Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3471

Appeal MA16-141

City of Toronto

July 18, 2017

Summary: The appellant made a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to communications sent or received by the staff of a named councillor relating to the councillor's Twitter account. The city denied access to any responsive records that might exist on the basis that it does not have custody of or control over the records within the meaning of section 4(1) of the *Act.* The appellant appealed. In this order, the adjudicator upholds the city's decision and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders M-813, MO-2821, MO-3287, MO-3281 and MO-2824.

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

BACKGROUND:

[1] The appellant submitted a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all e-mails, memos and other correspondence and communications sent or received by

staffers from a named councillor's office, relating to the councillor's Twitter account. The appellant asked for any such records dated from January 1, 2015 to January 1, 2016.

[2] The city issued a decision stating that "[The named councillor's] office advised any records that their office may hold constitute the Councillor's personal records. Personal records [belong] to a Councillor and do not fall within the scope of the Municipal Freedom of Information and Protection of Privacy Act."

[3] The appellant appealed the city's decision to this office. During mediation, the issue was identified as being whether the city has custody or control over the records under section 4(1) of the *Act.* Mediation was not successful and the appeal was then moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[4] I began my inquiry by seeking and receiving representations from the city and the councillor as an affected party. I then shared the representations of the city and the councillor with the appellant[1] and sought representations from the appellant, but the appellant did not file representations.

[5] In this order, I uphold the city's decision that it does not have custody of or control over the records at issue, and I dismiss the appeal.

RECORDS:

[6] The records at issue are any e-mails, memos and other correspondence/ communications sent or received by staffers from a named councillor's office relating to the councillor's Twitter account, from January 1, 2015 to January 1, 2016. As explained below, all parties interpreted this to mean communications within the councillor's office, not communications between the councillor's staff and third parties.

DISCUSSION:

[7] The only issue in this appeal is whether the records, if they exist, are "in the custody" or "under the control" of the city under section 4(1) of the *Act.*

[8] 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 . . .

[1] In accordance with this office's *Practice Direction 7: Sharing of Representations.*

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

[10] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[3] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[11] The courts and this office have applied a broad and liberal approach to the custody or control question.[4] 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.[5] 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?[6]
- What use did the creator intend to make of the record?[7]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[8]
- Is the activity in question a "core", "central" or "basic" function of the institution?[9]
- Does the content of the record relate to the institution's mandate and functions?[10]

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[2] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[3] Order PO-2836.
[4] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.
[5] Orders 120, MO-1251, PO-2306 and PO-2683.
[6] Order 120.
[7] Orders 120 and P-239.
[8] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[9] Order P-912.
[10] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.

- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[11]

- If the institution does have possession of the record, is it more than "bare possession"?[12]

- 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?[13]

- Does the institution have a right to possession of the record?[14]

- Does the institution have the authority to regulate the record's content, use and disposal?[15]

- 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?[16]

- To what extent has the institution relied upon the record?[17]

- How closely is the record integrated with other records held by the institution?[18]

- 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?[19]

[12] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[20]

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[11] Orders 120 and P-239.
[12] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[13] Orders 120 and P-239.
[14] Orders 120 and P-239.
[15] Orders 120 and P-239.
[16] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[17] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[18] Orders 120 and P-239.
[19] Order MO-1251.
[20] PO-2683.

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

- Who owns the record?[21]

- Who paid for the creation of the record?[22]

- What are the circumstances surrounding the creation, use and retention of the record?[23]

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?[24]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?[25] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

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

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?[26]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[27]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[28]

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[21] Order M-315.
[22] Order M-506.
[23] PO-2386.
[24] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[25] Orders M-165 and MO-2586.
[26] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).
[27] Order MO-1251.

[13] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[29]

[14] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[30] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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

Representations

The city's representations

[15] The city submits that the *Act* does not specifically include elected officials, such as a municipal councillor, as falling within the definition of an institution. The city submits that an individual municipal councillor is not an officer or employee of the city, nor does he or she have the authority to act for the city except in conjunction with other members of council constituting a quorum at a legally constituted meeting, and that this has been recognized by this office in its previous decisions.

[16] The city also argues that there is an absence of "unusual circumstances" supporting a finding that the councillor is part of the city, which typically occur only when a councillor has been appointed as a commissioner, superintendent, or overseer of any work pursuant the *Municipal Act*.

