

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER MO-3542-R

Appeal MA16-686

City of Windsor

December 19, 2017

**Summary:** The appellant made a request to the City of Windsor (the city) pursuant to the *Act* for records relating to an identified councillor and the 2015 federal election campaign. The city located a single record responsive to the request and denied the appellant access to it, in full, under the mandatory personal privacy exemption in section 14(1). The appellant appealed the city's exemption claim and took the position that the city's search was inadequate. During the inquiry, the city claimed the record was not under its custody or within its control. In Order MO-3519, the adjudicator upheld the city's decision, in part. Specifically, the adjudicator found the city was not required to search the councillor's records relating to the 2015 federal election campaign because they are not under the city's custody or control. In this order, the adjudicator denies the appellant's request for a reconsideration of Order MO-3519.

**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:** MO-3519, PO-2538-R

**Cases Considered:** *Chandler v. Alberta Assn. of Architects*, [1989] 2 SCR 848 and *City of Ottawa v. Ontario (information and Privacy Commissioner)*, 2010 ONSC 6835.

### OVERVIEW:

[1] The appellant asked that I reconsider my finding in Order MO-3519 that a councillor's own records relating to her federal election campaign are not within the custody or under the control of the city.

[2] Order MO-3519 arose from the appellant's request to the City of Windsor (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an identified councillor and the 2015 federal election campaign.

[3] The city located a single responsive record and denied the appellant access to it, in full. The appellant appealed the city's decision claiming that additional responsive records ought to exist. Specifically, the appellant claimed the city should conduct a search of the councillor's own records in relation to her federal election campaign. The city took the position that the councillor's own records were not under its custody or within its control. I upheld this part of the city's decision and found it was not required to conduct a search for the councillor's own records relating to her federal election campaign. The appellant now seeks a reconsideration of this aspect of Order MO-3519. First, the appellant argues that I conducted an "incomplete application" of the two-part test regarding custody or control in M-813. Second, the appellant submits that my "interpretive adoption of Order MO-2821" is not consistent with the broad and liberal approach to the custody or control question.

[4] In the discussion that follows, I find the appellant did not establish any basis upon which I should reconsider Order MO-3519. Accordingly, I deny the appellant's reconsideration request.

## **DISCUSSION:**

### **Background**

#### ***Custody or Control***

[5] The appellant appealed the city's decision to not conduct a search for the councillor's own records relating to her federal election campaign. The city took the position that the councillor's records relating to her federal election campaign were not under its custody or within its control. Section 4(1) of the *Act* reads, in part,

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

Under section 4(1), the *Act* applies only to records in the custody or under the control of an institution. An *institution* is defined in section 2(1) and includes the city. The definition of *institution* does not specifically refer to elected offices such as a municipal councillor.

#### ***Order MO-3519***

[6] In Order MO-3519, I upheld the city's search as reasonable. In particular, I found the city was not required to conduct a search for the councillor's own records relating to her federal election campaign. My reasons included the following:

The appellant submits that the city should have required the councillor to conduct a search of her records. However, based on my review of the circumstances, I find the councillor's own records relating to her federal election campaign are not within the custody or under the control of the city. In Order M-813, the IPC reviewed the issue of custody or control in relation to councillor's records and concluded that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

1. 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
2. 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.

Applying this test, I find the councillor was not acting as an officer or employee of the city during her federal election campaign. Moreover, I find her records relating to her campaign are not in the custody or under the control of the city.

I find support for this finding in Order MO-2821, in which the adjudicator found that political records of councillors are not within the custody or control of the municipality. In that decision, the adjudicator asserted, "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."<sup>1</sup> I adopt this finding for the purposes of this appeal and find that the councillor's political records are not within the custody or under the control of the city.

Given the wording of the request, it is unlikely the records that would be responsive to this part of the appellant's request would be anything other than the councillor's political records and not within the city's mandate. The fact that the councillor may have used the city's resources, such as email or servers, to send emails or to create records is not enough to establish that the records are in the city's custody or under its control.<sup>2</sup> Therefore, I find that records responsive to the appellant's request for the councillor's records relating to her federal election campaign are not in the custody or under the control of the city.

