer at issue in the appeal.

[8] In this order, I find that a portion of two Teams messages from the city's associate legal counsel to city staff are exempt under section 12 of the *Act*. I also find that the city has custody or control over communications between city staff but does not have custody or control of the communications between elected officials, including the mayor. I uphold the city's decision in part and order the city to issue an access decision with respect to communications between city staff.

RECORDS:

[9] At issue in this appeal are electronic communications that occurred during a specific Planning Committee meeting and a specific city council meeting. They include Microsoft Outlook email exchanges, Microsoft Teams exchanges and text communications.

ISSUES:

A. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the portions of the records for which it is claimed?

B. Are the remaining records at issue "in the custody" or "under the control" of the city under section 4(1)?

DISCUSSION:

Issue A: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the portions of the records for which it is claimed?

[10] As set out in the overview, the city claims that portions of the Teams communications exchanged between city staff during the planning committee meeting are subject to both common law and statutory solicitor-client privilege under section 12 of the *Act*.

[11] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel

[2] The city also provided two affidavits of its Corporate Records and Information Officer in support of its position. A small portion of the affidavits were withheld as it met the criteria for withholding representations.

for an institution. Section 12 provides:

> A head may refuse to disclose a record that is subject to solicitor- client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[12] Section 12 contains two different exemptions, referred to in previous IPC decisions as "branches." The first branch ("subject to solicitor-client privilege") is based on common law. The second branch ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

Branch 1: common law privilege

[13] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

[14] The city takes the position that parts of the Teams communications are subject to solicitor-client communication privilege but not subject to common-law litigation privilege. Accordingly, below I will only consider whether common law solicitor-client privilege applies to the portion of the records for which section 12 has been claimed.

Common law solicitor-client communication privilege

[15] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[3] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[4] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[5]

[16] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[6]

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[3] Orders MO-1925, MO-2166 and PO-2441.
[4] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[5] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

The representations

[17] The city submits that because the meetings were held virtually, it was not possible for city staff or elected officials to have personal communications verbally with each other at the meetings as they did or may have done in the past. So, the city says, city staff or elected officials used Outlook and Teams for that purpose.

[18] The city submits that the Teams communications generated during the planning committee meeting include communications from the city's associate legal counsel, one of its in-house lawyers, to city staff referring to the advice she provided to the planning committee during the planning committee meeting. The city submits that the associate legal counsel created these Teams communications to clarify her advice to the city's employees (who received it through Teams) and to keep those employees informed so that further advice could be given, either to the committee or those employees, if needed. The city submits that the only recipients of these Teams communications were city employees with knowledge of the matter and that the communications were made in confidence. The city explains in its reply representations that its lawyer did not provide the same legal advice contained in the Teams communications in public at the committee meeting and that solicitor-client privilege in the Teams communications has not been lost through waiver.

[19] The appellant takes the position that if the city's associate legal counsel provided the advice in public at the meeting, that would have the effect of waiving the privilege that attaches to that advice.

Analysis and finding

[20] I accept the city's position with respect to the Teams communications from its associate legal counsel. I find that these were direct communications of a confidential nature between a lawyer and her client, or their agents or employees, made for the purpose of obtaining or giving, or in this case clarifying, legal advice. I find that this qualifies as being subject to common law solicitor-client communication privilege.

[21] Furthermore, I accept that the legal advice provided in these communications was not advice that was communicated publicly or to the pubic in the meeting that would, as suggested by the appellant, result in waiver of the privilege. Accordingly, I find that the city's privilege in the Teams communications from its associate legal counsel has not been waived.

[22] I am also satisfied overall that the city properly exercised its discretion under section 12 of the *Act.* It should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[7].

[7] 2010 SCC 23, [2010] 1 S.C.R. 815, a case dealing with the provincial equivalent to section 12.

[23] I am satisfied that the city was aware of the reasons for the request and why the appellant wished to obtain the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the city considered why the appellant sought access to the information, whether the appellant had a sympathetic or compelling need to receive the information as well as the nature of the information. In all the circumstances and for the reasons set out above, I uphold the city's exercise of discretion to apply section 12 to portions of the communications.[8]

[24] Accordingly, I find that the portions of the Teams communications are subject to common law solicitor client communication privilege and qualify for exemption under section 12 of *Act*.

Issue B: Are the remaining records at issue "in the custody" or "under the control" of the city under section 4(1) of the *Act*?

