Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2878

Appeal MA11-411

City of Greater Sudbury

April 29, 2013

Summary: The city received a request for access to records relating to the city's involvement with the requester's property as well as with a particular road, including records held by a named municipal councillor. After issuing a time-extension decision which resulted in this appeal, the city issued a two-part decision. The first part of the decision was a fee estimate for searching for and photocopying certain records; the second part advised the appellant that records of the municipal councillor were not in the custody or control of the city and were, therefore, not subject to the *Act*. The appellant appealed the city's decision on a number of grounds including the adequacy of the decision letter, the fee estimate, the custody and control decision, and other matters.

In this decision, the city's fee estimate and custody and control decisions are upheld, and the other issues raised by the appellant are dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(b) (definition of an institution), 4(1) (right to access), 20(a), 45(1), 45(4), Regulation 823.

Orders and Investigation Reports Considered: Orders P-81, M-813, MO-1403, MO-2528, MO-2821, MO-2824.

Cases Considered: *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.), *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306; *City of Ottawa v. Ontario (Information and Privacy*

Commissioner), 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605).

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> … copies of all records concerning the City's involvement with my property [given address] as well as all records concerning [a named road] for the period from 2009 to present. All records include but are not limited to by-law enforcement reports, legal records, internal City official e-mails, records related to the parkland, e-mails and correspondence between City and outside parties (contractors, residence, etc) Council minutes of meetings, plans, drawings, notes, etc.

[2] The request went on to read:

> My request includes but [is] not limited to records of any ad hoc informal groups such as the one that advises [a named councillor for a particular ward], as well as [the named councillor's] e-mails, correspondence, etc. to all parties regarding [the identified address]. I have enclosed the email from [the named councillor] identifying a group of individuals. There may be others.

[3] In its initial response to the request, the city issued a time extension decision, advising the appellant that the time limit for responding to his request had been extended for a period of 67 days.

[4] The appellant appealed the time extension decision.

[5] Shortly after the appeal was opened, the city issued a second decision letter to the appellant. In that decision, the city identified that it considered that there were two parts to the request. The city then stated that it was issuing a fee estimate and interim access decision for Part One of the request (the first paragraph set out above) and issuing a final decision for Part Two of the request (the second paragraph set out above).

[6] The fee estimate and interim access decision for Part One read:

> According to replies received from the responsive departments and a representative sampling of the records it will cost an estimated $330.00 to process your request. The fee estimate is broken down as follows:

Search and Preparation Time: 7 hours @ $30 per hour = $210.00

Number of Pages to be copied: 600 pages @ 0.20 per page = $120.00

Based on a search of a representative sample, the following types of records were identified as responsive to your request.

- correspondence between city staff and elected officials;
- building permits and plans;
- drawings;
- by-law case details reports.

Based on a review of the representative sample, I estimate partial access will be granted under sections 8, 10, 12 and 14.

The costs outlined above are in accordance with section 6 of Regulation 823 made under the Act. In accordance with section 7.1 of regulation 823, where the fee estimate is $100.00 or more, an institution may request a deposit equal to 50 percent of the estimated fee before taking any further steps to process the request. Please forward a deposit in the amount of $165.00 [to the city].

[7] Regarding Part Two of the request, the city stated:

Please be advised that records of ad hoc informal groups are not in the custody and control of the city as the groups are not appointed by Council, do not report to the city and the city does not receive any meeting records for these groups.

Please also be advised that correspondence between a member of Council and his/her constituents have been found to be constituent records. These records are also outside the custody and control of the city.

[8] The city also directed the appellant to its website where records of Council meetings, including Council minutes, are available publicly. The city denied access to these records, citing section 15 (information published or available) of the *Act*.

[9] Upon receipt of this decision, the appellant (through a representative) confirmed that he wished to continue with this appeal. In this order, all references to the communications from the representative will be attributed to the appellant.

[10] The appellant took the position that the city's decision was inadequate, in that it failed to provide details regarding which documents were being redacted and the

reasons for the redactions. Accordingly, the adequacy of the city's decision was raised as an issue in the appeal.

[11] In addition, the appellant questioned the city's fee estimate, stating that records containing his own personal information should be exempt from payment under the *Act*. Accordingly, the city's fee estimate is also at issue in the appeal.

[12] The appellant also appealed the city's decision that certain records are not in its custody or control, as well as the city's application of section 15 of the *Act*. Accordingly, these issues were added to this appeal.

[13] Furthermore, the appellant believes that there ought to be records relating to the ad hoc informal groups in the municipal records which the city has not looked for and, as a result, the issue of the reasonableness of the city's search for records was added as an issue to the appeal.

[14] The city subsequently confirmed that its initial time extension decision continued to apply to the request and that, once it receives the deposit described in the fee estimate in Part One of the response, it will require an additional 67 days in order to complete processing Part One of the request and issue a final access decision to the appellant. Accordingly, the appropriateness of the time extension remained an issue in this appeal.

[15] The appellant also identified certain additional issues which he believes ought to be addressed in this appeal, and provided additional correspondence in support of his position.

[16] Mediation did not resolve this appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[17] I sent a Notice of Inquiry to the city, initially, in which I invited the city to address only the following issues at that time:

- the time extension decision;
- the fee estimate regarding Part One of the request;
- With respect to Part Two of the request: 1) the issue of whether any responsive records would be in the custody or under the control of the city, and 2) whether the search conducted for responsive records was reasonable.