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<sup>1</sup> Order MO-2821 at para. 53.

<sup>2</sup> See Order MO-3287 in which the adjudicator considered whether emails between a current city councillor and former city councillor are within the City of Vaughan's custody or control.

## **Reconsideration process**

[7] The IPC's reconsideration process is set out in section 18 of the *Code of Procedure*. The relevant portions of section 18 read as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

## **The appellant's reconsideration request**

[8] The appellant raises two main arguments in support of his reconsideration request. First, the appellant argues I conducted an "incomplete application" of the two-part test regarding custody or control in M-813. Second, the appellant submits that my "interpretive adoption of Order MO-2821" is not consistent with the broad and liberal approach to the custody or control question.

[9] The appellant submits I considered only the first part of the two-part test outlined in Order M-813 (reproduced above). The appellant submits I failed to "fully consider" the second part of the test and find that the councillor's records are in the custody or under the control of the municipality "on the basis of established principles."

[10] Further, the appellant submits I "erroneously" adopted the findings in Order MO-2821 to support my "false finding" that the records relating to the councillor's federal election campaign are not in the custody or under the control of the city. The appellant submits I erred in finding these records would constitute "political records". The appellant submits my determination "rests on a false and unsubstantiated equivalence that 'federal election campaign' records held by a councillor are the same as 'political' records held by a councillor per Order MO-2821." The appellant submits "reason, process and ordinary meaning" do not support this finding and I should have ordered a search of the councillor's records in question and reviewed each located document.

[11] The appellant submits Order MO-2821 focused on the "nature and structure of the political process." In relation to his request, the appellant submits the nature and structure of the political process in the city is "clearly outlined in the established principles set out in the relevant policies, codes and laws applicable to the councillor while she is in office, including over the federal election campaign." The appellant refers to the City of Windsor's *Code of Conduct of Members of Council and Local Boards* (the

*Code of Conduct*). The appellant submits the *Code of Conduct's* clauses relating to councillors' use of city resources are "established principles" through which the councillor's records regarding her federal election campaign would be found to be under the custody and within the control of the city. The appellant also notes the *Municipal Elections Act* prohibits a municipality from contributing to a councillor's campaign. The appellant submits the councillor used the city's resources during her federal election campaign and as such, the relevant records are not personal records and relate to "city business". Therefore, the appellant submits the councillor's records relating to her federal election campaign are under the custody and within the control of the city.

### **Analysis and Findings**

[12] The reconsideration process outlined in the IPC's *Code of Procedure* is not intended to provide a party with an opportunity to re-argue their case. In Order PO-2538-R, the adjudicator reviewed the case law regarding an administrative tribunal's power of reconsideration, including the Supreme Court of Canada's decision in *Chandler v. Alberta Assn. of Architects*<sup>3</sup>. In Order PO-2538-R, the adjudicator concluded,

[T]he parties requesting reconsideration... argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect... In my view, these arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code of Procedure*, which are based on the common law set out in *Chandler* and other leading cases such as *Grier v. Metro Toronto Trucks*.<sup>4</sup>

On the contrary, I conclude that these grounds for reconsideration amount to no more than a disagreement with my decision, and an attempt to re-litigate these issues to obtain a decision more agreeable to the LCBO and the affected party. ... As Justice Sopinka comments in *Chandler*, "there is a solid policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.

[13] The IPC adopted and applied this approach in subsequent orders<sup>5</sup> and I will do so in this reconsideration. The appellant states I made an error or omission by finding the councillor's records relating to her federal election campaign are not within the custody or under the control of the city, thereby raising the ground for reconsideration in section 18.01(c) of the *Code of Procedure*. However, this section of the *Code of Procedure* provides a ground for reconsideration where there is a "clerical error, accidental error or omission or other similar error in the decision." Section 18.01(c) does not relate to the type of error or omission the appellant suggests I made as the appellant submits that my findings were incomplete or inconsistency with previous jurisprudence.

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<sup>3</sup> [1989] 2 SCR 848.

<sup>4</sup> (1996), 28 O.R. (3d) 67 (Div. Ct.).

<sup>5</sup> For examples, see Orders PO-3062-R and MO-3478-R.