[25] The city takes the position that the remaining communications are not in its custody or under its control. For the reasons set out below, I find that some of the communications identified by the city as responsive to the request are within its custody or control, while others are not.

[26] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.[9] A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[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.[11] 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, as the city initially did here, or may be subject to a mandatory or discretionary exemption.

[27] The courts and this office have applied a broad and liberal approach to the custody or control question.[12] Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[13] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

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[8] As a result of this finding, it is not necessary that I also consider whether the statutory solicitor-client privilege also applies to these communications.
[9] 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 […].
[10] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[11] Order PO-2836.
[12] *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.
[13] Orders 120, MO-1251, PO-2306 and PO-2683.

- Was the record created by an officer or employee of the institution?[14]
- What use did the creator intend to make of the record?[15]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[16]
- Is the activity in question a "core", "central" or "basic" function of the institution?[17]
- Does the content of the record relate to the institution's mandate and functions?[18]
- 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?[19]
- If the institution does have possession of the record, is it more than "bare possession"?[20]
- 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?[21]
- Does the institution have a right to possession of the record?[22]
- Does the institution have the authority to regulate the record's content, use and disposal?[23]
- 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?[24]
- To what extent has the institution relied upon the record?[25]

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[14] Order 120.
[15] Orders 120 and P-239.
[16] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[17] Order P-912.
[18] *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.
[19] Orders 120 and P-239.
[20] Orders P-120 and P-239.
[21] Orders 120 and P-239.
[22] Orders 120 and P-239.
[23] Orders 120 and P-239.
[24] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[25] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

- How closely is the record integrated with other records held by the institution?[26]

- 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?[27]

[28] In addition to these factors, for the purpose of determining whether an institution has custody or control over councillors' records, previous orders have considered whether those records can be described as "constituency" records or "political" records where the records were created and are held by a councillor in their capacity of elected representative of their constituents and relate to their mandate and functions as a councillor. Such orders have generally found that records that are councillors' "constituency" or "political" records are not in the custody or under the control of the municipality to which they have been elected as representative.[28] 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.[29]

[29] Additionally, the Supreme Court of Canada, in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[30] 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?

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

The city's representations on custody or control

Policy and guideline

[31] The city states that it has a policy and a guideline for the use of city devices and for the retention and reproduction of records that are applicable to city staff.[31]

[32] Section 4.00 of the city's "Guidelines for Managing Emails, Text/Instant Messages,

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[26] Orders 120 and P-239.
[27] Order MO-1251.
[28] Orders M-813, M-846, MO-2821, MO-2878.
[29] *City of Ottawa v. Ontario,* cited above, at paragraph 31.
[30] 2011 SCC 25, [2011] 2 SCR 306.
[31] They consist of the city's "Guidelines for Managing Emails, Text/Instant Messages, and other Electronic Records" and the city's "Acceptable Use of Information Technology Policy" policy. The city submits that these do not apply to councillors' records.

and other Electronic Records" (the guideline) provides that:

> No Right to Privacy
>
> Employees should adopt a limited expectation of privacy with respect to the use of City owned mobile phones or devices. This includes any and all voicemails, social media messaging, emails, text/instant messages, call history and/or any other information stored on the mobile phone or device, regardless of whether stored in the device or in remote sites and/or with remote services. The City has the right to inspect any and all City-owned mobile phones or devices used by employees for such information at any time and without notice.
>
> Texts and Emails Regarding City Business
>
> Most text/instant messages regarding City business constitute City records that must be retained in accordance with the City's Information Management Policy and By-law # 2008-182, as amended. Text/instant messages that are retained, or that exist on a mobile phone or other device, may be subject to the disclosure requirements of *MFIPPA*. This applies to whether the text/instant messages regarding City business are sent or received on a City- owned or personally-owned mobile phone or device.
>
> City-Owned Mobile Phone or Device
>
> In accordance with approved City policies, City-owned mobile phones or devices shall be used for City business and in the event of emergencies, but not predominantly for personal text/instant messages or email. Moreover, as explained above, employees have no right to privacy on City-owned mobile phones or devices. After a receipt of a *MFIPPA* request, and upon the request of the City, an employee may be required to provide his or her City-owned mobile phone or device to the City for inspection, and all information on the mobile phone or device is subject to the City's review.
>
> Personal text/instant messages that do not relate to City business need not be retained on a City-owned mobile phone or device. However, if personal text/instant messages exist on a City-owned mobile phone or device at the time the City receives a *MFIPPA* request, those messages must be retained until the City responds to the request. The content of those personal text/instant messages may be reviewed by City staff in making a disclosure decision. Additionally, generic information that does not identify the content, subject matter, sender, or recipient of the personal text/instant message may be released, including date, time, size, an indication of an attachment, etc.
>
> ….