[18] The city provided representations on these issues, including affidavit evidence and attachments.

[19] I then sought representations from the appellant. The city's representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction* 7.

[20] The appellant was invited to respond to the issues addressed in the city's representations, as well as the issue raised by the appellant regarding whether the decision letter issued by the city was adequate. The appellant was also invited to identify and address any additional issues which he believes are relevant in the circumstances of this appeal.

[21] The appellant submitted representations in response.

Preliminary Issues

[22] A number of preliminary issues were raised by the appellant in the course of this appeal. Some of these issues were resolved in the representations, and the appellant identified some additional issues in his representations. In the following discussion, I will address the preliminary issues remaining or identified by the appellant in his representations.

Preliminary issue A: time extension/delay in responding

[23] As set out above, the city issued a time extension of 67 days. In its representations, the city notes that although the appellant initially acknowledged that an extension would be required, he then appealed the extension decision. The city notes further that it responded to the appellant's request two days after that appeal. In doing so, the city provided the appellant with an interim access decision and fee estimate relating to Part One of his request (which has the effect of "stopping the clock" with respect to this part of the request), and a final decision regarding Part Two of the request.

[24] The city indicates that the appellant's request, although clear, was for a large number of records contained in a number of different departments or offices of the city. The city states that the Freedom of Information Coordinator would need to work several hours a day to respond to the request within the 30 day time, and that doing so would interfere with the operations of the city. The city also points out that the request is large compared to other requests it has received over the previous years, and also that it is for records that may contain the personal information of other persons, which requires notification.

[25] In his representations, the appellant contends that, by claiming a time extension, the city delayed the process. He also refers to the detailed information provided by the city in its representations, and states that if the city had provided similar information to him earlier, he would not have needed to appeal the decision.

[26] The appellant also argues that his request was not extensive, and that the city ought to have "proper staffing" in place to respond to requests. He refers to a leave of absence taken by an identified individual, and posits that this ought not to result in delays, as others ought to be assigned to fill in. He also argues that the city ought not to be able to rely on "under staffing" as a reason not to meet its statutory obligations. In addition, he states that the city has now spent more time dealing with this appeal, when it ought to have spent that time more properly addressing his request in the first place.

[27] Because of the apparent delay, the appellant requests that the records be provided within ten days of the date of this order.

Analysis and findings

[28] Section 20(a) of the *Act* reads:

> A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,
>
> > (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution;

[29] I note that the time extension issue is effectively moot because the city has issued its interim and final access decisions. However, I have decided to address some of the appellant's arguments set out above because they appear to impact on issues pertaining to the larger access regime at the city.

[30] The primary argument made by the appellant is that the city's decision to extend the time for responding has unfairly delayed the access process. The appellant seeks to lay the blame for delay on the city and makes allegations that do not appear to have a basis in fact.

[31] While I accept the appellant's argument that an institution must have sufficient staffing to meet its freedom of information obligations, this does not mean that staffing must exist to meet each and every type of request that the institution receives. The city has provided statistics regarding the nature of requests that it has received in the past, and submits that it has sufficient staff to address the vast majority of requests that it receives. In the circumstances, I am not persuaded that requiring additional time in this case is evidence that the city is understaffed in this area.

[32] I accept the city's position that the circumstances of this appeal are different from the requests that it normally deals with and that it has sufficient staff to be able to effectively respond to them.

[33] The appellant also appears to take issue with the extent to which the city has participated in the mediation and adjudication stages of this appeal. In my view, the appellant's arguments are without merit. I note, after reviewing the entire file, that much of the time spent by both the city and the mediator involved in this appeal was in responding to the appellant's numerous e-mails and telephone calls.

[34] Finally, the appellant alleges that a leave of absence by a staff member during the processing of this appeal resulted in this matter "languishing" until she returned. I do not know the basis for this allegation, and consider it entirely without merit, as it is clear from the submissions that the Freedom of Information Co-ordinator was actively involved with the request from its inception. The affidavit indicates that one staff person was just ending her leave of absence at the time the request was received and that she was not fully able to assist with access matters. This information was provided as a partial explanation for the city's resourcing issues at the time the request was received, but does not suggest that the city was not prepared to respond to access requests that it received in the interim.

[35] Having considered all of the submissions made on this issue, I am satisfied that the city has established that the circumstances of this request required that it claim a time extension for completing it. Moreover, I find that the city followed proper procedures and that it has acted in good faith in responding to the appellant's request. This is evident in the city's issuance of an interim decision relating to Part One of the request and a final decision on Part Two issued two days after the appeal was initiated, particularly where it appeared that the appellant had acquiesced to the time extension.

Preliminary Issue B: adequacy of interim decision letter

[36] The appellant argues that the interim decision letter he received from the city was inadequate. He states that the main issue he was attempting to address when he filed the appeal was that "there was not enough information in the decision letter to allow [him] to make an informed decision as to whether or not he should be paying for the records."

[37] He then refers to the detailed information contained in the representations provided by the city in this appeal, and states that the general description of information contained in the earlier interim decision did not provide "even close to the level of detail contained in the [city's representations]." He states that the interim decision letter was "confusing" as it dealt with separate parts of his request, and that it was unclear which portions of the response were interim and which were final. He then states that it was only after receiving the city's representations was it clear that the city

had "sectioned out" the two parts of the request. He then suggests that the interim access decision should have contained the same information that was provided by the city in its representations in response to this appeal, and suggest that not doing so may be an "abuse" of the *Act* designed to delay compliance with the *Act*.

