Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3031

Appeal MA12-340

York Region District School Board

April 7, 2014

Summary: The board received a request for access to communications between certain named school board trustees relating to the selection of a new trustee to replace one who was departing. The board located certain responsive records and issued an access decision on them. With respect to other records, which are communications sent exclusively between the named trustees, the board took the position that these records are not in its custody or under its control and are, therefore, not subject to the *Act*. In this case, the adjudicator decided that the communications sent exclusively between trustees are not in the custody or control of the board and are not subject to the *Act*.

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

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

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 York Region District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain records relating to the selection and appointment of a new school board trustee. The final clarified request was for the following records:

1. All written communications including emails, letters, memos, reports, etc from or addressed to [seven named trustees][1] between [two specified dates] concerning the subject of the selection of a new trustee to replace [a named trustee]. Emails are to include the entire email thread ….

2. Minutes of the Trustee meeting held on [a specified date] at which the appointment decision was made.

[2] In response to the clarified request the board issued an access decision in which it identified six categories of records, including various emails between trustees relating to the requested subject, as well as a record of the identified trustee meeting. The board granted partial access to some of the records and denied access to others, in whole or in part, based on certain exemptions in the *Act*. In addition, in its decision the board identified an additional category of record, and stated:

> … we have reviewed a number of email communications that were sent and received by the named trustees and have decided these records are private, constituency records of the named trustees and beyond the Board's custody or control.

[3] The board also indicated that it had not yet completed a review of certain electronic records, and that a decision was pending regarding any records that might be located during this search. In addition, the board advised that it had notified an affected third party of the request and was providing that party with the opportunity to make representations concerning disclosure.

[4] The board subsequently issued a further decision on access to the additional electronic records. This decision also granted access to certain records, denied access to others, and indicated that some additional records were "constituency records" and not under the custody or control of the board.

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

---

[1] I note the request was not for the records of all of the trustees, but only the seven named in the request.

[6] During mediation, the appellant confirmed that he was only appealing the board's decision that certain records responsive to item 1 of his request were "constituency records" and not within the custody and control of the board. He took the position that the requested records relating to the appointment of a trustee to fill a vacancy, including records of discussions amongst trustees regarding this issue, are not "private constituency" records and are in the board's custody or control, because these records relate to the trustees' formal responsibilities in the selection process for a new trustee.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the board and the seven named trustees, initially, inviting representations on the issue of whether the identified records are in the board's custody or control. I received representations from the board and six of the trustees. I then sent the Notice of Inquiry, along with a copy of the board's representations and a summary of the representations received from the trustees to the appellant, who also provided representations to me.

[8] In this order I find that the records remaining at issue, consisting of email communications sent exclusively between the trustees of the board,[2] are not in the custody or control of the board, and are not subject to the *Act*.

RECORDS:

[9] The records at issue in this appeal are email communications (including single emails, email strings, or a series of emails) sent exclusively between trustees of the board. They are identified as initial Record numbers: 19-36 and 48-49, and additional Record numbers: 1, 5, 13, 14, 16, 27-34, 40-43, 56 (part of email string), 59 and 60.

DISCUSSION:

Background information about the records

[10] The board provides background information about the records remaining at issue. It begins by identifying the nature of the information in all of the records requested, and how it relates to the business of the board. It states:

> The request relates to a motion that was held on March 5, 2012 in which the Board moved to appoint a replacement for a former trustee pursuant to the "vacancies" provision in section 221(1)(a) of the *Education Act*, which reads:

[2] Although the records were sent to or from the seven trustees named in the request, some of the other board trustees were also involved in sending or receiving some of these emails.