[33] Section 4.0 of the guideline also addresses messages on personally owned devices, and provides as follows:

> Personally-Owned Mobile Phone or Device
>
> Personal mobile phones and devices are the private property of City employees. Personal text/instant messages and email messages that do not relate to City business need not be retained on a personally-owned mobile phone or device. However, text/instant messages and email messages sent using a personal mobile phone or device that pertains to City business may be subject to the *MFIPPA* disclosure requirements. While the City may not be permitted to inspect an employee's personal mobile phone or device without the employee's consent or other legal authority, an employee who uses his or her personal mobile phone or device to send or receive text/instant messages or email messages related to City business, may be required to produce, transcribe, or note in another document text relating to City business. City employees are required to cooperate with the City and provide their fullest assistance in fulfilling the City's duties and obligations under *MFIPPA* and in accordance with the City's Information Management Policy.

General submissions

[34] The city submits that on receipt of the request it asked the individuals attending the meetings to provide the communications to the city, which they did. The city takes the position that it only has "bare possession" of the communications, because the writers voluntarily provided them to the city. It argues that this does not qualify as the city having custody or control of the records.

[35] In its representations, the city submits that it considered the list of factors set out above that help in determining whether a record is within the custody or control of an institution. Specifically, it submits that in reaching its decision that it did not have custody or control of the records it considered:

- the city's possession of the records is not under a statutory or employment requirement,
- no sender expected or intended to share the communications with the city or expected the city to use any of the communications for its business,
- no sender expected that the communications would be disclosed to any member of the public who requested them,
- the communications are not being held by an officer or employee of the city for the purposes of their duties as an officer or employee,

- the city has not relied on the communications, and
- they are not stored and managed with other records held by the city.

City staff communications

[36] The city submits that city staff communications were of a personal nature. The city also submits that personal communications amongst city staff is not a function of the city, let alone a "core", "central" or "basic" function of the city. The city acknowledges that it has the authority to regulate the content, use and disposal of city staff Teams communications but says that this is only because Teams was used by city staff and those Teams communications were not deleted.

[37] Referencing *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*,[32] the city submits that the subject and tone of the communications indicate that they are personal communications having little or no connection to the business affairs of the city. The city takes the position that:

> They are the personal communications of the city employees who created them. They express their opinions and views in the Teams communications, not the city's. Those city employees, in their personal capacities, are not subject to *MFIPPA* or otherwise to having their personal records seized and disclosed to any member of the public who requests them.

[38] With respect to the Teams communications created by city employees who were members of a collective bargaining unit, the city submits that accessing them would be an invasion of an employee's privacy and breaches the restriction on employers, implied in the collective agreement, to reasonably exercise their management rights.[33]

[39] The city also argues that the existence of a collective agreement and the protection of section 8[34] of the *Charter*[35]against unreasonable search and seizure as well as jurisprudence establishing the tort of invasion of privacy, limits a determination of custody or control of the city staff communications.[36]

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[32] 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.), at paragraph 35.

[33] The city submits that Arbitrators have awarded damages against employers for such breaches.

[34] Section 8 of the *Charter* reads: Everyone has the right to be secure against unreasonable search or seizure. That said, the city does not challenge the constitutionality of section 4(1)(b) of the *Act*.

[35] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

[36] In its initial representations the city references *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Assn. of Management Administrative and Professional Crown Employees of Ontario v. Ontario (Ministry of Government and Consumer Services) (Bhattacharya Grievance)*, [2016], O.G.S.B.A. No. 29; *Colwell v. Cornerstone Properties Inc.*, [2008] O.J. No. 5092; *Ryerson University v. Ryerson Faculty Assn. (Warrantless Search and Seizure of Mail Grievance)*, [2020] O.L.A.A. No. 345; *Jones v. Tsige*, 2012 ONCA 32; *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, [2017] O.J. No. 1614 and *Elementary Teachers Federation of Ontario v. York Region District School Board*, 2020 ONSC 3695

Elected officials' communications

[40] The city asserts that councillors need a private place to allow for the full and frank discussion of issues, including the discussion of issues at the meetings, and that the electronic communications during the meetings facilitated that process.

