

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3823

Appeal MA17-218

City of Ottawa

August 30, 2019

**Summary:** The City of Ottawa (the city) received a request for a copy of a city councillor's Facebook account profile. The city issued an access decision stating that the records were not in its custody or control. The appellant appealed. In this order, the adjudicator finds that the records are not in the city's custody or control and dismisses the appeal.

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

**Orders and Investigation Reports Considered:** Orders MO-2749, MO-2821, MO-2842, MO-2993, MO-3281.

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

### OVERVIEW:

[1] Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant submitted a request to the City of Ottawa (the city or the institution) for the following information:

Copy of [named councillor's] Facebook Account Profile (as he has indicated this is used for city/ward business, . . .); requesting that he use the Facebook Download tool/utility available located on his Facebook profile to download the data in the interest of time. Also requesting that

he indicate what, if any, data has been deleted, blocked or cleared prior (as far as can be recalled to present) to download. Note this Facebook profile is not his ward page but a profile page that is located at: [specified Facebook link] but should include any Facebook page or profile that is used for city business.

[2] In response, the city issued an access decision, denying access on the basis that the requested records are not in the custody or under the control of the municipality. The appellant appealed that decision to this office.

[3] As mediation did not resolve the appeal, it moved on to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The parties were invited to provide representations which were received and shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[4] In this order, I uphold the city's decision and dismiss the appeal.

## **DISCUSSION:**

[5] The sole issue in this appeal is whether the specified councillor's Facebook account is in the custody or under the control of the city under section 4(1).

[6] 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 . . .

[7] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is either in the custody or under the control of an institution; it need not be both.<sup>1</sup> "Custody" and "control" are not defined terms in the *Act*.

[8] The term "institution" is defined in section 2(1), and includes a municipality. The definition of "institution" does not specifically refer to elected offices such as a municipal councillor.

[9] In *St. Elizabeth Home Society v. Hamilton (City)*,<sup>2</sup> the Ontario Superior Court of Justice described the relationship between a municipal council and its elected members as follows:

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<sup>1</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>2</sup> (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

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 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.

[10] 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.

[11] The courts and this office have taken a broad and liberal approach to the custody or control question.<sup>3</sup>

### **Factors relevant to determining “custody or control”**

[12] This office has developed the following list of factors to consider in determining whether or not a record is in the custody or under the control of an institution.<sup>4</sup> The list is not intended to be exhaustive. Some of the listed factors may not be relevant in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?<sup>5</sup>
- What use did the creator intend to make of the record?<sup>6</sup>

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<sup>3</sup> *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.

<sup>4</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>5</sup> Order 120.

<sup>6</sup> Orders 120 and P-239.

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?<sup>7</sup>
- Is the activity in question a “core”, “central” or “basic” function of the institution?<sup>8</sup>
- Does the content of the record relate to the institution’s mandate and functions?<sup>9</sup>
- 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?<sup>10</sup>
- If the institution does have possession of the record, is it more than “bare possession”?<sup>11</sup>
- 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?<sup>12</sup>
- Does the institution have a right to possession of the record?<sup>13</sup>
- Does the institution have the authority to regulate the record’s content, use and disposal?<sup>14</sup>
- 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?<sup>15</sup>
- To what extent has the institution relied upon the record?<sup>16</sup>

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<sup>7</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>8</sup> Order P-912.

<sup>9</sup> *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.

<sup>10</sup> Orders 120 and P-239.

<sup>11</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>12</sup> Orders 120 and P-239.

<sup>13</sup> Orders 120 and P-239.

<sup>14</sup> Orders 120 and P-239.

<sup>15</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>16</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

- How closely is the record integrated with other records held by the institution?<sup>17</sup>
- 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?<sup>18</sup>

[13] In determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.<sup>19</sup>

[14] The test for control has also been recently considered by the Supreme Court of Canada. In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,<sup>20</sup> the Court adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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

## **Representations**

### ***City and councillor’s representations***

[15] The city submits that a copy of the specified Facebook account, including any records that indicate what data has been deleted, blocked, or cleared from that Facebook page is neither in the custody or under the control of the city under section 4(1) of the *Act*. The city submits that the Facebook account is the personal account of the specified councillor and is used by him to represent his constituents, rather than conduct city business. In addition, the city submits that it has no right of access to personal social media accounts of councillors as official city communications are issued via official city channels, including official city social media accounts that are maintained by city staff.