> Subject to section 224, if the office of a member of a board becomes vacant before the end of the member's term,
>
> > (a) the remaining elected members shall appoint a qualified person to fill the vacancy within 90 days after the office becomes vacant, if a majority of the elected members remain in office [...]
>
> The Board … developed and implemented the selection process to ensure fairness and transparency. It provided candidates with an information package and invited them to make a short presentation in an open Board meeting in late February.
>
> The Board later proceeded with a vote, which was conducted after a short discussion at an open Board meeting. Selection was accomplished by holding votes on a succession of "runoff ballots." In each ballot, a candidate was eliminated until a winning candidate was appointed by achieving a simple majority on the final ballot. To ensure a free vote, votes on each ballot were confidential and counted by an independent auditor who only revealed the result.
>
> The Board's … process generated records. The Board treated any such records that were responsive to the request as being within its custody or control. It disclosed some and claimed exemptions on all or part of others. The [appellant] does not challenge the Board's treatment of these records.

[11] The board then makes a distinction between the records created as result of the process described above, which are not records at issue in this appeal, and those records which are at issue in this appeal, which concern the "political discussions related to the Board's business." It states:

> The records remaining at issue are different; they are all sent exclusively between the affected trustees and are political in nature. To be clear, if e-mails between trustees were forwarded to Board administration for follow-up, the Board treated the records as within its custody or control.
>
> By "political in nature," we mean that the trustees appear to have e-mailed each other to lobby support in relation to the pending motion. Such communications are a natural part of the political process, but were neither contemplated by the Board nor part of the Board's carefully developed and implemented selection process. …

> Some of the records at issue were sent and received on the Board's e-mail system and some of the records at issue were sent and received on trustees' personal e-mail accounts. …

[12] The board identifies the manner in which it deals with emails on its own system as follows:

> E-mails sent and received on the Board's system are subject to an acceptable use policy with typical terms. [Board Policy] indicates that e-mails can be records but are not necessarily records: "An e-mail message can be a record if made or received in connection with the transaction of Board business and must be retained in accordance with the transaction of Board business and must be retained in accordance with the Record Information Management and Freedom of Information and Protection of Individual Privacy policy and procedure." The Board has no specific policy that governs or guides whether trustee communications or papers are within its custody or control.

[13] The board then identifies the manner in which it decided to respond to the request. It states that it collected the e-mails at issue from its own email system and from trustees' personal e-mail accounts. It states that it did so for "the sole purpose of administering the Freedom of Information request," and that the affected trustees agreed to the board's approach, and provided the board with access to their personal emails. The board reiterates that it had and continues to have "no routine or expected use for the e-mails" which are at issue in this appeal, and states:

> … The Board collected the e-mails so it could properly administer the [Freedom of Information] request. … The Board reviewed the e-mails, carefully separated political communications from communications linked to its process, and rendered a decision.

[14] As a result of the approach taken by the board, certain records, including some trustee emails, were considered by the board to be within its custody or control, and the board issued decisions respecting access to them. The board takes the position that the remaining records, which are all email communications exclusively between trustees, are not within its custody or control. Because of the process used by the board to respond to the Freedom of Information request, the board has possession of all of the records at issue, and has provided copies of them to me to review in the context of this appeal.

[15] Accordingly, the sole issue in this appeal is whether the records at issue – the remaining email communications between board members – are within the board's custody or control for the purpose of the *Act*.

Are the records "in the custody" or "under the control" of the board?

[16] The board and a number of the trustees who provided representations take the position that the records remaining at issue are not in the custody or control of the board. The appellant argues that they are.

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

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

[18] 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.[3] 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.[4] 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.

[19] Previous orders and privacy complaint reports issued by this office have considered the issue of whether records held by elected municipal officials are in the "custody or control" of the municipality.[5] The definition of "institution" includes a municipality but does not specifically refer to elected offices such as a municipal councillor.

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

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or

- Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.

---

[3] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[4] Order PO-2836.
[5] These orders generally concern records of elected municipal councilors. See, for example, Orders M-813, MO-1403, MO-2750, MO-2821, Privacy Complaint Report MC10-75 and MC11-18.

[21] With respect to the second situation referred to above, previous orders as well as court decisions have set out factors relevant to the determination of "custody or control." I will discuss these factors below.