[41] In addition, the city submits that in making those communications, councillors were not discharging any special duty assigned by council or acting on behalf of the city and otherwise had no authority to act for the city. The city submits that there is no evidence that any councillor intended to use any communication to carry on city business. It says the records at issue are private communications or are about matters that arose generally out of the council member's activities as an elected official, qualifying as political or constituency records.

[42] The city states that councillor communications do not fall within the scope of "Committee and Boards Records" in the Records Retention By-Law. The city adds that during its regular "council orientation", the city's Records Management Division provides training to councillors regarding the *Act* and privacy. It says that the emails remain in the councillors' Outlook mailboxes. The city states that it does not have the authority to regulate the content, use or disposal of the electronic communications.

The appellant's representations

[43] In her representations, the appellant acknowledges that it is possible that some of the records created or received during the time frame of the two meetings in question concerned personal matters or constituent matters relating to a file not on the agenda of the meetings, but she does not seek access to these records. She says she only seeks access to the records relating to the matters that were on the agenda at the two meetings. The appellant notes that the YouTube recordings of the meetings show the frequent use of mobile devices.

[44] The appellant takes the position that the records she seeks relate to public meetings to conduct the business of the city and there is a public interest in their disclosure. She submits that staff information and councillor discussions relating to the agenda items at the public decision-making meetings must be in an open forum; otherwise, transparency and accountability are meaningless words.

[45] She submits that during a public decision-making meeting, secret discussions and behind-the-scenes information sharing are not in the public interest, discourages public engagement and undermines the role and importance of an informed citizenry.

[46] The appellant says that the public has a right and is entitled to know both

(*Elementary Teachers*). The Ontario Court of Appeal allowed the union's appeal of *Elementary Teachers* and quashed the underlying arbitrator's decision in *Elementary Teachers Federation of Ontario v. York Region District School Board*, 2022 ONCA 476. The Supreme Court of Canada dismissed an appeal of that decision in *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22.

information shared among staff during a public meeting and councillors' views and their voting intentions. She submits that these communications are part of the public decision-making meeting process and withholding them is not consistent with the purposes of the *Act*.

City staff communications

[47] With respect to city staff communications, the appellant submits that the communications were generated while staff were attending the public decision-making meetings in their capacity as employees of the city. She submits that staff were attending a planning committee and then a council meeting to present information pertaining to the business of the meetings and to answer questions. She says that this is the foundational, democratic core of the city's business.

[48] The appellant disagrees with the city that employees governed by a collective agreement and those who simply have a contractual relation with the city should be treated differently. She states that whatever the terms of their employment, the city staff named in her request worked for the city at the time of the meetings and were bound by the city's polices governing the used of information technology and the managing of emails.

[49] The appellant submits that the records generated by staff during the meetings are in the custody and control of the city for the following reasons:

- they were created by employees of the city,
- the institution was exercising a statutory power (under the *Planning Act*[37] and the *Municipal Act, 2001*[38]),
- decision-making is a core function of a municipal council,
- the records relate to the mandate and function of the city,
- the city has possession of the records and a right to their possession under the relevant policies.

[50] Pointing to the "Guidelines for Managing Emails, Text/Instant Messages, and other Electronic Records" reproduced above, the appellant submits that employees know that their communications on city devices are part of the city's record holdings, and that accordingly, they can only have "a limited expectation of privacy" with respect to them.

Elected officials' communications

[51] The appellant submits that during decision-making meetings of elected officials,

[37] RSO 1990, c P.13.
[38] *Municipal Act, 2001*, SO 2001, c 25

communications are "official records." She says that this is because they are clearly part of the city's "decision-making," are not "drafts" or "duplicates", "might be required in the future," and "have future business, financial, operational, administrative, legal, vital, or archival value to the city." She submits that:

> Planning decisions made by the city, for example, can be appealed to the Ontario Land Tribunal so records from the decision-making meetings may be important for future reference. Of course, for reasons such as solicitor-client privilege, they may not be accessible to the public, …

[52] The appellant submits that any communications created by the mayor were "created by an officer" of the institution, and, given city policies were under its "custody or control."

[53] The appellant submits that for the purposes of transparency, residents must be able to understand the information the planning committee and council had during these public meetings that might have had a bearing on their decision-making.