[16] The city submits that its councillors, when using a personal Facebook account, would typically conduct constituency business and/or communicate with others in a personal capacity rather than perform a duty assigned by council. The city submits that the posts on the specified councillor's Facebook page are publicly available and there is

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<sup>17</sup> Orders 120 and P-239.

<sup>18</sup> Order MO-1251.

<sup>19</sup> *City of Ottawa v. Ontario*, cited above.

<sup>20</sup> 2011 SCC 25, [2011] 2 SCR 306 (hereinafter *National Defence*).

no need to submit a "friend request" to see his profile page and posts. The city submits that it is clear through scrolling the posts on the councillor's Facebook page that he uses his personal account to communicate with constituents in respect of upcoming community events, convey greetings on special occasions such as the birth of a child, and post general comments on happenings, not only in his ward and the city, but also the rest of Canada and the world. The city defers to any representations provided by the councillor in respect of how he uses his personal Facebook account and data that may be contained in the account, but notes that the councillor is not an employee or officer of the city and the activity revealed in his posts including any of his acts of sending a "friend request" or accepting someone as a "friend" are not remotely related to any duty that he would have been assigned by council.

[17] The city submits that as the responsive records are not held by it, the framework of the two-part test from *National Defence*, ought to be applied (set out above). The city submits that the application of this two-part test and description of circumstances in IPC Order MO-3471 are very similar in context. In IPC Order MO-3471, the city submits that the adjudicator concluded that communications sent/received by a city (of Toronto) councillor using a personal Twitter account were not in the custody or control of the city. The city submits that similar to the city in MO-3471, its own city councillors maintain their own social media accounts including Facebook accounts to engage with members of the public and records that are created are personal and/or political records of the councillor's office relating to the councillor's activities as an elected representative.

[18] In respect of the first part of the test (do the contents of the document relate to a departmental matter), the city submits that records, if any, relate to the councillor's activities in his ward and/or his personal activities. The city submits that the publicly-available content of the page shows that he is not conducting city business. The city submits that the councillor is using his Facebook account for constituency outreach rather than city business that would otherwise be subject to the *Act*.

[19] The city submits that records, if any, that are responsive to this request are political/constituency records of the city councillor rather than city records. The city submits that although many of the publicly-available posts on the Facebook page advertise city events and incorporate/reference official city communications, they are not official city communications, which are otherwise available through the city website and official social media sites, including the city's Twitter and Facebook pages. The city submits that although the specified councillor is chair of the Police Services Board (a separate institution under the *Act*), his posts refer to more general policing activities in the community as reported by the media, including a February 17, 2017 post in which he shared an Ottawa Citizen video pertaining to the police having made the largest fentanyl seizure ever in the city. The city also submits that the councillor's choice of who he chooses as a "Friend" on Facebook is not the business of the city but rather his own political/personal decision. The city submits that the councillor's interactions via Facebook are not "core", "central" or "basic" of the city as an institution but rather his

own independent actions as a councillor engaged in political and/or personal activities.

[20] The city submits that the councillor, including possibly his staff, would have decided on what to post as it is not involved in the use of his Facebook account in any manner whatsoever. The city submits that city councillors may rely on their office staff to maintain their constituency records including social media accounts and councillors are granted an office budget that allows them to hire staff who are paid by the city and whose primary role is to assist with constituency matters.

[21] The city submits that it also provides councillors with city computer equipment and an email address. It submits that councillors' use of social media is not monitored by city information technology services as members of council and the mayor are specifically exempt from the city's responsible computing policy. The city refers to the decision in *City of Ottawa v. Ontario*<sup>21</sup>, which it states requires that custody and control factors be considered contextually in light of the purpose of the legislation. The city submits that the city funding "political" staff of the councillor and councillor use of city-provided IT equipment to access a web-based social media application such as Facebook or even any archiving of Facebook data on city servers is of little to no weight in determining whether the city has custody or control of the councillor's Facebook profile.

[22] In respect of the second part of the test, the city submits that it could not reasonably expect to obtain a copy of any responsive records. It submits that constituency records are not subject to the city records and disposition by-law and are considered to be confidential to the ward councillor and his/her office staff. The city submits that it does not have a right to access personal social media accounts of councillors, and therefore city staff would not expect to be granted permission to use any tools/utilities that are within the account that would otherwise allow it to view and retrieve any responsive data.

[23] The specified councillor also provided representations in this appeal. The councillor submits that he agrees with the decision of the city and that his Facebook account data would not be in its custody or control. He submits that responsive records, if they exist and are retrievable, would be stored in his personal Facebook account, an account that he uses for constituency business rather than city business.

