Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3511

Appeal MA14-378-2

The Corporation of the City of Oshawa

October 27, 2017

Summary: In Order MO-3281, issued in Appeal MA14-378, Adjudicator Gillian Shaw determined that an email sent and received by a city councillor from a personal device was under the city's control within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The email had been sent and received prior to a decision by city council to appoint an investigator, and was related to that decision. The city then issued an access decision under the *Act* and disclosed two emails, subject to minor severances that have not been disputed. The appellant appealed from the city's access decision on the basis that additional unrecovered emails ought to exist. Although the city did not request a reconsideration or seek judicial review of Order MO-3281, it argues in this case (which arises from the same request as the one that was at issue in Appeal MA14-378) that Order MO-3281 was wrongly decided.

In this order, the adjudicator determines that: (1) two additional emails mentioned by the councillor were deleted from her personal devices and are not retrievable from her personal email account by her internet service provider; (2) the argument that Order MO-3281 was wrongly decided is subject to the doctrine of *res judicata* based on issue estoppel, or alternatively, is a collateral attack or an abuse of process; (3) in any event, the adjudicator rejects the city's arguments concerning Order MO-3281; (4) section 1 of Regulation 823 (which excludes some records "capable of being produced from machine readable records" from the definition of "record" under the *Act*) does not apply; and (5) the city did not conduct a reasonable search and must search its own electronic record holdings.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "record"), 4(1), 19, 20, 22 and 45; Regulation 823 sections 1, 6 and 7.

Orders and Investigation Reports Considered: M-555, M-813, MO-3281, P-81 and PO-2634

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.); *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52; *C.M. v. R.P.*, [1993] O.J. No. 4185, 108 D.L.R. (4th) 358 (Div. Ct.), reversed on other grounds [1997] O.J. No. 156, 143 D.L.R. (4th) 766 (CA).

OVERVIEW:

[1] The appellant submitted the following access request to the Corporation of the City of Oshawa (the "city" or the "institution") under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I am requesting all communication between [a named city councillor and a lawyer retained as an investigator by the city] from March 1, 2013 through to October 1, 2013.

[2] The lawyer named in the request had been appointed by Oshawa City Council (city council) to be an investigator with all the powers of an Integrity Commissioner. In this order, I will refer to the lawyer as "the investigator." The councillor (referred to in this order as "the councillor") and the investigator had exchanged emails about the appointment before it was finalized by city council.

[3] In response to the request, the city stated the following:

> All records responsive to your request, should they exist, would have been generated by the councillor in their personal capacity or as an elected official and not as an officer or employee of the City of Oshawa Accordingly, access cannot be granted as the records are not within the custody and control of the City.

[4] The appellant filed an appeal of the city's decision with this office (the IPC), and Appeal MA14-378 was opened. That appeal was resolved by Order MO-3281, in which Adjudicator Gillian Shaw determined that the record at issue was under the city's control, and ordered it to make an access decision.

[5] The city did so, and disclosed two responsive emails with attachments. These emails had been sent to or from the councillor's personal email address. Small portions of the emails were withheld in accordance with sections 10(1) (third party information)

and 14(1) (personal privacy) of the *Act*.

[6] Upon receiving the emails, the appellant filed a further appeal with this office on the basis that additional emails should exist, and Appeal MA14-378-2 (this appeal) was opened.

[7] This appeal was later assigned to a mediator under section 40 of the *Act*. During mediation, the city contacted the councillor, and provided the appellant with a further decision that stated:

> The City of Oshawa has consulted with [the councillor] who has confirmed that to the best of her recollection, there were a total of four emails, but with the exception of the two that were previously provided to you, the other emails were minor in nature and deleted soon after the time they were exchanged.

[8] Also during mediation, the appellant confirmed that he is not seeking access to information that the city withheld under sections 10(1) and 14(1) of the *Act*. Rather, the appellant asserts that the city or the councillor has the ability to retrieve the two emails that were deleted (referred to in this order as the "unrecovered emails"). He also believes that additional emails should exist either on the city's email server or the councillor's email account.

[9] Mediation did not resolve this appeal, which moved on to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began the inquiry by inviting the city and the councillor to provide representations. Both the city and the councillor responded with representations, and the councillor also provided an affidavit. I then sent a Notice of Inquiry to the appellant, and provided him with the complete representations of the city and the non-confidential representations of the councillor, including a severed version of the affidavit.

[10] At that point in the inquiry, the councillor died. The appellant subsequently provided his representations and an accompanying affidavit, which I then provided to the city. The city responded with reply representations. I provided this material to the appellant in full, and he responded with sur-reply representations.

[11] The city did not request a reconsideration or seek judicial review of Order MO-3281. But it argues in this appeal, which arises from the same request that was at issue there, and deals with closely related records, that Order MO-3281 was wrongly decided. This is the foundation of the city's argument that it does not have control of the unrecovered emails. The city also argues that section 1 of Regulation 823 (which excludes some records "capable of being produced from machine readable records" from the definition of "record" under the *Act*) applies.

[12] In this order, the adjudicator determines that: (1) the additional emails mentioned by the councillor were deleted from her personal devices and are not

retrievable from her personal email account by her internet service provider (ISP); (2) the argument that Order MO-3281 was wrongly decided is *res judicata* based on the doctrine of issue estoppel, or alternatively, is a collateral attack or abuse of process; (3) in any event, the adjudicator rejects the city's arguments concerning Order MO-3281; (4) section 1 of Regulation 823 does not apply; and (5) the city did not conduct a reasonable search and must search its own electronic record holdings.