[54] The appellant further submits that:

> With respect to members of Council, there is no doubt that they were acting in their official capacity. Constituents elect members of Council and entrust them with the authority to represent them. When members of Council participate in and vote at a public meeting of the city, they are acting in their official capacity and fulfilling their democratically-entrusted duty.
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> […] In the context of a public decision-making meeting, employees' opinions and views are the subject matter of the meeting. They are attending the meeting to give professional opinions/views/advice to Planning Committee/Council in an open forum. Should they have also expressed these opinions/views/advice through communications that were not before the public, the communications should rightly be accessible through an access to information request.
>
> Similarly, members of Council are participating at a public meeting to present their opinions and views prior to voting. Should they have also expressed these opinions/views/advice through communications that were not before the public, the communications should rightly be accessible through an access to information request.

[55] The appellant adds that the elected officials were attending public meetings to conduct the core business for which they were elected - debating and voting on matters to further the business of the city.

[56] While the appellant agrees that councillors need to be able to have a full and frank discussion of issues, she submits that during a public decision-making meeting, discussion

and debate are to take place in an open forum. She adds that the fact that the city has not chosen to integrate the records with other records does not mean that they are not records covered by the *Act*.

[57] The appellant also argues that there is a distinction between communications with constituents and councillors during a decision-making meeting and those that take place before or after a public decision-making meeting:

> During a decision-making meeting, elected officials are conducting city business and are acting for the Corporation and, along with other members of council, are part of a quorum at a legally constituted meeting. Their records are key to their statutory duty and the city's mandate. I submit councillor records, generated during a public meeting, are under the custody or control of the city.

[58] The appellant adds that based on a statement made by a former city councillor, city councillors expect their communications to be available to the public on request. She provided a copy of the media report in which the statement was made. The portion that the appellant relies upon states:

> I will admit I have texted during a meeting whether in-person or via Zoom, Councillor [named councillor] said in an email, noting that councillors' emails and texts can be made public through a Freedom of Information request to the City." (Priscilla Hwang, CBC News Poster, November 1, 2020)

[59] The appellant submits that taken to the extreme, the city's representations would mean that at a public decision-making meeting, councillors and staff could exchange information and have a discussion via non-public electronic communications and then elected officials could vote on an issue without any public debate, and without subsequent scrutiny. She adds that this would make a mockery of democratic governance principles that have evolved over time.

The city's reply representations

[60] The city asserts that its guidelines are not equivalent to a policy and are simply intended to assist city staff in identifying "transitory records" or "official records" in accordance with its Records Retention By-Law. The city asserts that the communications at issue in this appeal were not part of the city's decision-making and do not have future business, financial, operational, administrative, legal, vital or archival value to the city.

[61] The city argues that interpreting "custody or control" as including private communications of city employees unrelated to city business, whether created and stored on city property, or created during regular working hours or during a council or committee meeting, does not advance the purpose of *MFIPPA*. Furthermore, the city submits that interpreting "custody or control" as not applying to those same private communications of employees does not interfere with the appellant's, or any other citizen's, right to fully

participate in democracy.[39]

[62] The city further asserts that each communication made by elected officials was created at a separate, contemporaneous private meeting attended electronically by only the limited number of council members who created, sent or received the communications. It takes the position that these communications were therefore not "meetings" for the purposes of the *Municipal Act, 2001* because there was no quorum.[40]

[63] The city refers to section 226.1 of the *Municipal Act* and submits that the mayor was not discharging his duties as chief executive officer under the *Municipal Act* when he created, sent or received any council member communication. The city submits that:

> The Mayor has no authority to act for the city, except in conjunction with the other council members, as a quorum of council members at a legally constituted council meeting. Like the other council member communications, the council member communications which the Mayor created, sent or received were not created with a quorum of council members at a legally constituted council meeting.

[64] Relying on *Hawkesbury (Town of) (Re)*,[41] the city submits that nothing in the *Municipal Act*, the city's procedural by-law, or any other legislation or by-law prohibits council members or committee members from speaking freely and privately with one another outside the structure of a formal meeting (even while a formal meeting is being held). It adds that exchanging information with another council member prior to casting a vote on a council meeting or committee meeting agenda item is a political or constituency activity, not a decision-making activity.

[65] The city submits that interpreting the term "custody or control" as including private communications between a limited number of council members or committee members, during a private meeting, with no statutory requirement to be open to the public, does not advance the purpose of the *Act*. Furthermore, it submits interpreting "custody or control" as not applying to those same private communications of council members or committee members does not interfere with the appellant's, or any other citizen's, right to fully participate in democracy.