[38] The appellant had also appealed the city's fee estimate decision, and I address that part of the interim access decision below.

[39] With respect to the appellant's arguments that the city's interim access decision was inadequate, I find them to be unfounded and entirely without merit. The request and much of the interim access decision is set out above. The interim access decision sets out clearly, in bold lettering, that it is divided into "Part One" and "Part Two." It also sets out the exact wording of the appellant's request under each of those parts, and identifies its decision for each of those parts. The decision letter also clearly spells out for the appellant the recourses available to him if he wishes to appeal either of these decisions.

[40] Lastly, during this appeal the appellant appears to be taking the position that the interim access decision, which identifies the fee, ought to identify precisely which documents are responsive to the request, and the exact exemptions in the *Act* that apply to each document.

[41] In Order 81, former Commissioner Sidney B. Linden outlined the concept of an interim access decision for use in situations where "a record is unduly expensive to produce for inspection … in making a decision." He referred to the relevant sections of the *Act*[1] and described the interim access and fee estimate process as follows:

> In my view, the *Act* allows the head to provide the requester with a fees estimate pursuant to [section 45(3) of the *Act*]. This estimate should be accompanied by an "interim" notice pursuant to [section 19 of the *Act*]. This "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees. In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access. Anything less, in my view, would compromise and undermine the underlying principles of the *Act*.

[1] Order 81 was issued under the provincial *Freedom of Information and Protection of Privacy Act*, and the relevant sections mirror those found in the *Act*. The references to the sections of the *Act* in the quotation below are references to the *Act* at issue in this appeal.

> How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (2) the head can base the estimate on a representative (as opposed to a random) sample of the records. …
>
> … *Because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed.* However, in my view, if no indication is made at the time a fees estimate is presented that access to the record may not be granted, it is reasonable for a requester to infer that the records will be released in their entirety upon payment of the required fees. [emphasis added]

[42] Former Commissioner Linden also confirmed that interim access decisions are not binding on the head and, therefore, cannot be appealed.

[43] In light of the approach taken in Order 81, I do not accept the appellant's position that the interim access decision ought to identify precisely which documents are responsive to the request, and the exact sections of the *Act* that apply to each document. Because of the nature of interim access decisions, concerns about the application of exemptions to certain records are not addressed in this order.

Preliminary issue C: appropriateness of the city's representations

[44] The appellant refers to the affidavit evidence provided by the city along with its representations in this appeal, and complains that the affidavit is excessive, and goes far beyond what is required to address the issues. He also takes the position that the city has initiated a personal attack on him and that it has acted in bad faith through the "falsehoods" and "innuendos" contained in the affidavits attached to the city's representations. He then asks that this office consider applying penalties against the city under section 48 of the *Act*, and notes that he may pursue other avenues if no action is taken. In addition, the appellant indicates his interest in knowing who prepared the city's representations, and suspects that outside parties were used.

[45] I note that the city's submissions were prepared by its Assistant City Solicitor. This information is contained on the outside cover of the city's submissions, which was inadvertently not shared with the appellant. The identities of those providing affidavit evidence is clearly known to the appellant.

[46] With respect to the affidavit evidence supporting the representations, I find that it contains certain recitations of fact and information about the appellant's situation

known by the affiant which enabled her to understand the possible locations of records. I do not find any of the information contained in the affidavit to contain "falsehoods" or "innuendos" that could be perceived as an attempt by the city to bias the adjudicator against the appellant.

[47] Moreover, I find that the city has attempted to provide a complete and detailed submission concerning the issues on appeal. I find the appellant's allegations in this regard to be without merit, and will not consider them further.

ISSUES:

A. Should the fee estimate be upheld?

B. Are the records responsive to Part Two of the request in the "custody or control" of the city and therefore subject to the *Act*?

DISCUSSION:

A. Should the fee estimate be upheld?

[48] Section 45(1) authorizes an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[49] More specific provisions regarding fees are found in section 6 of Regulation 823 made under the *Act*. That section reads:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, $10 for each CD-ROM.
3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

[50] Where the fee exceeds $25, an institution must provide the requester with a fee estimate. Section 7 of Regulation 823 states that, where the fee is $100 or more, the institution may require the requester to pay a deposit equal to 50% of the fee estimate before the institution takes any further steps to process the appeal.

[51] A fee estimate of $100 or more must be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[2]

[52] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[3] The fee estimate also assists requesters in deciding whether to narrow the scope of a request in order to reduce the fees.[4] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[5] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out above.

[2] Orders P-81 and MO-1699.
[3] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[4] Order MO-1520-I.
[5] Order P-81 and MO-1614.

The city's fee estimate decision

[53] As set out above, the city provided the appellant with a fee estimate of $330.00, which it itemized as follows:

> *Search and Preparation Time:* 7 hours @ $30 per hour = $210.00
>
> *Number of Pages to be copied:* 600 pages @ 0.20 per page = $120.00

[54] It also indicated the various types of records covered by the request.

[55] The appellant appealed the fee estimate decision, stating that records containing the appellant's personal information should be exempt from payment under the *Act*.