[22] Although Order M-813 concerns municipal councilors, the approach taken in this and other orders dealing with the custody or control of municipal councillors' records can be applied to the issue of custody or control of board trustee records, who are also elected officials. As a result, I will apply the same analysis to the records at issue in this appeal to determine whether the records are in the custody or control of the board and, therefore, subject to the *Act*.

Were any of the trustees functioning as an "officer" or "employee" of the board in the circumstances of this appeal?

Representations

[23] The board states that "[n]one of the affected trustees hold a statutory office and none are employed by the Board." It also states that the records at issue were not created by an officer or employee of the board, and that "[t]he affected trustees are elected officials only."

[24] A number of the trustees who provided representations state that they are neither officers nor employees of the board.

[25] The appellant concedes that the trustees do not hold a statutory office; however, he argues that in this instance the trustees were acting as officers/employees of the board. He provides the following arguments in support of his position:

- trustees are members of the board and are expected to act within the board's by-laws, as per the Ontario Government's School Board Governance Review report (2009);

- trustees are expected to familiarize themselves with the basic provisions of the *Act* to prevent inadvertent violation of it;[6]

- the trustees were discharging a special duty assigned by the board, such that they may be considered part of the board;[7] and

[6] The appellant refers to chapter 6 of *Making a difference for our Kids (2010)* published by the OPSBA - Good Governance: A Guide for Trustees, School Boards, Directors of Education and Communities.
[7] The appellant refers to Order M-813.

- trustees receive an annual honorarium from the school board, and the Canada Revenue Agency equates this honorarium to the salary paid an employee at the school board.

Analysis and findings

[26] Based on the information provided to me by the parties, I am satisfied that the board members (trustees) were not acting as "officers" or "employees" of the board. The board's and the trustees' evidence is clear that these individuals are not officers of the board, nor are they its employees.[8]

[27] Although I accept the appellant's point that these individuals are required to act within the board's by-laws and comply with certain legislative requirements, this does not result in them being officers or employees. Similarly, the fact that they are paid an honorarium which is treated by Revenue Canada as a salary does not mean they are employees of the board.[9]

[28] Furthermore, based on the evidence before me, I am not satisfied that the board members were discharging a special duty assigned by the board, such that they may be considered part of the "institution." Adjudicator Cropley in Order M-813 identified the "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.

[29] Applying a similar approach in this appeal, I have not been provided with sufficient evidence to establish that the board members are "officers" of the board in fulfilling their duties in this appeal. The appellant states that the trustees were "discharging a special duty assigned by the board," by which I assume he means the

---

[8] I note that, with respect to municipal councilors, the court in *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.) stated that it is a "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." In the words of the Court, municipal councillors are "mere legislative officers without executive or ministerial duties…"

[9] Municipal councilors are also ordinarily paid by the municipality.

duty on them, as remaining elected members, to appoint a qualified person to fill the board vacancy. I note that this duty is assigned to the remaining members of the board "if a majority of the elected members remain in office."[10] Although this itself might be a particular type of duty not usually placed on the board members, I am not satisfied that it is the type of "unusual circumstance" described by adjudicator Cropley, which would result in the trustees being considered "officers" while performing this duty. This duty is on the trustees because they are the remaining board members, and does not result in them being considered "officers" or "employees" of the board.

[30] In conclusion, I am satisfied that the communications at issue between the identified trustees concerning the subject of the selection of a new trustee to replace a departing trustee do not arise out of any exercise of duties as officers or employees of the board. To the extent the trustees hold these records, they do not hold them as part of the board or "institution."

[31] I find support for my conclusion in the Supreme Court of Canada decision in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*.[11] Although that case dealt with records in the offices of federal cabinet ministers, it is instructive in that it affirms that a government "institution" covered by access to information legislation is not synonymous with the office of an elected representative.

[32] As a result, I find that the trustees were not acting as "officers" or "employees" of the board in connection with the records at issue in this appeal.

[33] I must now review whether the requested records are, nevertheless, in the custody or under the control of the board.[12]

Are the records in the "custody or control" of the board, and therefore subject to the *Act*?