ISSUES:

The issues to be decided in this order are:

A. Is there a means of retrieval for the unrecovered emails in the hands of the councillor or her ISP?

B. Are the unrecovered emails "in the custody or under the control" of the city under section 4(1)?

C. Does section 1 of Regulation 823 apply?

D. Did the city conduct a reasonable search for records?

DISCUSSION:

A. Is there a means of retrieval for the unrecovered emails in the hands of the named councillor or her ISP?

[13] As already discussed, the city contacted the councillor concerning the request. She confirmed that to the best of her recollection, there were a total of four emails, two of which are the ones that have already been disclosed. She also indicated that the other two (the "unrecovered" emails) were minor in nature and deleted soon after they were exchanged. The question addressed here is whether they could be retrieved or recovered from the councillor's personal email account. The question of whether they could be recovered from her city email account is addressed below under "reasonable search."

[14] In her representations in this appeal, the councillor addressed the question of whether she would be able to retrieve the two deleted emails from her personal email account. As noted above, she had already stated that she had deleted the unrecovered emails from her devices. She also provided an affidavit of an information technology professional who had contacted the councillor's ISP. The IT professional relayed the councillor's ISP's explanation that data on its servers is "overwritten typically within a few days, and certainly after 90 days, due to the enormous volumes of data that [the ISP's] servers must manage." The councillor's ISP also "confirmed that there is no way to recover deleted content from 2013."

[15] The appellant concedes that, as a consequence of the councillor's death, there is "little or no way to access the former councillor's personal email account or conclusively prove or disprove any content that may or may not exist in that account or on her personal devices." Accordingly, he states that "he has been forced to concentrate entirely on the [city's] role and responsibility for preserving 'business records' of the [city]." The remainder of his representations on this issue pertains to whether the emails could be retrieved from the city's computer systems.

[16] Elsewhere in his representations, however, the appellant objects to the fact that the name of the councillor's personal ISP was severed from the version of the affidavit that was provided to him. I do not accept this objection, having ruled that the name of the ISP could be withheld as it is the councillor's personal information.

[17] The main thrust of the appellant's argument on retrievability relates to whether the deleted emails could be recovered from the city's computer systems. I will address this subject under "reasonable search," below.

[18] Based on the evidence provided to me, I am satisfied that the councillor deleted the unrecovered emails from her personal devices, and that they are not retrievable from her personal email account by her ISP.

[19] Accordingly, the balance of this order will address records, including the unrecovered emails, that may exist on the city's computer systems.

B. Are the unrecovered emails "in the custody or under the control" of the city under section 4(1)?

[20] 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 . . .

[21] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[22] 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.[1]

[23] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[2] A record 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

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[1] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[2] Order PO-2836.

discretionary exemption (found at sections 6 through 15 and section 38).

[24] The courts and this office have applied a broad and liberal approach to the custody or control question.[3]

[25] 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.[4] 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?[5]
- What use did the creator intend to make of the record?[6]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[7]
- Is the activity in question a "core", "central" or "basic" function of the institution?[8]
- Does the content of the record relate to the institution's mandate and functions?[9]
- 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?[10]
- If the institution does have possession of the record, is it more than "bare possession"?[11]
- 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?[12]

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[3] *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.
[4] Orders 120, MO-1251, PO-2306 and PO-2683.
[5] Order 120.
[6] Orders 120 and P-239.
[7] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[8] Order P-912.
[9] *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.
[10] Orders 120 and P-239.
[11] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

- Does the institution have a right to possession of the record?[13]
- Does the institution have the authority to regulate the record's content, use and disposal?[14]
- 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?[15]
- To what extent has the institution relied upon the record?[16]
- How closely is the record integrated with other records held by the institution?[17]
- 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?[18]

[26] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, (referred to in the remainder of this order as *National Defence*)[19] 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?

[27] In this case, the requested records were created and/or received by a municipal councillor. In *St. Elizabeth Home Society v. Hamilton (City)*,[20] the Ontario Superior Court of Justice described the relationship between a municipal council and its elected members as follows:

> It is [a] 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

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[12] Orders 120 and P-239.
[13] Orders 120 and P-239.
[14] Orders 120 and P-239.
[15] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[16] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[17] Orders 120 and P-239.
[18] Order MO-1251.
[19] 2011 SCC 25, [2011] 2 SCR 306.
[20] (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

> 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.

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

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

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

[29] Although *National Defence* was issued many years after Order M-813, I conclude that if the test set out in *National Defence* is met, this would mean that the city has control on the basis of "established principles."

Order MO-3281 and this appeal

[30] In Order MO-3281, the adjudicator determined that an email between the councillor and the investigator, relating to the city's ultimate decision to retain him, was under the city's control. Order MO-3281 dealt with Appeal MA14-378, which arose from the same access request as the one under consideration here. For that reason, this appeal was assigned the number MA14-378-2. In these circumstances, and pursuant to the policies of this office, no new appeal fee was charged for Appeal MA14-378-2.

[31] In the Notice of Inquiry that I sent to the city in this appeal, I began the section on custody or control in the following way:

> In Order MO-3281, Adjudicator Gillian Shaw determined that an email between the named councillor and the named lawyer who was retained by the city as an investigator was under the city's control. The city later disclosed two emails, with attachments, to the appellant. Is there any reason to believe that the deleted emails should be treated differently with respect to custody or control?

[32] The city's representations on the issue do not address this question at any point. Instead, despite referring at times to the "deleted emails" (which I refer to in this order as the "unrecovered" emails), the city's representations essentially consist of arguments that Order MO-3281 was wrongly decided. I will address these arguments later in this order.

[33] To answer the question posed in the Notice of Inquiry, and reproduced above, it is necessary as a beginning step to assess the circumstances under which the records (including those that have already been disclosed and the unrecovered emails) were created, as well as the likely subject matter addressed by the unrecovered emails.

[34] The email discussed in Order MO-3281 was part of a series of communications between the councillor and the investigator that culminated in city council's decision to retain the investigator. So was the second email that was disclosed by the city. It is apparent from the evidence that the unrecovered emails must also have related to the city retaining the investigator.