Representations and findings

[56] The city's representations provide specific information supporting the itemized fees. It states:

> The fee estimate provided a breakdown of how the fees were calculated for searching and photocopies. The Head decided that because the fee estimate was for more than $100, she should ask for a 50% deposit.
>
> The fee estimate was based on fees to be charged for general access records about a road and a property.
>
> The City followed the City's standard process with respect to searching for records. Search requests were sent to knowledgeable persons in the affected departments. Although a representative sampling was requested in this case, the majority of departments actually conducted the searches thereby producing a more accurate result than what would be expected of a representative sampling.

[57] The city then states that "knowledgeable persons in each department and office contacted provided information which led the Head to arrive at [the fee estimate]." It then indicates seven specific departments, the number of minutes of searching required by each department (totalling 7 hours) and the number of responsive pages of records (approximately 600).

[58] The city also states that the ward councillor conducted an actual search for the responsive records of correspondence between the appellant or other constituents and staff on which he was copied and correspondence between constituents and himself.

[59] The city also states:

> In revisiting the fees charged when the Appellant appealed the fee estimate, the Head found that the City undercharged the Appellant because it had not charged the Appellant for the searches conducted for the Head's own records, for the Ward Councillor's records and for the Leisure Services records. Furthermore, the Head discovered that over 600 additional records were thought to be responsive.
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> The City did not charge for severing records although it was entitled to do so. The City did not charge the Appellant for preparation or severing although the Head anticipated that some severing would be required. Furthermore, the Head endeavoured to reduce the Appellant's costs by removing duplicate records.

[60] The city also provides affidavit evidence in support of the information relating to the fee estimate.

[61] In addition, the city refers to previous orders in support of its position that its fee estimate decision was reasonable. It also states:

> [The process of calculating the fee estimate] involved both representative sampling and actual counting and searching by knowledgeable individuals in the City who have in-depth familiarity with the records. Although the City is required to charge for certain activities such as severance and preparation of records, the City did not do so and does not expect the Appellant to pay such fees. In the result, the Appellant is getting a discount with respect to his search. As such, the fee estimate is more than reasonable in the circumstances.

[62] With respect to the appellant's stated concern that the request in this appeal was for "personal information," the city confirms that the fees for general records are different from the fees for records containing an individual's own personal information. It refers to section 45 of the *Act* and section 6 of Regulation 823[6] which provide that the fees for photocopying are the same for these two categories of records, but that fees for searching for and preparing records can only be charged for general records. The city then states:

> The IPC has held that institutions must employ a record-by-record approach and not a page by page approach in determining whether a requester should be charged fees when a record contains the requester's personal information and general information.

[6] The city also refers to Order MO-2495.

> In Order MO-2528, the IPC distinguished between situations where a requester is seeking only records containing the requester's personal information from a request where the scope of the request was broad enough to encompass general records in addition to records containing the requester's personal information.
>
> … the Appellant's request was for general records related to [a named road] generally and [a particular address] specifically. The fact that the Appellant is the owner of [the particular address] is incidental to the overall request. The records which were provided during the actual and representative samplings of the records are indicative of the fact that the records were of a general nature as opposed to being records containing personal information. Other than email correspondence, the majority of records were general in nature (plans, maps, contract specifications, property information, by-law complaints reflecting other people's personal information). As such, it was reasonable for the City to provide a fee estimate based on fees applicable to a search for general records.

[63] In the appellant's representations on this issue, he begins by stating as follows:

> The detail provided appears to be sufficient to address the fee concern, with two exceptions.

[64] The appellant then identifies the two matters which he takes issue with.

[65] The first is the appellant's concern that the city's response "does not differentiate personal documents from other records." He states:

> [I] requested that the data intended on being provided by the City is marked and disclosed in the detailed disclosure of the pending response. Personal information, as you know, is not subject to the same fees. In order to make a final decision on whether to proceed with [the appeal], [I need to] have the personal records identified.
>
> [I] take the position that any records that contain personal information, as defined in [the *Act*], are not subject to fees. [I] also take the position that the majority of the records will fall within the definition of personal information, as defined in the *Act* …

[66] The appellant then reviews the definition of "personal information" in section 2(1) of the *Act*, and states:

> Should [the city] provide notations on their detailed description of records submitted with regards to the Appeal as to which records are personal

> and which are not, the fee matter may well be considered to be fully addressed. …

[67] The second matter raised by the appellant is the following:

> [I] requested a CD. The fee estimate is based on photocopies. Please request [the city] make the necessary adjustments.

Analysis and findings

[68] To begin, based on the detailed information provided by the city on how the fee estimate was calculated, and based on the appellant's statement that he does not take issue with the calculation of the fee (except for two matters addressed below), I uphold the city's fee estimate, subject to my analysis of the two matters raised by the appellant.

[69] The first matter is the issue regarding whether the fees should be calculated based on the records being personal information or general records. As identified by the parties, although photocopying fees apply to both these categories of records, fees for searching for and severing records responsive to requests for an individual's own personal information are not chargeable under the *Act*.

[70] The city takes the position that the request was, essentially, for general records, and states:

> … the Appellant's request was for general records related to [a named road] generally and [a particular address] specifically. The fact that the Appellant is the owner of [the particular address] is incidental to the overall request. The records which were provided during the actual and representative samplings of the records are indicative of the fact that the records were of a general nature as opposed to being records containing personal information. Other than email correspondence, the majority of records were general in nature (plans, maps, contract specifications, property information, by-law complaints reflecting other people's personal information). As such, it was reasonable for the City to provide a fee estimate based on fees applicable to a search for general records.