[17] The city submits, further, that the councillor's Twitter account relates to the actions of the individual councillor, not the activities or actions of the city itself as a municipal corporation. The city submits that it has its own Twitter accounts that it uses to communicate about city business.

[18] The city also made representations on several of the factors described above that are relevant to a determination of whether a record is in the custody or under the control of an institution. Specifically, the city submits as follows:

- As mentioned above, the city submits that the councillor is not an officer or employee of the city. The city submits, further, that while council members' staff are city employees, they are not members of the public service and are not

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[28] Order MO-1251.
[29] *City of Ottawa v. Ontario,* cited above.
[30] 2011 SCC 25, [2011] 2 SCR 306.

subject to the Toronto Public Service By-law. Rather, they are political staff and a unique subgroup of City of Toronto non-union employees. Members of council are responsible for staffing their own offices and have full carriage of their offices' recruitment process, and final decision-making responsibility for all aspects of hiring including résumé review, screening, testing, interviews, reference checks, selection and job offers. Council members manage their staff in accordance with the *Human Resources Management and Ethical Framework for Members' Staff.*[31]

- The city has no knowledge of the use that the creator(s) of the records intended to make of the records.

- The city does not have a statutory power or duty to carry out the activity that resulted in the creation of the records. The city submits that individual councillors are mere legislative officers without executive or ministerial duties, with the exception of the mayor or other chief executive officer of the corporation, or in unusual circumstances where a quorum of council has provided the express authority for an individual member of council to act for the municipality. The city submits that the records deal with the councillor's personal and individual actions in dealing with members of the public.

- The activity in question is not a "core", "central" or "basic" function of the city. The interactions between individual members of council and individual members of the public are not core, central or basic functions of the city as an institution, but are the personal matters of the individual councillor.

- The records do not relate to the institution's mandate and functions. The councillor's records, if they exist, relate to the independent and personal actions of a councillor's "political" or "personal" activities.

- The city does not have a right to possession of the councillor's records. The requested records are a city councillor's personal records unrelated to the councillor's responsibilities as a member of municipal council, and the city does not have the authority to compel councillors to submit their personal documents to the city.

- The content, use, and disposal of the records at issue are a matter for the individual councillor to determine. The city submits with respect to the issue of disposal, that these records are not corporate records and are not subject to the records retention by-laws contained in Chapter 217 of the Toronto Municipal Code.

- The city has not relied upon the records for any purpose.

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[31] http://www.toronto.ca/legdocs/mmis/2014/ex/bgrd/backgroundfile-72504.pdf

- The records are not integrated with other records held by the city. The records form part of the councillor's constituency or personal records, which are maintained separately from the records under the city's custody or control. The city points to section 5 of its City Council Handbook for councillors, which sets out record-keeping practices for councillors.[32]

[19] With respect to the two-part test articulated by the court in *National Defence*, the city submits the records at issue, if they exist, do not relate to any "departmental" matter or to the city as an institution. Furthermore, the city submits that it could not reasonably be expected to obtain a copy of the personal records of the councillor upon request.

The councillor's representations

[20] The councillor submits that if any responsive records exist, they would be held in his constituency office and relate exclusively to his personal Twitter account, not city business. He submits, therefore, that any such records would not be in the city's custody or control.

[21] The councillor submits that he is not an officer with the city. As a councillor, he receives funding from the city to operate his constituency office, and the city provides support in the form of equipment, space and staff. This support includes the use of city computer equipment and email; the same resources are provided to all city councillors.

[22] The councillor submits that bare possession is not sufficient to establish custody or control; the city must have "some right to deal with the records and some responsibility for their care and protection".[33] He submits that his Twitter account has always operated as his personal account; at no time has it been presented as an official account of the city.

[23] As for his staff, the councillor submits that they are paid for by the city but selected and instructed by him. Their primary responsibility is to assist him in representing his constituents, and they do not have other roles or duties at the city.

[24] The councillor also made submissions on the two-part test articulated in *National Defence*. With respect to the first part of the test, whether the records relate to a city matter, the councillor submits that the records, if they exist, are political records, not city records. His Twitter account, he submits, is privately operated and does not relate to city matters, nor is it maintained on behalf of the city or operated in an official capacity. The city has never asked the councillor to tweet on its behalf and he would

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[32] http://www1.toronto.ca/City%20Of%20Toronto/City%20Clerks/Councillors/Files/pdf/H/handbook-vol1-section3.pdf

[33] The councillor cites *National Defence*, cited above.

not do so if asked. Instead, he uses his account to share thoughts and ideas he has as an individual member of society and political representative. The communications he has with his staff are for the purpose of representing his constituents.