[35] In that regard, the councillor submits that "this appeal relates to two (2) of four (4) email messages sent in May 2013." So we know that they were contemporaneous. As noted in Order MO-3281, the councillor denied that she had a "personal relationship" with the investigator, stating that she had not seen or talked to him for nine or ten years. Based on her representations in Appeal MA14-378, it is clear that the purpose for which she contacted the investigator in May 2013 was to discuss the possibility of the city retaining him to act as such. Under the circumstances, and based on the available evidence, I conclude that the unrecovered emails relate to the same subject matter as the two emails that have been disclosed, namely, city council's decision to retain the investigator.

[36] In summary, the unrecovered emails were generated close to the same time as the ones that have been disclosed, and relate to the same subject matter.

What was decided in Order MO-3281?

[37] In Order MO-3281, the adjudicator explained her conclusion that the record was under the city's control as follows, principally with reference to the two-part test in *National Defence*:[21]

> 1) Do the contents of the record relate to a city matter?
>
> The record's content relates to the hiring of an investigator to review allegations made about individual city employees and city departments by the city's Auditor General in Report AG-13-09. In its representations, the city submits that it has the authority, when directed by council, to retain an investigator. I agree. I also agree with the appellant that the creation of the record at issue played an integral part in council's decision to retain the investigator in this case.
>
> I find, therefore, that the record relates to a city matter.

[21] At paras. 71-88.

2) Could the city reasonably expect to obtain a copy of the document upon request?

For the reasons below, I find that the city could reasonably expect to obtain a copy of the record upon request.

I place considerable weight on the circumstances surrounding the creation and use of the record. According to the Ombudsman's letter, which is consistent with the representations of the city and those of the councillor, the latter emailed the investigator to provide him with the opportunity to identify any problems with the language in a draft copy of the proposed motion. The councillor submits that she emailed the investigator as part of her preparation for a council meeting. While I accept that this is the case, I also note that this part of her preparation involved settling on the terms of the investigator's potential engagement by the city. The motion that council passed, and which is reproduced above, not only proposes hiring an investigator, but names the investigator and contains detail about the scope of his work, and the timelines for same.

The city submits that the record does not relate to its mandate and functions but rather to the independent and personal actions of the councillor in the context of her personal or political activities. It submits that the councillor's interaction with the investigator was a personal matter, and not a core function of the city. I disagree. The record contains, in effect, negotiations between the councillor and the investigator relating to the city's potential hiring of him. This relates directly to the city's mandate and functions.

The city argues that the named councillor did not have the authority to bind the institution when she emailed the investigator for his feedback on the draft motion. As noted in the Ombudsman's report, the pre-May 21 private meetings and discussions among three members of council were of an informal nature and did not come within the scope of the *Municipal Act*. I agree that the councillor did not have council approval to hire the investigator. However, this alone is not determinative. The councillor's email to the investigator, sent mere hours before the council meeting at which the motion to retain him was passed, was an integral part of the hiring of the investigator.

With respect to the use that the named councillor intended to make of the record, the city states that it can only speculate on the intended use as the named councillor generated the record in her capacity as an individual "constituent representative" and not pursuant to a council direction or assigned responsibility. However, it is clear from the uncontroverted background facts that the councillor used the record in order to confirm

the investigator's agreement to the terms of his potential engagement by the city.

I have also considered the extent to which the city has relied upon the record. The councillor's email asked for the investigator's feedback on a draft motion. The final motion, as reproduced above, contains detailed information about the terms of the investigator's engagement by the city. In other words, the councillor laid the groundwork for the city's decision to engage the investigator and the terms upon which it did so. The city submits that it has not relied on the record. While I accept the city's statement that the record has not been integrated with other records held by it, I find that its creation played a significant role in council's decision to hire the investigator in the vote that took place later that day. In this respect, the city relied on the record in order to secure the engagement of the investigator, on the terms outlined in the final motion.

Given these circumstances, I find that the city could reasonably expect to obtain a copy of the record from the councillor upon request. I find it unlikely that the councillor would refuse to provide it, given its particularly close nexus to council's decision to hire the investigator and the terms upon which he was hired.

I do not have any specific information before me about the city's authority to regulate the record's content, use and disposal. However, in *National Defence*, the Supreme Court found that in order to create a meaningful right of access to government information, "control" should be given a broad and liberal interpretation. The Court further noted that, had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not.

I find that the same reasoning applies in the context of the *Act*. While the power to dispose of the record at issue would be one factor tending to establish institutional control over the record, the absence of such a power does not automatically lead to a finding that the institution could not reasonably expect to obtain a copy of it. As noted by the Supreme Court, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include not only the legal relationship between the government institution and the record holder but also the substantive content of the record and the circumstances in which it was created. I find the latter factors of utmost importance in this appeal. The Supreme Court states that "control" means that a senior official with the government institution has some power of direction or command over a document, even if it is only on a partial basis, a transient basis, or a *de*

facto basis. Given the content of the record and the circumstances under which it was created, I find that a senior official of the city would assert control over the record if, for example, there were ever any question about the negotiations that led to the investigator's retainer, and that the official could reasonably expect the councillor to provide the record to the city, if requested to do so.

The city argues that it could not legally compel the councillor to provide the record. The parties did not refer me to any contracts, codes of conduct or policies that expressly or by implication give the city the legal right to possess or otherwise control the record, which was sent from the councillor's personal iPad. The Supreme Court has stated, however, that *de facto* (as opposed to *de jure*) control is recognized as control. Although a councillor is not considered to be part of the city for the purposes of the *Act*, neither is a councillor a stranger to the city; both are governed by the *Municipal Act*. Given this fact and particularly the very close nexus between the email and the terms upon which the city hired the investigator, I find that a senior city official could reasonably expect the councillor to voluntarily provide the record to the city.