[71] The appellant argues that any records that contain personal information are not subject to certain fees. He also argues that "the majority of the records" will fall within the definition of personal information.

[72] Based on my review of the request in this appeal and the representations of the parties, I am satisfied that the city properly calculated the fee estimate based on its position that the request is for general records. I accept the city's position that the

request is for information about a named road and a specified address, and that the fact that the appellant is the owner of the address does not necessarily mean that the records relating to this address are records containing "personal information." I also note that the city's representations refer to the fact that it reviewed actual representative samples of records, and that most of them constituted records that would not necessarily contain the appellant's personal information. Accordingly, I accept that the city's decision to provide a fee estimate based on fees applicable to a search for general records was reasonable.

[73] I note, however, that the city acknowledges that some of the records (for example, email correspondence) do contain the appellant's personal information. Based on the record-by-record approach to this issue, set out in Order MO-2528, in calculating the final fee amount, if any records contain the appellant's personal information, the city ought to amend the fee accordingly.

[74] The second matter raised by the appellant is his request that the records be provided to him on CD, therefore eliminating the fee for photocopies.

[75] In the circumstances, and because this appeal addresses the fee estimate, and not a final access decision, I will not determine the issue of whether providing the records on a CD will affect the fee estimate. I note, however, that simply stating that the records can be provided on a CD does not necessarily mean that fees for photocopying are not chargeable. Order MO-2528 addressed a similar argument by an appellant as follows:

> [The Board] has provided a photocopying fee estimate of $270 …
>
> The appellant "strongly contests" the Board's $270 fee estimate for photocopies. He submits that he is willing to provide the Board with CDs or DVDs onto which the records containing both his and his children's personal information can be copied, which would eliminate the need to charge a photocopying fee.
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> In response, the Board submits that copying the records onto a CD may not be less costly for the appellant:
>
> > ... At the present time, the records have all been photocopied for collecting and sorting purposes, and many of them will have to be "modified" to delete information that cannot be disclosed. The task of copying the records onto a CD may be entrusted to an outside resource if it is more efficient to proceed in this way. The costs of such work are currently unknown.

> In some circumstances, it may be reasonable for an institution to provide an appellant with records on a CD, DVD or other portable storage media. In my view, however, it is not reasonable in the circumstances of this particular appeal to require the Board to copy the records onto a CD or DVD instead of photocopying them.
>
> I find that the Board's photocopying fee estimate is reasonable and is required by paragraph 1 of section 6.1 of Regulation 823. …

[76] I adopt the approach taken in Order MO-2528. In the current appeal, the city has conducted some manual searches for records and has also indicated that exemptions will apply to records or portions of records. In the circumstances, it is not reasonable at this time to require the city to copy these records onto a CD instead of photocopying them. I draw the city's attention to this issue in the context of any further searches that may be conducted for other records.

Summary

[77] In conclusion, I am satisfied that the city's fee estimate for preparing and photocopying are appropriate. I note, however, that to the extent that any records contain the personal information of the appellant, the fees should be amended accordingly.

B. Are the records responsive to Part Two of the request in the "custody or control" of the city and therefore subject to the *Act*?

[78] As I indicated above, in the second part of the appellant's request he asked for records of "any ad hoc informal groups such as the one that advises [a named councillor for a particular ward (the ward councillor)], as well as [the ward councillor's] e-mails, correspondence, etc. to all parties regarding [the identified address]."

[79] I note that this issue of custody and control of records relates solely to records that may be held by the ward councillor. It does not apply to records held by city staff who, in the course of meeting with the councillor and/or the "ad hoc groups," created or produced records relating to those meetings. Records of this nature, held by city staff, are clearly in the custody or control of the city, and the city refers to these types of records as being responsive to Part One of the appellant's request.

[80] I also note that, with respect to the request for records relating to the "ad hoc group," the appellant appears to take the position that records relating to meetings held by this group, on city property, are in the city's custody and control. This group, which consists of the ward councillor and his constituents, and may include city staff, appears to meet on an "ad hoc" basis. My analysis of the custody and control issue does not extend to records held by constituents who may be in this group, (and whose records

would clearly not be in the city's custody or control), nor to records held by city staff (which are in the city's custody or control). Rather, my analysis will focus solely on records held by the ward councillor.

[81] The city takes the position that records responsive to Part Two of the appellant's request are not in the custody or control of the city.

[82] Section 4(1) 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 …

[83] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody *or* under the control of an institution; it need not be both.[7]

[84] 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.[8] 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).

[85] The issue of councillor records has been addressed in a number of previous orders of this office, including several released in the past few months.[9]

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

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

[7] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[8] Order PO-2836.
[9] Orders M-813, MO-1403, MO-1967, MO-2773, MO-2807, MO-2821 and MO-2824.

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

[87] After reviewing several sections of the *Municipal Act,*[10] court decisions and academic writing, Adjudicator Cropley determined that "except in unusual circumstances, a member of municipal council is generally not considered to be an 'officer' of a municipal corporation." She then reviewed examples of "unusual circumstances" where a councillor might also be considered an "officer" of a municipal council, and stated:

> An example of an unusual circumstance would be where a municipal councillor of a small municipality has been appointed a commissioner, superintendent or overseer of any work pursuant to section 256 of the *Municipal Act*. In this regard, the authorities indicate that this would be

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

> 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.

