

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-4125

Appeal MA18-00736

City of Ottawa

November 9, 2021

**Summary:** The appellant made a request to the City of Ottawa (the city) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records of all communications over a specified period between an identified councillor and the Salvation Army, pertaining to specified development requests. The issue in this appeal is whether records created or held by an identified elected councillor are in the custody or under the control of the city for the purposes of section 4(1) of the *Act*. In this order, the adjudicator finds that any records created or held by the identified councillor in communications with the Salvation Army regarding its development request are not within the city's custody or under its control within the meaning of section 4(1) of the *Act*. Accordingly, there is no right of access to the records under the *Act* and the decision of the city is upheld.

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

**Orders Considered:** Order MO-2821, M-813, MO-3281.

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

### OVERVIEW:

[1] The appellant submitted a request for access to records to the City of Ottawa (the city) pursuant to the *Municipal Freedom of Information and Protection of Privacy*

*Act* (the *Act*). The appellant requested access to copies of all communications (letters, emails, text messages etc.) exchanged between an identified councillor (or their office staff) and the managers, employees, representatives or volunteers of the Salvation Army at two specified locations. The appellant requested that the records include information or communications exchanged with an identified volunteer at the Salvation Army at its location in Barrhaven, as part of the Barrhaven BIA's<sup>1</sup> activities.

[2] The appellant clarified that he is seeking records relating to the period from July 1, 2016 to August 17, 2018.

[3] In response to the appellant's request, the city issued a decision letter to the appellant stating that it conducted a search for records responsive to the access request and found no responsive records.

[4] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC) and states that he believes that records exist that are responsive to his access request. Specifically, the appellant points to particular communications between the councillor and the identified volunteer at the Salvation Army, which are recorded in the city's lobbyist register, as the basis of his belief that records exist that are responsive to his request. The IPC assigned a mediator to assist the parties in resolving the issues in dispute in this appeal.

[5] During mediation, the identified councillor conducted a search of their records. Responsive records were located and were provided voluntarily by the councillor to the city's Access to Information and Privacy Office. The city reviewed the records, identified those records that had been copied to city staff or the Mayor's office and granted partial access to them, withholding some information under the mandatory personal privacy exemption in section 14(1) of the *Act*, in a supplementary decision issued to the appellant.

[6] In its supplementary decision, the city stated that the constituency and political records of elected municipal councillors are not in its custody or control for the purposes of section 4(1) of the *Act*.

[7] The appellant has advised that he is not seeking access to the information that the city withheld under section 14(1) of the *Act*. It is the appellant's position that the communications between the Salvation Army and the identified municipal councillor are in the custody or under the control of the city for the purposes of section 4(1) of the *Act*. Accordingly, this is the issue to be decided in this appeal.

[8] As a mediated resolution was not achieved, the file was transferred to the

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<sup>1</sup> Business Improvement Association.

adjudication stage, where an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeal began the inquiry by inviting the city to submit representations in response to a Notice of Inquiry, which summarised the facts and issues under appeal. The city submitted representations and the adjudicator then invited the appellant to make submissions in response to the Notice of Inquiry and the city's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations and the adjudicator then sought and received reply representations from the city.

[9] The file was then transferred to me to complete the inquiry.<sup>2</sup> In this order, I find that the requested records of the identified councillor's communications with a volunteer of the Salvation Army, a registered lobbyist, in the circumstances of this case, are not within the custody or under the control of the city and are therefore not accessible under section 4(1) of the *Act*. The city's decision is upheld.

## **RECORDS:**

[10] The records that remain at issue are the identified councillor's communications with the Salvation Army. Neither city staff nor the Mayor were copied on the communications that remain at issue.

## **DISCUSSION:**

[11] The sole issue to be resolved is whether the records are "in the custody" or "under the control" of the city under section 4(1) of the *Act*.

[12] It is the city's position that the appellant's access request is for records that are not within its custody or under its control, within the meaning of section 4(1) of the *Act*.

### **Custody or control**

[13] Section 4(1) of the *Act* states, 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 ...

[14] A record will be subject to the provisions of the *Act* if it is in the custody or under

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<sup>2</sup> I have reviewed the complete file material, including the representations of the parties, and have concluded that I do not need any further information before rendering a decision.

the control of an institution; it need not be both.<sup>3</sup> 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.<sup>4</sup> A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption.<sup>5</sup>

[15] The courts and the IPC have applied a broad and liberal approach to the custody or control question.<sup>6</sup> Based on this approach, the IPC has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution.<sup>7</sup> The list of factors includes whether the record was created by an officer or employee of the institution, what use the creator intended to make of the record, whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record and whether that activity is a "core", "central" or "basic" function of the institution, whether the institution has more than "bare possession" of the record and whether there are any limits on the use to which the institution may put the record, what are those limits and why they apply.

[16] The list of factors developed by the IPC is not intended to be exhaustive and the factors applicable to a particular case will depend upon the facts. The Divisional Court has held that in determining whether records are in the "custody or control" of an institution, the applicable factors must be considered contextually with regard to the purpose of the legislation.<sup>8</sup>

[17] In addition to the above factors, the Supreme Court of Canada has articulated a two-part test to determine institutional control of a record in cases where a record is not held by an institution. The IPC has applied this test in such situations, including where a record is solely held by a councillor:

1. Do the contents of the record relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the record upon request?<sup>9</sup>

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<sup>3</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>4</sup> Order PO-2836.

<sup>5</sup> Found in sections 6-15 and section 38.

<sup>6</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>7</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

<sup>8</sup> *City of Ottawa v Ontario*, 2010 ONSC 6835 (Div. Ct.).

<sup>9</sup> *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII).