I acknowledge that, as discussed above, many previous orders of this office have found that records created by city councillors are not in the control of the city. However, determining custody and control is a contextual exercise. None of the orders involved facts similar to those before me. Perhaps the closest parallels can be drawn between the facts in this appeal and those in Order MO-2842. Like the record in this appeal, the records in that appeal concerned councillor communications with a third party who was not a constituent. Those communications were for the purpose of exploring the possibility of bringing an NFL team to Toronto. The adjudicator in that case found that the records related to the councillor's role as an individual constituent representative and were in the nature of "political" rather than "city" records.

However, there are important differences between the facts in Order MO-2842 and those in the present appeal. In Order MO-2842, the records (if they existed) related to a city matter that was speculative or hypothetical. In the present appeal, while the hiring of the investigator was contingent on a vote of council members, that vote was imminent. Moreover, the councillor's email played a crucial role in the negotiations resulting in the hiring of the investigator.

Another significant difference, in my view, is the fact that, unlike in Order MO-2842, the record in this appeal relates to an agreement that materialized. Mere hours after the councillor sent the email, council made the decision to hire the investigator. While my conclusion may have been

> different had the motion not passed, that fact is that it did pass. In my view, this is a significant factor supporting a conclusion that the record, containing the councillor's negotiations with the investigator, is a "city" record, not a "political" record.
>
> I have not placed any weight on the appellant's argument that the record is a "document potentially related to this inquiry" within the meaning of the language in the motion. In my view, this language refers to documents relating to the events to be investigated, not documents relating to the investigation itself.
>
> I conclude, therefore, that the city could reasonably expect to obtain a copy of the record upon request. Therefore, the two-part test in *National Defence* is met, and the record at issue is a record under the control of the city within the meaning of section 4(1) of the *Act*.
>
> Finally, I reach the same conclusion if I consider the list of factors developed by this office, outside of the two-part test articulated in *National Defence*. Weighing the above factors contextually in light of the purpose of the *Act*, and for the above reasons, I find that the record is under the city's control.

The councillor's representations

[38] The councillor submits that the records at issue here would attract a different result if the criteria in Order MO-3281 are applied because:

- they were minor in nature and did not comprise negotiations or, at least, did not comprise negotiations beyond those that were contained in the two emails that have been disclosed;
- given their minor nature they could not have set the basis for the final retention of the investigator;
- given the first two bullet points, and since the emails contained neither negotiations nor preliminary terms, the emails do not stand in close nexus to the retention of the investigator by the city; and
- the emails would not assist in understanding the retention of the investigator.

[39] These representations were submitted by counsel for the councillor while she was still alive. I acknowledge that, to the best of the councillor's recollection, the two unrecovered emails were "minor in nature" and deleted soon after they were created. Beyond that, however, I find that these submissions by counsel for the councillor are highly speculative, and attempt to draw inferences from existing information. In my view, the existing information is open to a number of interpretations and I do not

accept that these assertions are established.

[40] The councillor also submits that she was unlikely to produce the records because she did not have them. I note, however, that although the city insists that it never had possession of the unrecovered emails, it has not searched its own email system. The question of whether the records could exist on the city's email system remains unresolved, and is addressed under "reasonable search," below.

[41] Accordingly, I reject the councillor's arguments to the effect that the unrecovered emails should be treated differently than was the case in Order MO-3281.

The city's representations: Res Judicata, Collateral Attack and Abuse of Process

[42] I now turn to the city's attempt to persuade me to reverse, or at a minimum, not follow, Order MO-3281. As already mentioned, the city's representations are essentially an argument that Order MO-3281 was wrongly decided. This is not simply an attempt to persuade me not to follow an existing order issued by this office, on the basis that *stare decisis* does not apply to administrative tribunals.[22] In this case, it is significant that Order MO-3281 is a final order that was issued in a previous appeal arising from the same request that is at issue in this appeal, and involved the same parties. It found that the city had control of an email generated close to the same time, and concerning the same subject matter, as the unrecovered emails. The city did not seek reconsideration of Order MO-3281 or bring an application for judicial review. Rather, the city acted on the order by making an access decision and disclosing two emails.

[43] This raises the question of whether, under the circumstances, I am required to, in effect, rehear an issue that has already been decided. In my view, the city's approach to this issue engages at least one, if not more, of the legal principles aimed at bringing finality to litigation and avoiding attacks on prior decisions that are not made within the usual channels for challenging a decision: reconsideration, appeal or judicial review. These principles include *res judicata*, issue estoppel (which is a subspecies of *res judicata*), collateral attack and abuse of process.

[44] As already noted, the city did not answer my question as to why the unrecovered emails should be treated differently, for the purposes of control, and I have rejected the councillor's arguments to this effect. Nor does it matter, for this purpose, whether the emails are to be recovered from the councillor's email accounts (which I have already concluded is impossible) or from the city's email system. In my view, there is no principled basis for making such a distinction.

[45] Accordingly, and for the reasons that follow, I find that it was not open to the city to argue that Order MO-3281 was wrongly decided, at this stage of the

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[22] See *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 1995 CanLII 108.

proceedings, having failed to request a reconsideration or bring an application for judicial review. The basis for this conclusion is either that the issue of control is *res judicata* on the basis of issue estoppel, or that these arguments are an abuse of process and/or a collateral attack.

[46] The fundamental test for issue estoppel is set out by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*[23]("*Danyluk*") The Court also explained how issue estoppel fits within the set of principles designed to encourage finality in litigation. As these issues are germane, I will set out relevant extracts from the Court's discussion at some length:[24]

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose [a complaint under the *Employment Standards Act* (the ESA)] as her forum. She lost. **An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner.** A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> . . .
>
> The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21§17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that **a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it**: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*,

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[23] 2001 SCC 44.
[24] *Danyluk*, paras. 18, 20-21, 24-25 and 33.

[1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223. [Emphasis added by the adjudicator.]

These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

. . .

Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. **Any right, question, or fact <u>distinctly put in issue and directly determined</u> by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action.** The right, question, or fact, <u>once determined</u>, must, as between them, be taken to be conclusively established so long as the judgment remains. [Underlined emphasis added by the Court. Bold emphasis added by the adjudicator.]