[88] This approach has been followed in subsequent orders of this office.[11] Relying on the analysis in Order M-813, Adjudicator Donald Hale found in Order MO-1403 that "the mayor of a municipality is an 'officer' of that municipality for the purposes of the *Act* while municipal councillors are not."

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

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

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

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

[92] The city states:

> [T]he Ward Councillor corresponded with a number of [named] Road residents and also the [named] Road Association, both groups which are not part of the City government. Instead, they are constituent groups communicating with their elected official as is their right in a democratic society.
>
> The City submits that facilitating democracy is not always best achieved by providing access to constituency records. In circumstances involving constituency correspondence, the democratic principle is best achieved when constituents are provided with a means by which they can make full and frank disclosure to elected officials in private correspondence that is not intended to become part of the institutional records.

[11] See, for example, Orders MO-1403, MO-1967, MO-2821 and MO-2824.

[93] Referring to Order M-813, the city notes that "where a council member was acting in his individual capacity as a representative of his constituents he is not carrying out the duties of an officer of the municipality." The city submits that,

> The Ward Councillor was receiving constituent correspondence with respect to issues or concerns relating to [the named road] because he is a Ward Councillor for the area containing [the road]. This was not a circumstance in which the Councillor was acting in a statutory or official capacity for the City and nor was he acting as an employee.
>
> Furthermore, the residents and the constituent groups with whom the Ward Councillor was corresponding were not acting as officers or management of the City. Instead, they were operating as special interest groups in the community communicating with an elected official.

[94] The appellant submits that Order M-813 does not apply to the facts in the current appeal, particularly in relation to meetings held by the ward councillor. The appellant states that the ward councillor invited city staff to the meetings he held with residents and other groups, and any records thus generated would not constitute constituency records. Rather, he argues that the meetings were held within the mandate and responsibility of the city, attended by city staff and held in city-owned buildings.

[95] The appellant provides copies of e-mails he has obtained from city staff and the ward councillor that refer to these meetings. He submits that they are evidence that these types of meetings fall within the city's jurisdiction and any records relating to them must be under its custody or control.

Analysis and findings

[96] Having considered the representations of the parties, I am satisfied that at the time the ward councillor met with residents and others, he was not acting as an officer of the city.

[97] The evidence submitted by the appellant clearly demonstrates that the ward councillor held meetings with residents and others and that he invited city staff to attend them and provide information to those in attendance. However, based on the city's representations, I am satisfied that the ward councillor had no express authority to act for the city.

[98] In my view, the comments made by the ward councillor in the e-mail provided by the appellant are consistent with a finding that he meets with residents in his capacity as an individual councillor representative. It is evident from the e-mail sent to the appellant from a city staff member that this staff member was invited to a meeting

arranged by the ward councillor in order to assist the councillor's constituents in understanding the issues to be discussed. I am not persuaded that, because the ward councillor invited a city staff member to meetings he has with residents and other groups (whether they be constituents or not), this alters the councillor's capacity in which he is acting.

[99] Absent the "unusual circumstances" referenced above, councillors act for the city only when in a properly constituted quorum. As set out in the court decision in *St. Elizabeth Home Society v. Hamilton*:[12]

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

[100] Based on the evidence provided, I find that the circumstances of this appeal do not result in the "unusual circumstances" where the ward councillor might also be considered an "officer" of the municipality.

[101] In Order MO-2824, I determined that the analysis of whether or not a councillor is an "officer" does not turn on who the councillor communicates with. Rather, the question requires an examination of the capacity in which the councillor is acting. I agree with this analysis, and add that the analysis does not turn on whether city staff are also in attendance at a meeting arranged by him, but rather, what capacity the councillor was acting in at the time. As I found above, the evidence establishes that none of the unusual circumstances referred to in the case law apply.

[102] In the circumstances of this appeal, I am not persuaded that the ward councillor was functioning as an officer of the corporation during the meetings he held with residents, which would result in his records falling within the ambit of the *Act*. Accordingly, I find that the ward councillor was not functioning as an officer of the city when he met with residents.

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[12] *St. Elizabeth Home Society v. Hamilton* (2005), 148 A.C.W.S. (3d)497 at paras 264 and 267 (Ont. Sup. Ct.).

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

[103] Having found that, in the circumstances of this appeal, the ward councillor was not an officer of the city, I must now determine whether the requested records are nonetheless in the custody or under the control of the city.[13]

[104] The courts and this office have applied a broad and liberal approach to the custody or control question.[14]

[105] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[15] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?[16]
- What use did the creator intend to make of the record?[17]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[18]
- Is the activity in question a "core", "central" or "basic" function of the institution?[19]
- Does the content of the record relate to the institution's mandate and functions?[20]
- 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?[21]

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[13] See Orders P-239 and M-813, for example.
[14] *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.
[15] Orders 120, MO-1251, PO-2306 and PO-2683.
[16] Order P-120.
[17] Orders P-120 and P-239.
[18] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.
[19] Order P-912.
[20] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders P-120 and P-239.
[21] Orders P-120 and P-239.