[14] In any case, I find the appellant did not provide me with any basis upon which to conclude the councillor's records relating to her federal election campaign are under the custody or within the control of the city. As discussed in Order MO-3519, I find the councillor's records relating to her political election campaign do not relate to the city's mandate. The councillor was not acting as an officer or employee of the city during her federal election campaign. Given this circumstance and applying the analyses in Orders M-813 and MO-2821, I concluded the councillor's records relating to her campaign are not in the custody or under the control of the city.

[15] Regarding my application of Order MO-2821, I found that the records constitute the councillor's *political records* because they related to the councillor's federal election campaign. It appears the appellant takes issue with my creating a "false and unsubstantiated equivalence" between the "political records" at issue in Order MO-2821 and the councillor's records at issue in this appeal. This is not the case. I identified the councillor's records relating to her federal election campaign as *political records* due to the nature of the records. In any case, regardless of the identifier I assigned, in the circumstances, I found the councillor's records relating to her federal election campaign are not under the custody or within the control of the city as they do not relate to the councillor's role as an officer or employee of the city and do not relate to city business.<sup>6</sup>

[16] The appellant also refers to the city's *Code of Conduct* and alleges the councillor used the city's resources during her election campaign. The appellant did not provide support for these allegations. The appellant submitted these arguments during the inquiry process. I stated in my order that, "the fact that the councillor may have used the city's resources, such as email or servers, to send emails or to create records is not enough to establish that the records are in the city's custody or under its control."<sup>7</sup> I also referred to Order MO-3287 in which the adjudicator considered whether emails between a current city councillor and former city councillor are within the City of Vaughan's custody or control.

[17] Overall, I find the appellant's submissions re-argue his position that the councillor's records relating to her federal election campaign are within the custody or under the control of the city. The appellant made a number of arguments in both his inquiry and reconsideration submissions, such as his claims that the city's *Code of Conduct* is relevant to the determination of custody or control and that the councillor used the city's resources during her campaign. As noted above, a reconsideration is not an opportunity to re-argue the appeal. In my view, the appellant is doing just that.

[18] With regard to the appellant's newer arguments, I note section 18.02 of the *Code of Procedure* states, "The IPC will not reconsider a decision simply on the basis

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<sup>6</sup> See *City of Ottawa v. Ontario (information and Privacy Commissioner)*, 2010 ONSC 6835 which established that when a government employee uses his/her workplace email address to send and receive personal emails unrelated to work, those emails are not within the "custody or control" of the institution. In particular, at paragraph 35, the Divisional Court held that the employee, "in his personal capacity, is also not subject to having his personal documents seized and passed over to any member of the public who requests them."

<sup>7</sup> Order MO-3519, para. 54. See also *City of Ottawa*, *supra* note 6.

that new evidence is provided, whether or not that evidence was available at the time of the decision.” For example, appellant refers to Order MO-3420 to support his position that the councillor’s records should be within the custody and under the control of the city. Order MO-3420 does not relate to the issue of custody or control. Rather, Order MO-3420 considers whether the names of municipal election candidates constitutes these candidates’ personal information. Again, I confirm that the reconsideration process is not an opportunity for the appellant to reargue the appeal.

[19] In any case, I reviewed all of the appellant’s arguments and they do not change my analysis of whether the city has custody or control over the councillor’s records relating her federal election campaign. In Order MO-3519, I considered the appellant’s arguments but found that the councillor’s records relating to her federal election campaign are not within the custody or under the control of the city. Based on my review, I find there was no fundamental defect in this office’s adjudication process, per section 18.01(a) of the IPC’s *Code of Procedure*. In addition, I find there is no other jurisdictional defect in Order MO-3519, per section 18.01(b). Finally, I find there is no clerical error, accidental error or omission or other similar error in Order MO-3519, per section 18.01(c). Overall, I find the appellant is attempting to re-argue his appeal.

[20] In conclusion, I find the appellant’s reconsideration request does not establish any of the grounds upon which this office may reconsider a decision.

**ORDER:**

I deny the appellant’s reconsideration request.

Original signed by \_\_\_\_\_

Justine Wai  
Adjudicator

December 19, 2017 \_\_\_\_\_