. . .

The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, supra, at p. 254:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

. . .

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. . . . [Citations omitted.]

[47] The Supreme Court provides further guidance in *British Columbia (Workers' Compensation Board) v. Figliola*,[25] a case that does not actually turn on issue estoppel but is concerned with section 27(1)(f) of the British Columbia *Human Rights Code*, which exists to accomplish similar objectives. The judgment contains pertinent analysis of the legal principles whose aim is the finality of litigation and the wise use of adjudicative resources:

> The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: "A litigant . . . is only entitled to one bite at the cherry. . . . Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).
>
> **The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route:** [citations omitted].
>
> Both collateral attack and *res judicata* received this Court's attention in *Boucher*.[26] The Ontario Superintendent of Pensions had ordered and

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[25] 2011 SCC 52 at paras. 27-34.
[26] A reference to *Boucher v. Stelco Inc.*, 2005 SCC 64.

approved a partial wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified, but chose not to contest the Superintendent's decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees' claim. **Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use.** The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's decision":

> Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions . . . . [para. 35]

In other words, **the harm to the justice system** lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, **it comes from inappropriately circumventing them** *(Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 46).

And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator's decision was to relitigate the conviction for sexual assault, the proceeding amounted to a "blatant abuse of process" (para. 56).

Even where res judicata is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered

where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

> **[Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.** [para. 51] [Additional citations omitted.]

At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*,[27] at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

- It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; Boucher, at para. 35).

- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).

- **The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature** (*Boucher*, at para. 35; *Danyluk*, at para. 74).

- **Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or**

[27] A reference to *Garland v. Consumers' Gas Co.*, 2004 SCC 25.

> **administrative decision** (*TeleZone*,[28] at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
>
> • Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).
>
> [Bold emphases added by the adjudicator.]

[48] The issue to be decided in this section of the order is whether the unrecovered emails are within the city's control. I have concluded that the unrecovered emails were generated close to the same time, and relate to the same subject matter, as the ones that have been disclosed under Order MO-3281 (issued in Appeal MA14-378), and no principled basis has been advanced for treating them differently and re-litigating this issue. The same question of control arises with respect to both the emails that have been disclosed and the closely related unrecovered emails. I also note that the same parties that were involved in Appeal MA14-378 (the appellant, the city and the councillor) are also the parties to Appeal MA14-378-2, which is under consideration in this order. And as already noted, Order MO-3281 was a final order. Therefore, the elements of *res judicata* based on issue estoppel appear to be present.

[49] Despite this analysis, it might be suggested that because the unrecovered emails were not specifically at issue in Appeal MA14-378, issue estoppel does not apply. In my view, however, whether the city's approach is characterized as attempting to re-open a matter that is *res judicata* based on issue estoppel, or as a collateral attack on Order MO-3281, or as an abuse of process, it is clear that the city is attempting to overturn Order MO-3281 by means other than those provided by the legislature and the common law for that purpose. Rather than bringing a reconsideration request in relation to Order MO-3281, or an application for judicial review, the city argues before me, in a subsequent inquiry arising from the same request, that my colleague's decision is wrong. This is inappropriate as it offends the principles that underlie the decisions I have referred to above. I find that the city is not entitled to do so.

[50] I recognize that these issues require the exercise of discretion and that, for example, *res judicata* and issue estoppel should not be applied mechanically.[29] Rather,

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[28] A reference to *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62.

[29] *Danyluk*, cited above, at para. 33. See also *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, where the Court found that discretion should not have been exercised to apply issue estoppel because ". . . the Court of Appeal erred in its analysis of the significant differences between the purposes and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader rights." No such differences or expectations exist here. Similarly, in discussing abuse of process, the Supreme Court stated in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, that "[t]here may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original

the public interest in finality of litigation must be balanced against ensuring that justice is done in a particular case. I also recognize that the doctrine of *stare decisis* does not apply to administrative tribunals.[30] In my view, however, the circumstances of this appeal, as outlined above, support an exercise of discretion to refuse to rehear this issue.

[51] Moreover, and in any event, I reject the city's arguments that Order MO-3281 was wrongly decided on the merits. Under the circumstances, I will not reproduce the city's arguments in great detail, but in a nutshell, they are as follows:

- the factual basis for the decision in Order MO-3281 was the city having "bare possession" of the record;
- Order MO-3281 is an "outlier" that departs from previous IPC decisions about custody/control of councillors' records;
- in *National Defence*,[31] the Supreme Court expressly rejects a "function-determinative" analysis, while the adjudicator in Order MO-3281 employs just such an approach, determining control based on the ultimate function or content of the record;
- in a similar vein, an "ex post facto" analysis cannot be used to turn a record over which the city has no control into one over which it exercises control;
- the councillor had no authority to retain the investigator;
- the emails did not relate to the city's mandate, but rather to the councillor's political or personal activities.

[52] Order MO-3281 did not rely on the city's "bare possession" of the record in order to conclude that the emails were within the city's control.[32] Rather, in Order MO-3281, the adjudicator affirmed that the city's "bare" possession of a copy of one of the emails that the city disclosed pursuant to the order was not determinative:[33]

> . . . I acknowledge that the city has physical possession of the record. I accept the city's submission that this is only because it asked the councillor for it to prepare its response to the appellant's access request under the *Act*. For the purposes of my analysis, therefore, I will assume

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results; or (3) when fairness dictates that the original result should not be binding in the new context." None of these factors are present here.

[30] See *Weber v. Ontario Hydro*, cited above.

[31] Cited above.

[32] Order MO-3281, paras. 67, 75, 76, 77 and 79.

[33] At para. 67.

> that the city's current physical possession of the record amounts to "bare possession" only.