[66] Regarding the statement a former city councillor made to a reporter, the city submits that it was made in the context of an interview about the access request which is the subject of this appeal. The city asserts that it is not reliable evidence of the councillor's expectations or intentions when the council member communications were created and sent (prior to the councillor becoming aware of the appellant's request for

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[39] In support of this submission the city references *Ottawa (City) v. Ontario* at paragraph 28.
[40] In support of this submission the city references *Hawkesbury (Town of) (Re)*, 2021 ONOMBUD 7 at paragraphs 16 to 18.
[41] 2021 ONOMBUD 7.

access to them). The city adds:

> Further, in that statement, [the councillor] expresses her belief that a councillor's emails and texts can be made public through a freedom of information request. It does not express an expectation or intention that any email or text, regardless of its content or context, created or sent by a council member will be made public if responsive to a freedom of information request. In any event, [the councillor's] statement is not evidence at all of any other council member's or committee member's expectations or intentions when the council member communications were created and sent.

The appellant's sur-reply

[67] In sur-reply, the appellant disagrees with the city's position that the inter-councillor discussions within the context of the meetings were a "separate, contemporaneous, private meeting attended electronically" as suggested by the city. She submits that the communications were made as part of the meeting and should be considered as such.

[68] The appellant argues that at a public meeting of council, were a council member to approach the mayor and have a whispered conversation, another councillor would surely object. Similarly, she says, two council members would not get away with a whispered conversation during the meeting, or with a one on-one conversation with staff. She says that the expectation is that all council members are privy to all communications, and, that the public is too. She submits that the *Municipal Act*, *2001* promotes governance transparency.[42]

Analysis and findings on custody or control

[69] For the reasons that follow, I find that the city has custody or control over the city staff communications, but it does not have control of the communications between elected officials, including the mayor.

Communications between city staff

[70] Records created or received by city staff in connection with their duties are covered by the *Act*, and for the most part, are within the city's custody or control.[43]

[71] The city argues that the staff communications at issue are of a personal nature and is the type of information over which it does not have custody or control, like in the *City of Ottawa* case. The city also argues that the issue of custody or control is impacted by the existence of a collective agreement, the protection of section 8 of the *Charter* against unreasonable search and seizure as well as jurisprudence establishing the tort of

[42] She references sections 224(d.1) and 270(1)5 of the *Municipal Act*, *2001* in support of this submission.
[43] There was a notable exception for matters of a personal nature unrelated to the business of the city discussed in *City of Ottawa v. Ontario City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.), which is addressed below.

invasion of privacy. The appellant argues that the information should be disclosed for reasons of transparency, and the existence of a collective agreement does not impact a determination of whether the city has custody or control of the records.

[72] As set out above, records created or received by city staff in connection with their duties are covered by the *Act*, and for the most part, are within the city's custody or control. In this case staff were meetings as city employees. The communications were made by these city employees during the meetings. I have reviewed the communications and although containing information that may be personal in nature, they also discuss matters relating to the meeting and viewed as a whole, I find that they are related to the business, mandate or operations of the city. In this way, I find that they are distinguishable from the information at issue in the *City of Ottawa* case. In that regard, the *City of Ottawa* case dealt with records that had nothing to do with the business of the city of Ottawa and were wholly unrelated to the subject employee's work. That is simply not the case here.

[73] I do not agree with the city that the existence of a collective agreement, the protection of section 8 of the *Charter* against unreasonable search or seizure or the jurisprudence establishing the tort of invasion of privacy, impacts my finding on the issue of custody or control. I acknowledge the recent decision of the Supreme Court of Canada in *York Region District School Board v Elementary Teachers' Federation of Ontario*[44] establishes that school board employees enjoy rights under section 8 of the *Charter* against unreasonable search and seizure.[45] However, that case, like the other authorities cited by the city in support of this argument, arose in the context of an allegation of unauthorized search and seizure of records or potentially improper access to and/or use of information rather than a determination of custody or control under the *Act*, which is the issue before me. The city did not challenge the constitutionality of section 4(1) of the *Act*. In my view, the existence of a collective agreement, section 8 of the *Charter* or the tort of invasion of privacy, does not alter my finding. At this stage, I am dealing with a simple application of the relevant provisions of the *Act* regarding a determination of whether an institution has custody or control of a responsive record, not any other issue.[46]

[74] Accordingly, I find that the city has custody and control of the staff communications. I will therefore order the city to issue an access decision with respect to the remaining withheld portions of the city staff communications.