[34] The courts and this office have applied a broad and liberal approach to the custody or control question.[13] 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.[14] 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.

---

[10] See section 224 of the *Municipal Act, 2001*, referenced above.
[11] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25.
[12] See: Orders P-239 and M-813, for example.
[13] *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.
[14] Orders P-120, MO-1251, PO-2306 and PO-2683.

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

---

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

- To what extent has the institution relied upon the record?[26]

- How closely is the record integrated with other records held by the institution?[27]

- 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?[28]

[35] Moreover, in determining whether records are in the "custody or control" of the board, the above factors must be considered contextually in light of the purpose of the legislation.[29]

[36] In addition to the above factors, the Supreme Court of Canada[30] has recently articulated a two-part test to determine institutional control of a record:

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

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

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

Representations

The board's representations

[38] The board begins by arguing that the subject matter of the emails is "the critical concern." It refers to the Divisional Court's 2010 decision in the *City of Ottawa*,[31] in support of its position that the board's control over its e-mail system through its email policy "… does not, on its own, support a custody or control finding." It also states that the e-mails that the board collected from the trustees' personal e-mail accounts "are even further removed from the Board's domain."

---

[25] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.
[26] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.
[27] Orders P-120 and P-239.
[28] Order MO-1251.
[29] 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.
[30] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25 [*National Defence*].
[31] *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).

[39] The board then provides representations in support of its position that "political" e-mails are not within an institution's custody or control. It states that this office has developed "a clear and purposive position on political communications sent and received by elected representatives; they are generally beyond an institution's custody or control." It refers to order MO-2821 as the "clearest statement" of this approach, and reviews that order in considerable detail.

[40] Order MO-2821 involved a request to the City of Toronto for communications between two city councilors relating to cycling issues. In that decision, Senior Adjudicator Sherry Liang held that these communications were beyond the city's custody or control. The board refers to four specific paragraphs from that order which it states are "particularly important, and identifies the reasons why it takes this position as follows:

- at paragraph 44, Adjudicator Liang suggests that communications about matters that relate broadly to an institution's mandate are not necessarily within an institution's custody or control;

- at paragraph 47, Adjudicator Liang affirms the idea from *City of Ottawa* that communications are not necessarily under an institution's custody or control because they are made over an institution's e-mail system;

- at paragraphs 51 and 52, Adjudicator Liang explains that the exclusion of political records is consistent with the scheme and the purpose of the *Act* because the *Act* strikes a balance between the need for politicians to have "private space to allow for the full and frank discussion of issues" and the need for government transparency.

[41] The board argues that Adjudicator Liang's finding is consistent with the previous orders of this office, including MO-2807, MO-2824, and MO-2842.

[42] The board then states that this appeal "is about political records of the kind the IPC has treated as excluded." It states that it has established a formal process to govern its deliberations regarding the appointment of a new trustee, that that it does have control over "the records that were made for that process." It states that its process did not contemplate private conversations between individual trustees, and that the board "did nothing to invite those conversations or control those conversations." The record of those conversations, as reflected in the emails at issue, is a record of political conversations occurring in a "private space," according to the board.

[43] The board then confirms that it collected the e-mails from its system and from trustees' personal e-mail accounts for "the sole purpose of administering the [Freedom of Information] request." It states that it did so after hosting a meeting with the affected trustees, after which the trustees voluntarily provided the board with access to

their records. It argues that the fact that it collected the e-mails for the sole purpose of processing the request is not relevant to the issue of custody or control – it doesn't change the nature or subject matter of the records or shed any light on the board's activities. The board again refers to its email policy, and confirms that emails on its system are subject to an acceptable use policy with typical terms.

[44] The board then reviews in detail the list of factors to assist in determining custody and control, set out above. Its position on these factors can be summarized as follows:

- The records were not created by an officer or employee of the institution, but by elected officials.