[53] The city also argues that it is it is "absurd" to require it to explain that the unrecovered emails were never in the "bare possession" of the city, much less in its custody or control. In the face of the city's consistent failure and/or refusal to search its own electronic records for responsive records at any time during the processing of the appellant's request and the ensuing appeals, the city is not in a position to make this argument. In this order, I have already found that the unrecovered emails cannot be retrieved from the councillor's personal ISP. I will explore the question of whether they might be located on the city's email system under "reasonable search," below.

[54] The city also alleges that the adjudicator's finding of "de facto" control is based on the city's bare possession of the record, and argues that Order MO-3281 should have defined "de facto" control. This representation is belied by the order itself, as is evident from my extended quotation, above, in which the adjudicator explained her decision on this point. It is not based on the city's bare possession of the record. Nor, in my view, was any further explanation required, including a definition of "de facto" which, for the record, means "in fact." It is clear from the adjudicator's analysis that she did not rely on the city's bare possession of the record in finding that it was under the city's control.

[55] As well, Order MO-3281 went into great detail to explain why its approach differed from previous orders.[34] As noted by Adjudicator Shaw[35]:

> I acknowledge that, as discussed above, many previous orders of this office have found that records created by city councillors are not in the control of the city. However, determining custody and control is a contextual exercise. None of the orders involved facts similar to those before me. . . .

[56] Another of the city's criticisms of Order MO-3281 is, as noted above, that it contains "ex post facto" analysis to find that the records relate to a city matter. I disagree.

[57] Adjudicator Shaw's finding under part 1 of the test, reproduced above, bears repeating here[36]:

> The record's content relates to the hiring of an investigator to review allegations made about individual city employees and city departments by the city's Auditor General in Report AG-13-09. In its representations, the

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[34] Order MO-3281, paras. 60-65, 83, 84 and 85.
[35] *Ibid.*, para. 83.
[36] At para. 71 of Order MO-3281.

> city submits that it has the authority, when directed by council, to retain an investigator. I agree. I also agree with the appellant that the creation of the record at issue played an integral part in council's decision to retain the investigator in this case.
>
> I find, therefore, that the record relates to a city matter.

[58] Although, in distinguishing an earlier order, the adjudicator later adverts to the fact that in this instance, city council ultimately decided to hire the investigator,[37] there is nothing "ex post facto" about this finding under part 1 of the *National Defence* test.

[59] The city also says it is odd that in Order MO-3281, the adjudicator relies on what the city again attempts to label an "ex post facto" analysis in part 2 of the *National Defence* test. I take the contrary view. I agree with Adjudicator Shaw's analysis that the "circumstances surrounding the creation and use of the record"[38] are significant in applying part 2 of the *National Defence* test.

[60] In her part 2 analysis, she also states that "[t]he record contains, in effect, negotiations between the councillor and the investigator relating to the city's potential hiring of him. This relates directly to the city's mandate and functions."[39] And: "[t]he councillor's email to the investigator, sent mere hours before the council meeting at which the motion to retain him was passed, was an integral part of the hiring of the investigator."[40] In these circumstances, I disagree that this does not relate to the city's mandate, and the fact that the councillor herself could not retain the investigator, while obvious, is also irrelevant.

[61] In *National Defence*, the Supreme Court is concerned to avoid an untrammeled expansion of coverage under the federal *Access to Information Act*. The issue was whether a Minister's or Prime Minister's records were within a government institution's control. The court rejected an analysis that was only concerned with the content or function of a record. The Court developed its test for control, which Order MO-3281 applies, in order to avoid such unlimited coverage. Just prior to quoting the test, which had initially been developed by the trial judge, the Court summarized the trial judge's review of the law, including the following statement:[41]

> The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the *Act*.

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[37] See para. 85 of Order MO-3281.
[38] *Ibid.*, para. 74.
[39] *Ibid.*, para. 75.
[40] *Ibid.*, para. 76.
[41] *National Defence*, cited above, para. 48.

[62] The Court subsequently affirmed the trial judge's summary of the law, stating that "[t]hese principles should inform the analysis."[42]

[63] The Court goes on to observe that ". . . [u]nder step two [of the test], all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder."[43] It also states that "[i]f a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word 'could' is to be understood accordingly."[44]

[64] It is evident that this approach was followed in Order MO-3281. The order expressly considers the role of a municipal councillor and goes into considerable detail concerning the circumstances of the creation of the records.

[65] On a slightly different point, the city also argues that the use of the term "should" instead of "could" in the Supreme Court's explanation of part 2 of the test in *National Defence* signifies an imperative, in the sense of a legal obligation, in relation to the expectation of obtaining the record. It bases this interpretation of "should" on *C.M. v. R.P.*[45], a family law case.

[66] This interpretation of "should" arises in the context of section 33(7)(b) of the *Family Law Act* stating that "[a]n order for the support of a child *should* . . ." [emphasis added] and the fact that "should" is the past tense of the imperative "shall." The Court of Appeal affirmed that, "*in the context of* s. 33(7), 'should' means 'must.'" In other words, "an order for the support of a child *must*. . . ." [Emphasis added.] Transposed into part 2 of the test, the result is "[i]f a senior official of the government institution, based on all relevant factors, reasonably must be able to obtain a copy of the record . . ." which is simply incomprehensible and is clearly not what the Supreme Court meant in the context of *National Defence*.

[67] However, "should" also has other meanings, including "[u]sed to indicate what is

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[42] *Ibid.*, para. 51.
[43] *Ibid.*, para. 56.
[44] The city notes that in *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, the Court of Appeal used the word "should" in stating the second part of the *National Defence* test. This case relates to the Independent Assessment Process provided by the Indian Residential Schools Settlement Agreement, dated May 8, 2006, and whether records collected during that process are subject to federal legislation, including the *Access to Information Act*. The Court of Appeal in *Fontaine* addresses the issue briefly, and quotes *National Defence* verbatim. My analysis in this order takes cognizance of the Supreme Court's use of "should" in explaining the second part of the test in the *National Defence* judgment.
[45] [1993] O.J. No. 4185, 108 D.L.R. (4th) 358 (Div. Ct.), reversed on other grounds [1997] O.J. No. 156, 143 D.L.R. (4th) 766 (CA).

probable."[46] It is a word that appears in many contexts, and is not always imperative. The test in *National Defence* is contextual and intentionally nuanced. As the Supreme Court stated:[47]

> In this case, "control" means that a senior official with the government institution . . . has some power of direction or command over a document, *even if it is only on a "partial" basis, a "transient" basis, or a "de facto" basis.* [Emphasis added.]