Communications between councillors

[75] As indicated above, under section 4(1), the *Act* applies only to records that are in in the custody or under the control of an institution. An "institution" is defined in section 2(1), and includes a municipality. The definition of "institution" does not specifically refer

[44] 2024 SCC 22.
[45] See paragraph 97.
[46] I also note that the city emphasized in its representations that the city staff communications were voluntarily provided.

to elected offices such as municipal councillors or mayors.

[76] This office has found that except in "unusual circumstances," records of city councillors are not generally considered to be in the custody or under the control of the city, as an elected member of municipal council is not an agent or employee of the municipal corporation in any legal sense.[47]

[77] Records held by elected officials may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" of the municipality in the particular circumstances; or

- where, even if the councillor is not acting as an officer of the municipality, his or her records are in the custody or under the control of the municipality on the basis of established principles.[48]

[78] In Order M-813 the adjudicator discussed the particular or unusual circumstances where an individual who is not an officer of an institution may be considered part of the institution for the purposes of the *Act*. She described those circumstances in the following terms:

> … [a]n example of an unusual circumstance would be where a municipal councillor of a small municipality has been appointed a commissioner, superintendent or overseer of any work pursuant to [the relevant section of the Municipal Act]. In this regard, the authorities indicate that this would be an extremely unusual situation, and where it occurs, the councillor would be considered an "officer" only for the purposes of the specific duties he or she undertakes in this capacity. In these cases, a determination that a municipal councillor is functioning as an "officer" must be based on the specific factual circumstances.

[79] The appellant argues that while making the communications the councillors were acting in an official capacity, thereby acting as agent of officer of the city.

[80] I do not agree. I find that at all material times the councillors were simply acting as elected officials performing their duties in that capacity at the two meetings. They were not discharging a special duty assigned by the city, such that they may be considered officers or agents of the city, nor were they acting as "officers" or agents of the city during the meetings as those terms have been defined in the jurisprudence. In that respect, I find that there is no particular or unusual circumstance that takes them

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[47] Order M-813, MO-1403 and MO-3287. See also *Ras v. Corporation of the City of Mississauga and Ron Starr*, 2023 ONSC 7102.
[48] See, for example, Orders M-813, MO-1403 and MO-3287.

out of their role as elected officials during those two meetings.

Communications from the mayor

[81] A mayor is an officer of a municipality, as they are its chief executive officer.[49] Therefore, records created or received in connection with their duties as a mayor are covered by the *Act*, in the same manner as the records of city employees or other officials of the city.[50]

[82] That said, in my view, the content of the exchange at issue was a mixture of personal and political matters in the nature of a casual communication unrelated to the mayor's official duties under section 226.1 of the *Municipal Act*, *2001*. As this was a communication that was not related to the exercise of his duties, it does not fall within the scope of the mayor's responsibilities as an officer of the city or as head of council.

Are the records otherwise in the custody or under the control of the city on the basis of established principles?

[83] Although I have found that neither the councillors or the mayor made the communications as an officer or agent of the city, I still must consider whether the requested records are, nevertheless, in the custody or under the control of the city on the basis of established principles.[51]

[84] After considering the submissions made by the parties referred to above, I find that the records at issue in this appeal are not in the custody or control of the city for the purposes of the *Act*. I make this finding for a number of reasons.

[85] The appellant argues that that discussions amongst elected officials are part of the city's business. I accept that on a broad view, discussions about council matters may engage city interests. However, I accept the city's submissions that this does not necessarily mean these records are within its custody or control and in this case, they are not. In that respect, I follow the decision in Order MO-2821 where the former Assistant Commissioner found that although the content of communications may relate broadly to matters in an institution's mandate, and elected representatives may communicate with each other about these matters, this does not mean that the records are necessarily within the institution's custody or control. As she stated:

> … it is entirely to be expected that councillors communicate regularly with each other and with any number of individuals and organizations about

[49] Order MO-1403.
[50] Section 226.1 of the *Municipal Act, 2001*, SO 2001, c 25 sets out that a mayor shall, (a) uphold and promote the purposes of the municipality; (b) promote public involvement in the municipality's activities; (c) act as the representative of the municipality both within and outside the municipality, and promote the municipality locally, nationally and internationally; and (d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.
[51] See: Orders M-813 and MO-3511, for example.