- If the institution does have possession of the record, is it more than "bare possession"?[22]

- 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?[23]

- Does the institution have a right to possession of the record?[24]

- Does the institution have the authority to regulate the record's content, use and disposal?[25]

- 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?[26]

- To what extent has the institution relied upon the record?[27]

- How closely is the record integrated with other records held by the institution?[28]

- 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?[29]

[106] Moreover, in determining whether records are in the "custody or control" of the city, the above factors must be considered contextually in light of the purpose of the legislation.[30]

[107] In addition to the above factors, the Supreme Court of Canada[31] has recently articulated a two-part test to determine institutional control of a record:

1. whether the record relates to a departmental matter, and

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[22] Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.
[23] Orders P-120 and P-239.
[24] Orders P-120 and P-239.
[25] Orders P-120 and P-239.
[26] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.
[27] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.
[28] Orders P-120 and P-239.
[29] Order MO-1251.
[30] See *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.); leave to appeal denied (C.A. M39605), para 31.
[31] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 [*National Defence*].

2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

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

Representations:

[109] The city has addressed the above criteria in its representations as follows:

- The ward councillor corresponded with residents, including the appellant, and other constituent groups, some of whom were operating as "special interest groups in the community," who were communicating with their elected official.

- The ward councillor received "constituent correspondence" with respect to issues or concerns relating to the named road because he is a ward councillor for the area in question. In doing so, the ward councillor was not acting in a statutory or official capacity for the city and nor was he acting as an employee.

- In Order M-813*,* applying the 10 factors, the IPC held that where the records consisted of constituency records, the institution did not have custody of control of the records despite the fact that the record was received by the councillor at an office at City Hall and read aloud during a Council meeting.

- Where city staff responded to an inquiry from a resident or group and copied the ward councillor, the councillor was copied in his capacity as elected official with respect to matters in that particular ward, not in his capacity as an officer or employee of the city. In doing so, the creators intended to respond to the resident while keeping the ward councillor informed because he was copied on the initial inquiry. The intent was to respond to the inquiry itself.

- Referring to *Ottawa v. Ontario*[32] and Order PO-3009-F, the city acknowledges that, while it has bare possession of the emails on its email servers and, in the most extreme circumstances could lock out a user from his email account and access the account, this bare possession does not give rise to authority of the city to regulate the record itself. Nor does it give the city the right to dispose of the record, other than by having the power to delete data from the email server. The ward councillor's records

[32] *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. CL) at paras. 36-41.

are stored in a separate file folder on the city's email server, inaccessible to other city personnel. These records are not integrated other than to the extent that they are on the city's email server. The ward councillor's use of the city's email application to receive email from constituent groups is akin to receiving lettermail at City Hall and as such the records are not in the custody or control of the city.

- There was no mandatory or statutory requirement that constituents email the ward councillor or to email city staff persons. It is significant that the emails were i) sent directly to the ward councillor or that ii) the ward councillor was copied on the records. In the first instance, the sender specifically chose not to copy a city staff person as the record was intended for their elected official only. This shows specific intent not to put the records in the custody or control of the city. In the second instance, copying the ward councillor was a way of keeping that elected official apprised of the situation in order that he could represent the interests of the constituent. The intention behind the creation of these emails was to advance the constituent interests by keeping their elected official apprised of the situation and their correspondence with the city in the event that he as their representative could do something.

- E-mails that were sent by staff and copied to the ward councillor may be simultaneously located in the folders of both city staff and the ward councillor, thus being subject to the *Act* when located in the email account of the staff person and not subject to the *Act* when copied to a council member. The email correspondence residing within the email account of the city staff person is under the custody or control of the city because the city staff person is addressing a citizen complaint, which gives the city a right of possession over the version of the email sitting in the city staff person's account.

- The ward councillor in this case is not acting as an officer or employee of the city. While the city could control the version of the record sitting in a city staff person's account, it does not have a right to possess or dispose of the version of the record residing in the ward councillor's account. The ward councillor is free to use, not use, dispose of, forward, or change the record at will.

- Pursuant to section 2 of the *Municipal Act, 2001* the "purpose of municipalities" is described as follows:

> Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is

> given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.

- In Order M-813, the adjudicator held that despite the fact that a letter related to an issue that was before Council, the letter read aloud in a Council meeting was not within the custody or control of the City because it related to the councillor's mandate and function as a representative of his constituents.

- In Order M-846, applying the 10 factors, the adjudicator held that personal correspondence from a resident to a councillor relating to the passage of an interim control by-law constituted the councillor's personal records held by her in her capacity as elected representative of her constituents and relating to her mandate and functions as a councillor.

- In meeting and/or communicating with residents and other groups, the ward councillor was acting within his political mandate and function as an elected representative of his constituents. His actions could not bind the city because he was not acting with Council as a whole. The ward councillor's mandate is distinguishable from the city's mandate, and therefore Council's mandate, of providing good governance and being responsible and accountable. "Although constituents may call on the ward councillor to make the [city] account for its actions and provide good governance, the elected official's mandate is to represent these calls to action. The two mandates, that of the [city] and that of the elected officials, although not contradictory, are distinct. The free and frank disclosure by constituents to councillors is at the heart of a councillor's mandate as a representative and differs from the mandate of the [city]."

- The city's Records Retention By-law does not apply to individual councillor records.

- The city's customary practice when obtaining records responsive to an access request is to provide council members with instructional tools that distinguish between records under the city's custody or control and records which constitute constituency records that are excluded from the city's custody or control.

- There is no evidence that the city has used the records or relied on them in any way.

[110] As I noted above, the city acknowledges that wherever a city staff person was the creator of the record, or the record was sent to a staff person, the version of the

record created or received by the city staff person would be in the custody or control of the city. The city indicates that these records are expected to be responsive to the Part One search.