[68] In my view, bearing this in mind, the Court's use of the term "should" to explain the meaning of part 2 of the test is a reference to a probable outcome, and is not an imperative. I therefore reject the city's arguments based on the meaning of "could" and "should" in part 2 of the test. Moreover, it is evident that Order MO-3281 interpreted and applied part two of the test on that basis, and in a nuanced manner, in view of the way the adjudicator stated her conclusion:

> The Supreme Court has stated, however, that *de facto* (as opposed to *de jure*) control is recognized as control. Although a councillor is not considered to be part of the city for the purposes of the *Act*, neither is a councillor a stranger to the city; both are governed by the *Municipal Act*. Given this fact and particularly the very close nexus between the email and the terms upon which the city hired the investigator, I find that a senior city official could reasonably expect the councillor to voluntarily provide the record to the city.

[69] The city also cites an Ombudsman Ontario report[48] that looked into whether the councillor and some of her colleagues held a closed meeting, finding that they did not do so on the basis that the discussions, which preceded council's decision to retain the investigator, were "private" and "informal." According to the city, this means that the councillor's actions in the email were not related to city matters. I disagree.

[70] A finding by the Ombudsman that a closed meeting was not held because of the nature of the discussions does not equate to finding that discussions did not pertain to city matters, which they clearly did for the reasons explained in Order MO-3281. In fact, the Ombudsman's report expressly recognizes that "the *Municipal Act, 2001* does not create an absolute prohibition *against members of council discussing city business* outside chambers." [Emphasis added.] The report's characterization of the discussions as "private" and "informal" is in no way a suggestion that the discussion did not relate to city matters.

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[46] https://en.oxforddictionaries.com/definition/should
[47] at para. 48 of *National Defence*.
[48] Order MO-3281 sets out an extended extract from the Ombudsman report. See paragraphs 22 and 23 of the order.

[71] For all these reasons, I agree with the conclusions in Order MO-3281 and, given my earlier finding that there is no principled basis for treating the unrecovered emails differently than the record in Order MO-3281, I will proceed on the basis that the unrecovered emails, if they exist, are under the city's control for the purposes of the *Act*.

C. Does section 1 of Regulation 823 apply?

[72] The city submits that, based on the definition of "record" in section 2(1) of the *Act* and section 1 of Regulation 823, the unrecovered emails do not qualify as a "record" within the meaning of the *Act*.

[73] Section 2(1) defines "record" as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> > (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, **a machine readable record**, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
> >
> > (b) **subject to the regulations**, **any record that is capable of being produced from a machine readable record** under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;
> >
> > [Emphases added.]

[74] Section 1 of Regulation 823 states:

> A record capable of being produced from machine readable records **is not included in the definition of "record"** for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution. [Emphasis added.]

[75] The city submits:

> . . . In the absence of any information regarding the deletion of the emails from the Named Councillor's personal email account more than three years ago, it may be reasonable to suggest that an undertaking to retrieve the deleted emails would unreasonably interfere with the operations of the City based, at least in part, on that very lack of information. The City submits that the Act does not contemplate this kind of work being

> performed by an institution, that is, requiring the City to create new processes and ultimately to attempt to recreate the records themselves in order to meet the access request, assuming the latter is even possible. This is not a situation such as those the IPC has previously decided, where the deleted emails once resided in the institution's technology infrastructure, e.g. on backup tapes for the purposes of disaster recovery, rather these emails never resided within the City's computer systems and therefore previous decisions can be distinguished from the present situation on that basis alone.

[76] These submissions are aimed at a circumstance in which the city attempts to retrieve the unrecovered emails from the councillor's personal devices or ISP account. I have already determined, above, that this would not be possible. These submissions are also premised on the assumption that the unrecovered emails never existed on any electronic server or system maintained by the city.

[77] I will review that assumption in my discussion of "reasonable search," below. However, with respect to the argument regarding section 1 of Regulation 823, I note that paragraph (a) of the definition of record includes "a machine readable record." In my view, generally speaking, an email is a "machine readable record" and is, therefore, a record under the *Act*. Because paragraph (b) of the definition refers to records that are "capable of being produced from" a machine readable record, rather than simply a "machine readable record," I conclude that these words do not describe an email. Rather, they describe a new record that can be "produced from" a machine readable record or records. As section 1 of Regulation 823 also applies to records that are "capable of being produced from a machine readable record," I find that it does not apply here.

[78] Moreover, and in any event, I also find that, absent any cogent argument that searching for the unrecovered emails in the city's electronic record holdings would unreasonably interfere with operations, section 1 of Regulation 823 does not apply for that reason as well.

D. Did the city conduct a reasonable search for records?

[79] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[49] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[80] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to

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[49] Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.[50] To be responsive, a record must be "reasonably related" to the request.[51]

[81] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[52]

[82] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[53]

[83] The city submits:

> As the Named Councillor was best able to conduct a search of the Named Councillor's City email account and personal email account, the City submits that the Named Councillor was in the best position to locate and identify responsive records, which the named Councillor demonstrably did. The Named Councillor also provided information with respect to the deleted emails presently at issue. . . .
>
> The City does not engage its Information Technology Branch to conduct searches of City email accounts unless the individual(s) who may potentially have responsive records have left the City. In this case, the Named Councillor was the only affected individual and was able to conduct the appropriate searches.