- The records are communications between trustees regarding their views on a pending motion. The trustees are engaged in politics; they are lobbying each other and discussing how to lobby each other.[32]

- With respect to whether the board has a statutory power or duty to carry out the activity that resulted in the creation of these records, the board states that the power to replace a trustee is given to the board under the *Education Act*, and that this power only indirectly "resulted" in the creation of the record. It states that, as suggested by the recent decisions, records can relate "broadly" to an institution's mandate but not be within in institution's custody or control.

- The activity is not a "core", "central" or "basic" function of the board. A school board's core duty is "to provide instruction and adequate accommodation during each school year for the pupils who have a right to attend school under the jurisdiction of the board."

- Although the board has possession of e-mails sent and received on its system, and took possession of personal e-mails for the exclusive purpose of processing the request, this amounts to no more than "bare possession" of the records.

- With respect to whether the board has a right to possession of the records, the board states that it has a "typical right of access to e-mails sent and received on its system," but that this is not sufficient to support a finding of custody or control (based on the *City of Ottawa* decision).

[32] The board argues that they are "persuad[ing] each other about a position on an issue" as contemplated by Order MO-2821.

- The board has no right under contract or statute to obtain trustee personal emails. Some trustees provided the board with personal e-mails at their discretion.

- The board does not have the authority to regulate the record content, use and disposal. How the trustees communicate with each other about political matters is the trustees' own business. They must abide by the board's acceptable use policy if they use the board's system to communicate, but this kind of control is insufficient to make personal (or political) e-mails subject to the board's custody or control.

- With respect to whether there are any limits on the use to which the board may put the records, the board states that it is "implicitly restricted from using the communications for any purpose other than processing the Freedom of Information request."

- The board has not relied upon the records.

- The e-mails at issue have not been integrated into any physical or electronic space for holding board records (that is - they were not retrieved from a board file).

- The board has no policy or customary practice regarding the treatment of these records.

- There is no contract, practice, procedure or circumstance that affects the control, retention, or disposal of the record by the board.

[45] The board also refers to the information provided in the "background" section, summarized above, in support of its position that the board did not invite the creation of the records at issue, and has no use for them.

The representations of the trustees

[46] The representations of the six trustees who responded to the Notice of Inquiry were varied. In addition to the custody or control issue, some trustees also addressed the issue of whether or not access to the records ought to be granted. A number of trustees took the position that these records are personal records that ought not to be disclosed, while others took the position that these records ought to be disclosed, and doing so would not affect their interests.

[47] However, the issue in this appeal is not access to the records, but whether the requested records are in the custody or control of the board for the purposes of the *Act*. In that respect, although the representations of the trustees contained some support

for the position that the records are not "constituency" records, the trustees who provided representations generally supported the position that the records are not in the board's custody or control. The relevant representations of the trustees on the custody and control issue can be summarized as follows:[33]

- The requested records are communications between elected officials and therefore "constituency," "personal," or "political" records," which means they are not "subject to the public record." They are therefore private documents and not in the control of the board.

- These personal communications between trustees were made for the sole purpose of assisting trustees in being properly informed about matters of a "political and constituency" nature.

- These records relate to the trustees' role as an elected representatives, and do not fall under the control of the board.

- Trustees frequently communicate outside of board meetings about factors involved in political matters and decisions flowing from them.

- Emails are not considered "formal" or "official" records when amongst colleagues and informal in nature, tone and content.

- Email is a preferred method of informal communication because trustees have jobs or other responsibilities during the day, and are not available for phone calls. Emails are used in place of phone calls.

- It is important for trustees to be able to communicate quickly and efficiently in an informal manner in order to perform their job to the best of our abilities.

- Individual trustees may be aware of contextual aspects of a local nature, which are shared with other trustees as this knowledge may assist them in their deliberations.

- It is important for trustees to be able to communicate with their constituents and other trustees "privately" and "off the record" to ensure that the trustees have all necessary information.

- Trustees have an expectation that they have some degree of privacy when communicating privately on constituency issues with colleagues.

[33] Some of the summarized points were submitted by a number of trustees.

- Trustees have the right to discuss among themselves how to reach a consensus and how to best serve their constituents.