[111] The city concludes:

> Taking all of the factors into account as well as the democratic principles associated with the legislative purpose of [the *Act*], the ward councillor's records are clearly distinct and separate from records under the [city's] custody or control. The [city] has only bare possession of the records and no right to possess, regulate or dispose of the records. The records are stored separate from [city] records and most importantly the records are consistent with the councillor's mandate of representation of his constituency as opposed to the [city] and Council as a whole's mandate of good government and accountability to the public generally. These records are not within the custody or control of the [city].

[112] The appellant submits that because the ward councillor invited city staff to the meetings, the records must be within the city's custody and/or control. The appellant submits further that because the ward councillor uses the city's e-mail, his records cannot be maintained separate and apart from city records whether or not he uses a password to secure it. The appellant argues that the e-mail system is paid for by taxpayer money and e-mails found on it are, therefore, within the city's custody and control. Similarly, the appellant contends that since the ward councillor is paid with taxpayer money his records are subject to the *Act*. Finally, the appellant submits that the subject matter of the meetings falls within the city's mandate and all of the evidence surrounding the meetings, including location and attendance of staff, indicate that the city should have custody and control over the records in question.

Analysis and findings

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

[114] Before addressing this issue, I note that references are made in the representations and the following discussion to "constituency records." In Order MO-2821, Senior Adjudicator Sherry Liang considered the nature of the records that are held by municipal councillors as follows:

> 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.[33]

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

[33] *National Defence*, above at note 31, para.41.

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

[115] I agree with this analysis. Although the records at issue in the current appeal may fall within the category of "constituent" records because they relate to meetings that the ward councillor had with his constituents, they may not fall exclusively within this type of record. In that event, the broader characterization of the records as consisting of "political" records is understood in any discussion that refers to constituent records.

[116] After considering the submissions made by the parties, I conclude that the requested records are not in the custody or control of the city.

[117] I note again that the city acknowledges that any records created by or sent to city staff and held by them would fall within its custody and control, and that the city will be addressing these records in responding to the first part of the appellant's request. The ensuing discussion refers only to those records held by the ward councillor.

[118] With respect to the list of factors to consider in determining whether or not a record is in the custody or control of an institution, I accept the position of the city that it has not relied on the records held by the ward councillor.

[119] I am also satisfied that the ward councillor's records have not been provided to or integrated with records held by the city, regardless of whether they may have been received or created by the ward councillor at his municipal office, using the city's e-mail system. I have considered the possibility that some records, if they exist, are located on city property, such as on a computer server provided by the city. Even if some of the records are emails located on computer servers administered by city staff, I accept the submissions of the city that such records are not integrated with city records and that the city does not regulate their content, use or disposal.

[120] With respect to the issue of whether the content of any records relates to the institution's mandate and functions, I accept that, in a general sense, records of this nature may relate to issues that fall within the mandate of the city (ie. matters related to road development). Based on the subject matter of the records requested, the content of any records that may exist would relate broadly to matters in the city's mandate. The city clearly has an interest in road maintenance/development and by-law issues occurring in the city, and it is arguable that the requested records relate to a "city matter."[34]

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[34] See also the manner in which the phrase "departmental matter" is referred to in the first part of the *National Defence* test.

[121] As I noted above, the city has custody or control of records held by staff and incorporated into its records. The records at issue in this appeal, however, are different in nature, as they relate to the councillor's role as an individual constituent representative.

[122] The appellant also argues that the records are in the custody of the city because the e-mail system is paid for by taxpayer money and e-mails found on it are, therefore, within the city's custody and control. I note that a number of previous orders and decisions have reviewed the issue of whether records stored on institutional computers are in that institution's custody. A recent decision of the Divisional Court,[35] referred to by the city, reviewed this issue in some detail. Although that case dealt with records which were clearly the "personal records" of an employee of the City of Ottawa, the following quotation is instructive:

> … The City in this case has some limited control over the documents in the sense that it can dictate what can be created or stored on its server. However, this is merely a prohibition power, not a creation power. The 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.

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

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

[125] In my view, this decision is consistent with the findings of the Supreme Court of Canada in *National Defence*, referred to above. In that decision, the Supreme Court

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[35] *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.

discussed the unique position that ministers hold, which is not dissimilar from the positions held by municipal councillors. The court articulated the following two-part test for institutional control of a record:

1. whether the record relates to a departmental matter, and

2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

[126] Applying this two-part test, even if the requested records could arguable relate to a "city matter" in a broad sense, I have found that the city does not have the authority to regulate the use or content of any such records, and I am satisfied that the city could not reasonably be expected to obtain a copy of such records upon request.[36] The circumstances therefore do not fulfill the second part of the test in *National Defence* for a finding of institutional control, and I am satisfied that the city does not have control of the requested records.

[127] As a result of the above, I find that the requested records relating to Part Two of the appellant's request that are held by the ward councillor are not in the custody or under the control of the city and are, therefore, not subject to the *Act*.

[128] Having made this finding, and in the absence of additional information, it is not necessary for me to determine whether the search conducted for records responsive to Part Two of the request was reasonable.

ORDER:

1. I uphold the city's fee estimate decision.

2. I uphold the city's decision that records held by the ward councillor are not in the custody or control of the city.

Original signed by: April 29, 2013
Frank DeVries
Adjudicator

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