> matters within the mandate of [the institution]. Presumably, the reason for many of these communications is that an individual or organization wishes to express a view to councillors about an issue that may come to a vote at council, or councillors wish to persuade each other about a position on an issue.[52]

[86] In the circumstances of this appeal, although I also find that records were created during meetings which relate broadly to the city's mandate, the private communications at issue in this appeal relate more specifically to the councillors expressing their personal views to other councillors about an issue or attempting to persuade each other about a particular position mixed with casual, personal communications. As I set out above, the communication from the mayor was a mixture of personal and political matters and was in the nature of a casual communication. Based on the jurisprudence, I find that these communications fall within the exception created for political records, over which the city does not have custody or control. In that regard, I accept the city's submission that the records at issue in this appeal relate to the councillors in their roles as constituent representatives and are in the nature of "political" rather than "city" records. It is possible that the council members individually made determinations about how to vote based on a number of factors (i.e.: constituency input, lobbying from various interest groups, personal research, etc.), but this does not mean that the city itself relied on these email communications, and I find that it did not do so. The city does not assert control over what records the councillors create, how they maintain these records, or what they choose to do with these communications afterwards, including the right to destroy them if they wish.

[87] I also find no distinction between communications before, during or after the meetings as suggested by the appellant. In my view, the timing of the communication does not change its nature, which I have discussed above. I also acknowledge the appellant's general concerns about accountability and transparency with respect to the disclosure of communications made during public meetings. Similar concerns were addressed in a number of orders, including Order MO-2821, which considered the impact of a finding that "political" or "elected or constituent representative" records fell outside the scope of the *Act*. In that order, the adjudicator determined that such a finding is consistent with the scheme and purposes of the *Act*:

> … 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

[52] At paragraph 44.

> do not affect other transparency or accountability mechanisms available with respect to those activities.[53]

[88] I agree with the approach taken in Order MO-2821 and find it equally applicable in the current appeal. My finding that the communications between elected officials that are before me fall outside the scope of the *Act* because they are not in the custody or control of the city is consistent with the overall framework of the *Act*. In addition, as noted in Order MO-2821, this finding does not affect other ways in which the activities of elected officials and their conduct at open meetings are regulated.

[89] I also find that although the communications may be stored on city servers or were sent using city issued phones, this does not establish that they are in the city's custody or control. In making this finding, I follow the previous orders and decisions that have found that records stored on institutional computers are not necessarily in the institution's custody. In particular, I rely on the reasoning in the decision of the Divisional Court in the *City of Ottawa*.[54] Although that case dealt with records which clearly did not relate to the business, mandate or operations of the institution but were stored on a City of Ottawa server, the following quotation is instructive:

> … The City in this case has some limited control over the documents in the sense that it can dictate what can be created or stored on its server. However, this is merely a prohibition power, not a creation power. The City can prohibit employees from certain uses, but does not control what employees create, how or if they store it on the server, and what they choose to do with their own material after that, including the right to destroy it if they wish. […][55]

[90] Finally, with respect to the appellant's characterization of the former councillor's statement and any expectation that it created, I am satisfied that this does not change or alter my conclusions set out above.

[91] As a result of the above, I find that the remaining records at issue relating to the communications of councillors and the mayor are not in the custody or under the control of the city and are, therefore, not subject to the *Act*.

Conclusion

[92] In this order, I find that a portion of two emails from the city's associate legal counsel to city staff are exempt under section 12 of the *Act*. I also find that the city has custody or control over communications between city staff but does not have custody or

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[53] At paragraph 53.
[54] *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605). This decision discussed the custody and control of both electronic and paper records, and reviewed certain factors that must be considered in conducting such a review.
[55] At paragraph 47.

control of the communications between elected officials, including the mayor. I uphold the city's decision in part and order the city to issue an access decision with respect to communications between city staff.

ORDER:

1. I find that the withheld Teams communications from the city's associate legal counsel to city staff are subject to exemption under section 12 of the *Act*.

2. I uphold the city's decision that communications between and amongst elected city officials (including the mayor) are not within the city's custody or control.

3. I find that communications between city staff are within the city's custody or control and order the city to issue an access decision with respect to these communications, in accordance with the requirements of the *Act*, treating the date of this order as the date of the request for the purpose of the procedural requirements of the *Act*.

4. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the access decision referred to in order provision 3, as well as any records disclosed with this access decision.

Original Signed By: August 28, 2024

Steven Faughnan
Adjudicator