- The board does not direct or limit how the trustees communicate.

- The board has no right to the trustees' emails.

- Board email is simply a tool used by trustees to communicate, and these communications are not "owned" by the board.

- If trustees are unable to discuss matters such as these privately with other trustees, the best solution might not be achieved and the democratic process would be "impeded."

- According to the *Education Act*, the business of the board is not transacted over email, phone conversations or verbal communications outside the board room, and the trustees abide by this.

- The board does not have custody of these private conversations.

The appellant's representations

[48] The appellant acknowledges that whether records are in the custody or control of an institution must be determined on the basis of the particular circumstances of each case. He then provides a number of arguments in support of his position that the records are in the board's custody or control, which I summarize as follows:

- The appellant argues that the records concern the board's mandate and function and states that, in the circumstances, the appointment of a replacement trustee should be considered a core responsibility of the board. In support, he refers to the board's *Good Governance: A Guide for Trustees* (2010) document, particularly the portion which identifies the key roles trustees play. He then argues that, based on the key roles trustees play, the replacement of a trustee is significant, and the process to appoint a new trustee becomes a core responsibility for the existing trustees. He also points out that the process to appoint a new trustee was "mandated" by the decision of the board (via the sitting trustees) not to hold an election to replace the resigned trustee.

- With respect to whether the board relied on the records, the appellant contends that the board, through the actions of the trustees, could potentially have used the facts and/or opinions contained in the emails to determine their voting bias in selecting a new trustee. He argues that the

board has not provided any detail in support of its position that it "has not relied upon the records at all."

- With respect to the board's position that it has "no right under contract or statute to obtain trustee personal emails," the appellant refers to a decision of the British Columbia Information and Privacy Commissioner, which stated as follows regarding work-related email sent or received from personal email accounts: "The use of personal email accounts does not relieve public bodies of their duty to comprehensively search for requested records and to produce them."

- With respect to whether the board has the authority to regulate the record content, use and disposal, the appellant refers to the board's "Appropriate Use of Technology" policy, which requires users to use the board's network "in a responsible and ethical manner." He contends that there is the potential that portions of the records at issue may contain misrepresentations of facts, and would therefore not conform with the Board's acceptable use guidelines, specifically the ethics requirement.

[49] He also states:

- the *City of Ottawa* decision referenced by the board dealt with records that did not relate to the institution's mandate and functions, whereas the records in this appeal do relate to the board's mandate and function (the appointment a new trustee, after the board decided against taking the issue of choosing a new trustee to the electorate).

- In Order MO-2821, the records dealt broadly with the issue of cycling, which was not scheduled to be addressed in council for a decision, whereas the records in this appeal deal with an upcoming vote by trustees to appoint a new trustee.

[50] In addition, the appellant refers to the three "tenets" of freedom of information legislation (accountability, public participation and fairness in decision making), and argues that access to the information at issue, including the facts relied on and the opinions held by trustees will "increase the ability of members of the public to hold their elected representatives accountable." He also states that, without access to the records, the public cannot validate the accuracy of any alleged "factual content" contained in these emails.

Analysis and findings

[51] Having found above that the affected party trustees were not acting as officers or employees of the city at the time they created the communications at issue, I have

also considered whether any of the responsive records remaining at issue may, nevertheless, be in the custody or control of the board. 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 board for the purpose of the *Act*. I make this finding for a number of reasons.

[52] To begin, I note that all of the records at issue in this appeal consist of email communications exclusively between various trustees; they were not sent to the board's senior staff or employees. I also note that, as a result of the process set out above, the seven trustees voluntarily provided the emails to the board, and these were provided to me. A number of the emails are communications between the trustees using trustees' personal email addresses. Other communications were sent and/or received using the trustee's board email address.

[53] I also note that these communications do not directly relate to the selection *process* implemented by the board, or any of the specific matters dealt with by the board as a result of that *process*. The board affirms that it treated any such records as "being within its custody or control," and that it disclosed some and claimed exemptions for others. The board confirms that the only records remaining at issue are those communications passing exclusively between trustees concerning what the board describes as the "political discussions related to the board's business."