[25] The councillor submits, further, that the fact that some of his tweets relate to the city itself, or city council, does not change the personal and/or political nature of the account. He argues that the important question is not the subject matter of his tweets but whether the communication represents a decision-making or executive function exercised by the councillor on behalf of the city. He submits, therefore, that the records, if they exist, would not relate to city matters.

[26] With respect to the second part of the test, whether the city could reasonably expect to obtain a copy of the records, the councillor submits that the city does not exercise any actual control over his office records or Twitter account and cannot reasonably expect to obtain a copy of the records, if they exist.

[27] The councillor acknowledges that his office and his email address are resources that the city provides to him in order to best represent his constituents. He submits, however, that his use of those resources does not give the city custody or control of his records. He relies on Order MO-2824 where the adjudicator found that the presence of councillor records on a city server or in an office provided by the city amounts to "bare possession" by the city and that the records are not in the custody of the city in these circumstances.

[28] Finally, the councillor submits that the city has never requested his constituency communications or records and that he would not provide those records if asked, as he is a councillor fulfilling his duty as an elected representative by appropriately using the resources provided to him by the city.

The appellant's position

[29] The appellant did not file representations. I have, however, taken into account the arguments that the appellant made in his letter of appeal.

Analysis and findings

[30] To begin, I observe that the appellant's request (communications sent or received by the councillor's staffers) could, on its face, be interpreted to include communications between the councillor's staff and others outside of the councillor's office, including public service city staff. However, it is clear from my review of the information before me, including the appellant's appeal letter, that what the appellant seeks are communications within the councillor's office. From my review of the representations of the councillor and the city, it is also clear that they interpreted the request as being for records of communications within the councillor's office.

[31] Accordingly, this order will address the issue of whether internal communications

among the councillor and/or his staff relating to his Twitter account are in the custody or under the control of the city.

Are the records in the custody or under the control of the city on the basis of a consideration of the above-listed factors?

[32] As noted above, 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.[34] The list is not intended to be exhaustive; some of the listed factors may not apply in a specific case, while other factors not listed may apply.

[33] Based on consideration of these factors, several previous orders of this office have found that city councillors' communications were not in the custody or under the control of the city in the circumstances of those appeals.[35] For example, in Order MO-2821, communications between City of Toronto councillors about cycling issues were found not to be under the control of the city. The adjudicator in that appeal distinguished between city records, on one hand (which would be subject to the *Act*), and personal or political records, on the other (which would not), and found the records at issue to fall in the latter category.

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

> Before concluding, I wish to address the question of "constituency" records. The parties made reference to this description of councillor records, as prior decisions of this office have found councillors' constituency records to be excluded from the *Act.* One of the factors the appellant relied on in her Appeal Form is that the records do not involve any individual constituent. She suggests, therefore, that the records must therefore be "city records."
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> Although the distinction between "constituency records" and "city records" is one framework for determining custody or control issues, it does not fully address the activities of municipal councillors as elected representatives or, as described in *St. Elizabeth Home Society*, above, "legislative officers." Records held by councillors may well include "constituency records" in the sense of having to do with an issue relating to a constituent. But they may also include communications with persons or organizations, including other councillors, about matters that do not relate specifically to issues in a councillor's ward and that arise more generally out of a councillor's activities as an elected representative.

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[34] Orders 120, MO-1251, PO-2306 and PO-2683.
[35] See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

> 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.
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> The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministers, do not have responsibility for a government department and are more like MPP's or MP's without a portfolio. A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the *Act.* A finding that the city, as an institution covered by the *Act,* is not synonymous with its elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.

[35] In Order MO-3287, I found that emails passing between a City of Vaughan councillor and a former councillor were not in the custody and control of the city. I found that in the circumstances of that appeal, there was no reason to believe that such records would be anything other than personal or political records of the councillor. I also found that the fact that the city's servers may have been used to send the emails (if they existed), taken alone, was not enough to establish that the emails were in the city's custody or under its control.