[24] The councillor submits that he is not an officer of the city. He submits that he receives funding from the city to operate his constituency office and the city provides support such as equipment, space and staff. The councillor submits that although his staff are paid for by the city, he made the decision to hire them and they are accountable to him. He submits that his staff are responsible for assisting him in

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<sup>21</sup> 201 O ONSC 6835 (Div. Ct.).

representing his constituents.

[25] The councillor submits that he has always operated his Facebook account as a personal account and members of the public can view it without the need to "friend" him. He submits that the city does not require him to have a Facebook account and his account is separate from the official city Facebook account.

[26] The councillor submits that the city does not maintain or control/direct the content on his Facebook account. He submits that as with any other constituency record, he considers them to not be subject to the city's records retention and disposition by-law. He submits that responsive records are his political/constituency records rather than city records. He submits that he uses his Facebook account to share his thoughts and views as an individual resident of the city and political representative. He also submits that he uses his account to reach out to his constituents and other people he knows personally.

[27] The councillor submits that although much of his Facebook activity often references activities in the city and sometimes repeats official city communications, they are not intended to be official city communications, which are otherwise available through the city website and official social media sites. He submits that he, together with the assistance of his staff, makes the decisions, rather than the city, regarding how his account is used and what is posted. He submits that the fact that much of the content in his Facebook account relates to the city does not change the personal and/or political nature of his account. He submits that the use of his Facebook account including what data he chooses to "block" or "clear" does not represent a decision-making or executive function exercised by himself on behalf of the city.

[28] The councillor refers to the two-part test set out in Order MO-3281 and submits that with respect to the first part of test, the responsive records in his personal Facebook account, if any, are political records, not city records. In respect of the second part of the test, he submits that the city does not have possession or exercise any actual control over his personal Facebook account and therefore, he submits, it would be unreasonable for the city to be provided with access to his account including data, if any, that is responsive to the request.

### ***Appellant's representations***

[29] The city and councillor's representations were provided to the appellant who made her own representations in response. The appellant submits that since the specified councillor is a member of several committees and is the Chair of the Police Services Board and these positions are appointed by the city, his position can be argued to be equal to that of an officer or employee of the city. The appellant also submits that under special circumstances, and in response to emergencies in exceptional situations, the role of councillor may informally broaden to include duties akin to that of a city employee or officer. The appellant also submits that the specified councillor was appointed deputy mayor which would be construed as an employee or officer of the



city.

[30] The appellant refers to Order MO-3281 and submits that the adjudicator in that appeal found that records held by municipal councillors may be subject to an access request under the act in two situations:

1. Where the 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"
2. The councillor's records are in the custody or under the control of the municipality on the basis of established principles per section 4(1) of the *Act*.

[31] The appellant submits that the claim that the councillor's Facebook page is being used for personal use, "is not evidenced on the page nor was evidence provided in representations." The appellant submits that the information on the councillor's Facebook page does not demonstrate any personal content (referring to the form of personal friends, photos, personal information or activities). The appellant submits that the page explicitly states that he is a city councillor and Police Services Board Chair.

[32] The appellant submits that the posts that can be viewed are institutional or departmental in nature and revolve around posts by the councillor and questions and comments by the public on matters related to city assets and infrastructure, road conditions, policing matters, emergencies, safety and so on. The appellant submits that some of the posts and messages before and after the 2014 municipal election are political in content.

### ***Reply representation***

[33] In the city's reply representations, it submits that the appellant mistakenly conflates city-related events/matters of interest with official conduct of departmental business. For example, the city submits that the councillor would not have been carrying out council-assigned duties when he re-posted city staff-issued news releases such a warning residents about phony sales pitches or information about new proposed rate structure for water services.

[34] The city submits that the appellant has not explained how the content of the broad records at issue – the requested Facebook account profile and data – would specifically relate to city business or that city council assigned to him.

[35] Further, the city continues to submit that the specified councillor is not an officer or employee of the municipality. It submits that as deputy mayor, the role was specifically limited to presiding over council meetings and attending events that the mayor was unable to attend, as well as signing documents in the mayor's absence. The city submits that in this context, it is not reasonable to conclude that the specified

councillor was an officer or employee of the city.