[54] With this in mind, I have considered the factors set out above in deciding whether or not the records are in the custody or control of the board, and I make the following findings.

[55] First, I accept the position of the board and the affected party trustees that the records were not created by an officer or employee of the board, and that the board does not regulate the content, use or disposal of these communications.

[56] Second, based on the board's representations, I am satisfied that the board has not relied on the records. Although the appellant argues that the trustees could potentially have used the facts and/or opinions contained in the communications to determine their voting bias in selecting a new trustee, this is not the issue. It is possible that the trustees 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.), this does not mean that the board itself relied on these email communications, and I find that it did not do so.

[57] Third, based on the evidence provided by the board and the records themselves, I find that these communications have not been provided to or integrated with records held by the board, regardless of whether or not they were received or created by the trustees using their board email system or their personal email addresses.

[58] Fourth, addressing the issue of whether the content of these records relates to the board's mandate and functions, I accept that, on a broad view, discussions about the selection of the new trustee engaged board interests. However, I accept the board's submissions that this does not mean these records are within its custody or control. In that respect, I follow the decision in Order MO-2821 where Senior Adjudicator Liang 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 [elected municipal officials] communicate regularly with each other and with any number of individuals and organizations about 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 [the elected municipal officials] about an issue that may come to a vote at [a meeting], or [elected municipal officials] wish to persuade each other about a position on an issue.

[59] In the circumstances of this appeal, I find that although the records relate to the selection of a new trustee and, as argued by the appellant, that the selection of a new trustee relates broadly to the board's mandate, the private communications at issue in this appeal relate more specifically to the trustees expressing their personal views to other trustees about an issue, or attempting to persuade each other about a particular position.

[60] Fifth, with respect to the records that exist within the board office (i.e.: on the board server), 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*.[34] Although that case dealt with records which were clearly the "personal records" of an employee of the City of Ottawa stored on a city 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

[34] *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.

> choose to do with their own material after that, including the right to destroy it if they wish.

[61] Sixth, I accept the board's submission that the records at issue in this appeal relate to the named trustees in their "political" roles as individual board members. The board does not assert control over what records the trustees create, how they maintain these records (i.e.: in their office, on a board server, or on their personal electronic devices), or what they choose to do with these communications afterwards (including the right to destroy them if they wish). As a result, although the records at issue in this appeal and provided to this office are clearly within the possession of the board, I find that such possession amounts to "bare possession" and that the records are not in the custody of the board on that basis.

[62] Finally, I also reject the appellant's contention that the possibility that the records may contain misrepresentations of facts, and may therefore not conform with the ethics requirement of the board's acceptable use guidelines, means the records are within the board's custody or control. In addition, based on the representations and material before me, I am satisfied that the board has no authority to compel the production of these records, or to otherwise regulate the trustees' use and disposal of them. These records relate to the trustees' role as constituent representatives and are in the nature of "political" rather than "board" records.

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

[64] On a final note, with respect to the appellant's general concerns about accountability and transparency, similar concerns were addressed in a number of orders, including Order MO-2821. That order considered the impact of a finding that "political" or "elected or constituent representative" records fell outside the scope of the *Act*, and determined that such a finding is consistent with the scheme and purposes of the *Act*. As Senior Adjudicator Liang stated:

> … A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the *Act*. A finding that the city, as an institution covered by the *Act,* is not synonymous with its elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.[35]

[35] Order MO-2821.

[65] I agree with the approach taken by Senior Adjudicator Liang. My finding that the records at issue in this appeal fall outside the scope of the *Act* because they are not in the custody or control of the board is consistent with the overall framework of the *Act*. In addition, as referenced in Order MO-2821, this finding does not affect other ways in which the activities of board trustees are regulated.

ORDER:

I uphold the board's decision and dismiss this appeal.

Original Signed by: April 7, 2014
Frank DeVries
Adjudicator