[36] Other orders have applied the factors mentioned above and the two-part test set out in *National Defence* and have come to the conclusion that a councillor's records are in the custody or control of a municipality. For example, in Order MO-3281, I found that a city councillor's email to an investigator setting out potential terms of the investigator's hiring by the city was under the control of the city, as the email was in relation to a city matter and the city could reasonably expect to obtain a copy of it upon request, given that the email was integral to the city's hiring of the investigator.

[37] For the following reasons, I find that the records at issue in this appeal, if they exist, are not in the custody or control of the city. I will begin with a consideration of

whether the councillor and/or his staff were acting as officers or employees of the city when the records, if they exist, were created, then will turn to other factors.

[38] Were the records created by an officer or employee of the city?

[39] I find that the councillor was not acting as an officer or employee of the city when the records, if any, were created. The court stated in *St. Elizabeth Home Society v. Hamilton (City)*[36] that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. In Order M-813, the adjudicator concluded that only in "unusual circumstances" is a councillor considered an officer of a municipality and therefore part of the institution for the purposes of the *Act*. I find that there are no "unusual circumstances" present in this appeal such that the councillor should be considered an officer of the city. There is no evidence, for example, that any communications about the councillor's Twitter account were a result of a special duty assigned by council.

[40] I find, further, that for the purposes of custody and control of records, the councillor's staff are more properly considered to be an extension of the councillor himself than employees of the city. In other words, the councillor's office is considered as a whole. I observe that the 2014-2018 City Handbook referred to in the city's representations contains the following definitions:

City staff	Refers to all employees except Members of Council and their staff.
Councillor's office	Refers to both the Councillor and his or her staff.
Member staff	Refers to employees in a Member of Council's office, whether on a full-time or part-time basis, fixed term or otherwise.

Section 3.3.1 of the handbook states in part:

> Members are responsible for staffing their offices. Members have full carriage of their offices' recruitment process and final decision making responsibility for all aspects of hiring including résumé review, screening, testing, interviews, reference checks, selection and job offer and determining their staffs' level of compensation within the Council approved salary range for the respective position.

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[36] *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

Section 3.3.4 states as follows:

> Members' staff are not members of the public service. Rather they are political staff and a unique sub-group of City of Toronto non-union employees.

[41] In my view, these provisions support a finding that a councillor's entire office, including its staff, is distinct from the offices of the city as an institution. While the city pays the salaries of the councillor's staff, they are selected by the councillor and instructed by him. They are not part of the city's public service. I also accept the councillor's submission that his staff's primary responsibility is to assist him in representing his constituents, and that they do not have other roles or duties at the city. This information is consistent with the information found in the City Handbook.

[42] In conclusion, I find that the councillor was not acting as an officer or employee of the city when the records, if they exist, were created. Further, his staff, while they are city employees, are not part of the public service; they are selected and instructed by the councillor to assist him in his role as an elected representative.

Other factors

[43] The records, if they exist, were not created in furtherance of any city business. They are related to the councillor's own Twitter account, which is not an official city account. I have not been provided with any authority to suggest that the city has a statutory power or duty to maintain a Twitter account for city councillors. I accept the councillor's statement that he uses his account to share thoughts and ideas he has as an individual member of society and political representative, and that communications he has with his staff about the account are for the purpose of representing his constituents. I also accept the city's submission that the councillor's Twitter account relates to the actions of the individual councillor, not the activities or actions of the city itself as a municipal corporation, and that the city has its own Twitter accounts that it uses to communicate about city business.

[44] The councillor acknowledges that some of his tweets relate to the city itself. Indeed, I would find it surprising if a city councillor's tweets never touched on matters within the city's mandate. The councillor submits, however, that this fact does not alter the personal and/or political nature of the account and that the important question is not the subject matter of his tweets but whether the communication represents a decision-making or executive function exercised by him on behalf of the city. I address this in my discussion of the first part of the test in *National Defence*, below.