[84] Elsewhere in its representations, the city states:

> During mediation of the current appeal, the City conducted an additional search for records comprising of an additional request being made to the Named Councillor. The Named Councillor provided to the City, which in turn provided to the Appellant, the following information:
>
> > The City of Oshawa has consulted with [Named Councillor] who has confirmed that to the best of their recollection, there were a total of four emails, but with the exception of the two that were previously provided to you, the other emails were minor in nature and deleted soon after the time they were exchanged.

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[50] Orders P-624 and PO-2559.
[51] Order PO-2554.
[52] Orders M-909, PO-2469 and PO-2592.
[53] Order MO-2185.

> To be clear, the City does not possess responsive records in its own server as the City's server was never engaged or at issue either during the current or previous appeal process. . . .
>
> . . . The Appellant also appears to hold the belief that additional emails exist on the City's server and/or the Named Councillor's personal email account. This is not the case, as is abundantly clear from the information provided by the Named Councillor and acknowledged by the Appellant, namely that the deleted emails did not originate from nor were they sent to an email account on the City's server.

[85] Order MO-3281 refers to a submission by the councillor "that her email to the lawyer was sent from her personal iPad, not her city computer, and was not sent using the city's server."

[86] In this appeal, the councillor submits:

> The councillor can confirm that the two emails are no longer available on the iPad. *The Councillor's belief in this regard is the result of having conducted key word searches by date, time, author and recipient on the iPad.* These searches returned no results.
>
> . . .
>
> The Councillor understands that the two emails are not available on a server. The two emails were never sent to the City or through any email accounts provided by the City. [Emphasis added.]

[87] The appellant's submissions on reasonable search are premised on the view that the unrecovered emails should be recoverable from the city's electronic record holdings. In his reply representations, he states:

> The city of Oshawa has failed or refused to conduct a search of its records, servers and back ups to determine if these deleted emails ever existed on city data bases.
>
> The City's position that they are relying on the Named Councillor's advice is purely a convenience matter, knowing that the now deceased Named Councillor can no longer be questioned as to her 'recollection' or the accuracy of her records. . . . The City's denial of the existence of the email records on the City's servers or backups is baseless, with absolutely no evidence to support it, without conducting a search in the first place, which they have neglected and or refused to perform.

[88] The appellant's initial representations refer to the contents of the emails that were released after Order MO-3281. Based on these contents, he submits that the

councillor forwarded emails to her @oshawa email address, which is a city email account.

[89] In particular, the appellant bases this argument on the first disclosed email, the unredacted copy of which[54] confirms that it originated with the councillor's personal email address. However, it is a forwarded message, and the recipient account in both the redacted and unredacted copies shows that it was also *sent* to an email account in the name of the councillor, but there is no detail as to which email account that was. In other words, the councillor forwarded this message from her personal email account to herself at another, unidentified account. The question is, what account did she send it to? According to the appellant, it must have been her @oshawa account.[55]

[90] The city responds to this argument by pointing out that the appellant has claimed that the message was forwarded before it was received. In fact, that was a typographical error in the appellant's representations, as the city could easily have determined by looking at its copy of the record. The message was, of course, forwarded *after* it was received.

[91] As the appellant points out, the city has not searched its own record holdings. Instead, it has taken the position that only the councillor could conduct a reasonable search, so its approach has been to ask her for records.

[92] Contrary to the position taken by the city to the effect that the councillor's statements make it clear that the unrecovered emails have never existed on the city's server, the councillor's statements (to the effect that they were not sent "through" city-issued email accounts) simply indicate that the emails did not originate there. It is evident from her submissions in this appeal that the councillor did not herself search her city email account; rather, she says she searched her iPad. While the councillor does submit that the emails were not sent "to the City," the precise meaning of this is unclear. Moreover, I note that a considerable amount of time had elapsed between the events the emails relate to (and the date of the emails that have been produced) and the dates when the councillor provided representations in these proceedings.

[93] In any event, the fact that the first released email came from the councillor's personal email account and was *forwarded* from her personal email to another unidentified email account in her name strongly suggests the possibility that the councillor did forward or copy the unrecovered emails to her city email account.

[94] The simplest way to determine whether the unrecovered emails and any other related records are available on the city's servers would be for the city to conduct a

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[54] The councillor's personal email address was redacted to protect her privacy.
[55] The appellant makes additional arguments on this point based on the formatting of the "to" address, which I do not accept. The formatting does not prove that the "to" address was an Oshawa city email account.

search of its electronic records. If the search would be time consuming or involve other difficulties, the time extension provisions in section 20 of the *Act*, the fee provisions in section 45 of the *Act* and section 6 of Regulation 823, the ability to request a deposit under section 7 of Regulation 823, and the option of issuing an interim access decision, where appropriate,[56] exist to assist institutions in dealing with such difficulties.

[95] The city indicates that it does not search city email accounts "unless the individual(s) who may potentially have responsive records have left the City." In this case, the councillor is deceased.

[96] In my opinion, it is possible that the unrecovered emails and other records may exist within the city's electronic record holdings because the councillor may have forwarded them to her city email account. Unfortunately, we cannot ask her whether she did, and the only way to obtain a definitive answer is to look.

[97] Given the findings of control in Order MO-3281 and this order, and given the ambiguity concerning the way the released email was forwarded, I am not satisfied that the city has conducted a reasonable search. The appellant is not required to prove that additional records exist, and the question of what is a reasonable search is contextual. In this case, I find that the city's failure to search its own record holdings renders its search unreasonable. I will therefore order it to conduct an additional search.

ORDER:

I order the city to conduct a search of its electronic record holdings for responsive records, and to issue a new access decision, either interim or final, to the appellant, treating the date of this order as the date of the request, and taking into account sections 19, 20, 22 and 45 of the *Act*, and sections 6 and 7 of Regulation 823. I further order the city to provide me with copies of the correspondence in which it sets out its new access decision.

Original Signed by: October 27, 2017
John Higgins
Adjudicator

[56] See Orders P-81, M-555 and PO-2634.