[36] The city's reply representations were shared with the appellant who provided further representations. The appellant submits that this is not a matter of whether the councillor is an employee of the city but that he is or was fulfilling the duties as assigned by the city and was part of the "institution." The appellant refers to section 224 of the *Municipal Act* which sets out the "role of council" and submits that constituent interactions are inclusive to the role and responsibilities of a councillor by way of duties as set out in section 224. The appellant submits that none of the duties of the councillor can be fulfilled without interaction and communications to and with constituents, or the public, as noted in the city's job description of city councillors. The appellant refers to a city publication that sets out the role of city councillors where it states:

- Meet with ward residents, gain familiarity with local issues/concerns about existing and proposed City services directions and changes.
- Attend community association meetings and keep up-to-date with ward issues, needs and concerns.
- Communicate Council decisions concerning services/programs/issues to ward residents, either through attendance at meetings, preparation of newsletters or other communication vehicles.
- Provide assistance, direction and information to ward residents on access or use of City services.
- Obtain the assistance of City staff in resolving and addressing unique or particular issues or concerns raised by ward residents.

[37] The appellant also submits that in an online article published by a freelance journalist, the specified councillor clearly states that he is using his Facebook account to "fulfill the requirements set out by the [city] [in] his role of municipal councillor." The appellant submits that the councillor's communications were in the duties as assigned by the city and were core, central and a basic function of the city.

### **Analysis and finding**

[38] As noted in Order MO-3281, 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. Was the record created by an officer or employee of the city?

[39] I find that the named councillor is not an officer or employee of the city. In *St. Elizabeth Home Society v. Hamilton (City)* the Court stated that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. The appellant submits that at one point the councillor was deputy mayor, sits on several committees and is chair of the Police Services Board. She suggests that it can be argued the councillor was acting in roles that were equal to that of an officer or employee of the city. I disagree.

[40] As submitted by the city, the councillor was deputy mayor during the previous term of council and the role was specifically limited to presiding over council meetings and attending events that the mayor was unable to attend as well as signing documents in the mayor's absence as described in the 2010-2014 Governance Review report approved by counsel. I agree with the city and find that in the context of this appeal, it is not reasonable to conclude that the Facebook data would pertain to the activities of an officer or employee of the city.

[41] This is supported in Order MO-2993 where the adjudicator found that records relating to Ford Fest were not within the custody or control of the city despite the records being generated by the mayor of the city. Similarly, I find here that the councillor's Facebook account is not a special duty assigned to him by council.

[42] Since I find that the councillor was not acting as an employee or officer of the city at the time in question, he is not, in the circumstances, considered to be part of the city. However, that does not end the analysis of whether the record at issue is in the control of the city and therefore subject to the *Act*. I must now consider whether the record is in the custody or control of the city on the basis of established principles.

***Is the record in the custody or under the control of the municipality on the basis of established principles?***

[43] Several previous orders of this office have considered the factors set out above and have found that city councillors' communications were not in the custody or under the control of the city in the circumstances of those appeals.<sup>22</sup>

[44] In Order MO-2821, the question was whether communications between City of Toronto councillors about cycling issues were under the control of the city. The adjudicator found that, although it was arguable that the records met the first part of the two-part test articulated by the Supreme Court of Canada, because they related to

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<sup>22</sup> See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

a "city matter", the second part of the test was not satisfied.

[45] The adjudicator commented as follows on the nature of the records that are held by municipal councillors:

Before concluding, I wish to address the question of "constituency" records. The parties made reference to this description of councillor records, as prior decisions of this office have found councillors' constituency records to be excluded from the *Act*. One of the factors the appellant relied on in her Appeal Form is that the records do not involve any individual constituent. She suggests, therefore, that the records must therefore be "city records."

Although the distinction between "constituency records" and "city records" is one framework for determining custody or control issues, it does not fully address the activities of municipal councillors as elected representatives or, as described in *St. Elizabeth Home Society*, above, "legislative officers." Records held by councillors may well include "constituency records" in the sense of having to do with an issue relating to a constituent. But they may also include communications with persons or organizations, including other councillors, about matters that do not relate specifically to issues in a councillor's ward and that arise more generally out of a councillor's activities as an elected representative.

The councillors have described such records as "personal" records but it may also be appropriate to call them "political" records. In any event, it is consistent with the scheme and purposes of the *Act*, and its provincial equivalent, that such records are not generally subject to access requests. In *National Defence*, the Court stated that the "policy rationale for excluding the Minister's office altogether from the definition of "government institution" can be found in the need for a private space to allow for the full and frank discussion of issues" and agreed with the submission that "[i]t is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records" that Parliament sought to protect by not extending the right of access to the Minister's office.