[45] I also find that the presence of any emails on the city's server amounts to bare possession only. The councillor acknowledges that the communications at issue, if they exist, may be found on the city's servers. I agree, however, that this fact alone does not mean that the city has any right to regulate the content, use or disposal of the

emails. I agree with the adjudicator in Order MO-2824 where he states as follows:

> […] because records of this nature relate to the councillor in his role as an individual constituent representative, the city does not control what the councillors create or receive, how or if they store them on the city's server, and what they choose to do with the material after that, including the right to destroy it if they wish. 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.[37]

[46] I have also considered the test articulated in *National Defence*,[38] cited above, where the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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

[47] With respect to the first question, I find that at least some of the tweets, and the communications about the Twitter account itself, would be expected to touch on matters within the city's mandate. In this respect, it is arguable that some of the communications in the records at issue relate to "city matters" within the meaning of part one of the test in *National Defence*. This would be taking a broad and liberal view of what constitutes a "city matter" for the purposes of the custody or control question. The councillor, on the other hand, argues that the important question is not the subject matter of the tweets but whether the communication represents a decision-making or executive function exercised by him on behalf of the city. I agree with the councillor that the context of the creation of the record is important in determining what constitutes a "city matter". In Order MO-3281, I found that an email from a City of Oshawa councillor to an investigator who was later hired by the city related to a "city matter" because the city had the authority, when directed by council, to retain an investigator, and because the creation of the record at issue played an integral part in council's decision to retain the investigator. Here, I have no evidence suggesting that any of the councillor's tweets, and therefore his staff's communications about those tweets, arose out of a decision-making function or was integral to a council decision.

[48] In any event, assuming without deciding that the contents of the records relate

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[37] See also *City of Ottawa v. Ontario*, cited above.
[38] 2011 SCC 25, [2011] 2 SCR 306.

to a "city matter", I find that the city has no authority to compel the production of the records at issue or to otherwise regulate the use and disposal of them by the councillor's office. The communications of the councillor's staff about his Twitter account, if they exist, relate to councillor's role as an individual constituent representative and are in the nature of "political" rather than "city" records. I find, therefore, that even if records of this nature relate broadly to a "city matter," the city does not have the authority to regulate the use or content of any such records, and could not reasonably be expected to obtain a copy of such records upon request. The circumstances, therefore, do not meet the second part of the test in *National Defence* for a finding of city control of the records.

Conclusion

[49] Having considered the factors and the test in *National Defence,* I find that the records at issue, if they exist, are not in the custody or under the control of the city. They are the personal and/or political records of the councillor's office relating to the councillor's activities as an elected representative.

[50] Before concluding, I will briefly address the burden of proof, since the city raised the issue in its representations. The city argues that the burden of proof is on the appellant to establish that the records are in the custody or under the control of the city. Relying on *Snell v. Farrell*[39] and Order MO-2660, it argues that the onus is on the appellant because the appellant has raised the allegation that the requested records are in the custody or control of the city. Further, the city argues that it has no particular knowledge or ability to know whether the councillor or his staff sent or received communications about the councillor's personal Twitter account, and therefore there are no grounds for the onus to shift to the city. The councillor did not address the burden of proof in his representations and the appellant did not file representations.

[51] In The Law of Evidence in Canada,[40] the authors note that there have been various attempts to create formulae to determine the allocation of the burden of proof; for example, the principle that a party asserting an affirmative of an issue must prove it. However, the authors note that since it is merely a matter of choice whether an issue is stated positively or negatively, this principle is of limited usefulness.

[52] The authors also note that where legislation is silent or unclear as to the allocation of the burden of proof, decision makers must examine the legislation and resolve these problems on a case-by-case basis.[41]

[53] In civil proceedings, the persuasive burden does not have a role in the decision-

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[39] [1990] 2 S.C.R. 311.
[40] *The Law of Evidence in Canada*, 3d ed by Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst (Markham: LexisNexis Canada) at p. 115.
[41] Ibid at p. 114.

making process if the trier of fact can come to a conclusion on the evidence. If, however, the evidence leaves the trier of fact in a state of uncertainty, the persuasive burden is applied to determine the outcome.[42]

[54] I find that I do not need to make a finding as to who bears the burden of proof in this case, because I can reach a conclusion on the evidence. The request in this case was for records of communications among the councillor and/or his staff relating to the councillor's Twitter account. This appeal turns on the application of the appropriate legal principles to the nature of the request and the evidence before me. The evidence does not leave me in a state of uncertainty.

[55] Given that the city was the only party to make representations on the burden of proof, and since the outcome of this appeal does not turn on the allocation of the burden of proof, I decline to make a finding about who bears the burden of proof in this case.

ORDER:

I uphold the city's decision that the records responsive to the request, if they exist, are not in the custody or under the control of the city within the meaning of section 4(1) of the *Act.*

Original Signed by: July 18, 2017
Gillian Shaw
Adjudicator

[42] Ibid at p.91.