The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministers, do not have responsibility for a government department and are more like MPP's or MP's without a portfolio. A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the *Act*. A finding that the city, as an institution covered by the *Act*, is not synonymous with its elected representatives, is consistent with the nature and structure of the

political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.

[46] In Order MO-2842, the appellant requested records relating to communications between a named city councillor and outside parties about the possibility of bringing an NFL team to Toronto. The city took the position that any records in the possession of the named councillor that may exist are not within the city's custody or control. Applying the test in *National Defence*, the adjudicator in that case found that even if the records could arguably relate to a "departmental or city matter", the city did not have the authority to regulate their use or content and could not reasonably be expected to obtain a copy of them upon request. The adjudicator 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.

[47] In Order MO-2749, the adjudicator stated:

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. This office has recognized that municipal councillors perform both "constituency" functions, and official responsibilities as members of municipal council. When performing constituency work, past decisions have established that councillors are not "officers" and, accordingly, records related to their constituency work is not in the custody or control of an institution. However, records that arise out of the councillor's official responsibilities as a member of council or some aspect of council's mandate would be subject to the *Act*.

[48] As a result, the adjudicator found that email correspondence with a named city councillor about a laneway closing was in the custody or under the control of the city.

[49] I agree with the principles set out in Orders MO-2821, MO-2842, MO-2749 and MO-3281 and apply them here.

*Factors relevant to determining "custody or control" / Two-part test in National Defence*

[50] I will now consider the factors relevant to determining "custody or control." I will do so in the context of the two-part test of the Supreme Court of Canada, referred to by both the city and the appellant. As noted above, in *National Defence*,<sup>23</sup> 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:

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<sup>23</sup> *Supra*.

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?

I now turn to the elements of the two-part test.

Do the contents of the record relate to a city matter?

[51] As submitted by the specified councillor, his Facebook account consists of his political/constituency records rather than city records. In referencing Order MO-3281, the councillor submits that the responsive records on his personal Facebook account, if any, are political records. As noted by the city and the specified councillor, a Facebook account is not required of its city councillors and this account is separate from the official city Facebook page.

[52] The appellant points to an online "article" where she submits that the councillor states that he is using his Facebook account in order to fulfill the requirements set out by the city in his role as city councillor. However, this does not assist the appellant, since the key phrase is "in his role as city councillor."

[53] Based on the representations, and considering the case-law, I find that the records were not created in furtherance of any city business. They relate to the councillor's own Facebook account, which is not an official city account. I have not been provided with any authority to suggest that the city has a statutory power or duty to maintain a Facebook account for city councillors. I accept the councillor's statement that he uses his account to share thoughts and ideas he has as an individual member of society and political representative, and that communications he has with staff about the account are for the purpose of representing his constituents. I accept that although much of the councillor's Facebook activity often references activities of the city, sometimes repeating city communications, they are not intended to be official city communications, which are otherwise available through the city's website and other official social media sites.

[54] Further, I agree with the city's submission that despite its funding "political" staff to the councillor and providing IT equipment to access web-based social media applications such as Facebook this is of little or no weight in determining whether the city has custody or control. I rely on Order MO-3471 where the adjudicator found that the councillor's staff are more properly considered to be an extension of the councillor himself than employees of the city. I also note that the city submits that although it provides the councillors with city computer equipment and an email address, its councillor's use of social media is not monitored by its IT services as members of council and the mayor are specifically exempt from the city's Responsible Computing Policy. I agree with the city that the councillor's use of the computer equipment does not support that the city has custody or control over the records and find that in the circumstances of this appeal any use of the city's servers for Facebook activities would

amount to bare possession only.

[55] Although I find that the records do not relate to a city matter and therefore part one of the test has not been met, and I do not need to consider part two of the test, I would also find that the city could not reasonably expect to obtain a copy of the councillor's Facebook profile upon request. The city has no authority to compel the production of the records or to otherwise regulate the use and disposal of them by the councillor's office. The communications of the councillor, or his staff, regarding his Facebook account, if they exist, relate to councillor's role as an individual constituent representative and are in the nature of "political" rather than "city" records. I find, therefore, that even if records of this nature relate broadly to a "city matter" (which I find they do not), the city does not have the authority to regulate the use or content of any such records, and could not reasonably be expected to obtain a copy of such records upon request. The circumstances therefore do not meet the first or second part of the test in *National Defence* for a finding of city control of the records.

**ORDER:**

The appeal is dismissed.

Original Signed By: \_\_\_\_\_  
Alec Fadel  
Adjudicator

\_\_\_\_\_ August 30, 2019