## **Municipal councillors**

[18] The issue of whether records created or held by elected councillors are in the custody or under the control of a municipality is complex and not readily provided for in the *Act*.

[19] The *Act* does not expressly refer to records of municipal councillors. The term "institution" is defined in section 2(1) of the *Act* and includes a municipality. However, the definition of "institution" does not specifically refer to elected offices, such as a municipal councillor.

[20] In *St. Elizabeth Home Society v Hamilton (City)*, the Ontario Superior Court of Justice described the relationship between a municipality and elected members of council 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 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.<sup>10</sup>

[21] In Order M-813, Adjudicator Cropley considered the meaning of the term "officer" as it is used in municipal law and noted that the term is generally interpreted to refer to "a high ranking individual within the municipal civic service, who exercises management and administrative functions, and who derives his or her authority either from statute or from council." Adjudicator Cropley found that, in light of the case law, it was only in "unusual circumstances" that a councillor would be considered to be an officer of a municipality and therefore part of the institution for the purposes of the *Act*. An example of an unusual circumstance would be where a municipal councillor had been appointed a commissioner, superintendent or overseer of any work pursuant to section 256 of the *Municipal Act, 2001*<sup>11</sup> (the *Municipal Act*).

[22] Following the analysis set out in Order M-813, IPC decisions have taken the approach that councillors' records may be subject to the *Act* where:

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<sup>10</sup> (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.) at para 264.

<sup>11</sup> S.O. 2001, c.25.

1. A councillor is acting as an officer or employee of the municipality, or performs a duty assigned by council, such that they might 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.

[23] When answering these questions, the IPC makes a distinction between "city records" on the one hand (which would be subject to the *Act*) and "personal or political records" on the other (which would not).<sup>12</sup>

### **Representations**

[24] During the inquiry stage, both parties were referred to the IPC's published guidance on the factors considered when deciding whether records created or held by municipal councillors are within the custody or under the control of an institution for the purposes of the *Act*. Both parties submitted comprehensive representations.

[25] To provide context for his access request, the appellant states that his request concerns communications between the identified councillor [in their role as chair of the city's Planning Committee (the planning committee) and as a member of the board of management of the Barrhaven BIA (the BIA board)] and an identified volunteer with the Salvation Army, who is a registered lobbyist. The appellant states that his request is concerned with the period when the Salvation Army was preparing two development applications for construction projects in the city. The appellant believes that the Salvation Army made representations to the identified councillor and the city concerning the Salvation Army's construction projects and development requests before the applications were filed.

[26] It is the city's position that the chair of the committee is not assigned specific tasks by council in relation to applications before the committee or required to communicate with specific individuals or organizations. The chair has only one vote in proceedings before the committee and has no unilateral power over matters properly before it. The city states that the role of planning committee chair is procedural only.

[27] In addition to the identified councillor's role as chair of the planning committee during the period to which the access request relates, the councillor was also a member of the BIA board. It is the city's position that the duties of members of the BIA board are established by the board's own procedural by-laws and the appointment to the role of board member is not a special duty assigned by Council.

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<sup>12</sup> Order MO-2821.

[28] The appellant provided representations about the role and mandate of the positions held by the identified councillor. The appellant cites the City of Ottawa Procedure By-law No. 2019-8<sup>13</sup> (the procedure by-laws), the *Municipal Act* and the *Planning Act*, R.S.O. 1990, c. P.13 (the *Planning Act*), as the basis for his position that the identified councillor's role as chair of the planning committee was not simply political or procedural.

[29] The appellant refers to the fact that, in their communications with the lobbyist, the identified councillor used a city email address and computer equipment provided and maintained by the city and states that the city therefore has custody and control of information received in this way (i.e. via this email address and computer equipment).

[30] The appellant's position is that this case can be distinguished from the cases and the jurisprudence normally considered in access requests for records created or held by municipal councillors. The appellant states that this is not a situation where a municipal councillor fulfils a uniquely and strictly political function representing their ward on the municipal council.

### **Analysis and findings**

[31] I have considered the parties' representations, the relevant statutory provisions and previous orders of the IPC. For the reasons that follow, I find that the identified councillor was not acting as an officer or employee of the city or performing a duty assigned by council in their communications with the Salvation Army regarding the development applications. Further, I find that applying the established principles set out above and for the reasons that follow, the appellant's access request relates to records that are not in the custody or control of the city for the purposes of section 4(1) of the *Act*.

### **Officer or employee of the city or performing a duty assigned by council**

[32] The appellant cites various statutory provisions as the basis for his characterising the identified councillor's roles (as chair of the planning committee and as a member of the board of the identified BIA) as acting as an officer or employee of the city or performing a duty assigned by council in those roles.

[33] The procedure by-law allows the council to establish committees at any time for the consideration of matters within the jurisdiction of the council.<sup>14</sup> The duties of a committee chair are set out in section 78 of the procedure by-law. The appellant cites

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<sup>13</sup> The consolidated and amended procedure by-laws are made pursuant to the *Municipal Act, 2001*, section 238.

<sup>14</sup> Procedure By-law 2016-377, section 74.

these duties as demonstrating that a chair's role is not strictly procedural in the context of the committee's functions and decision-making but that it is also a role that links the administrative apparatus of the city with the members of the council. The appellant characterises the chair's role as performing a "kind of ministerial function" with respect to civil servants and having considerable influence on the work, deliberations and decisions of the committee. In particular, the appellant points to section 78(13) of the procedure by-law, which sets out a chair's duty to "receive all communications and announce them to the Committee/Commission ...".

[34] The city's position is that the procedure by-law designates a chair with presiding duties in relation to committee proceedings. From my review of the relevant provisions, I agree that this is the case. The duties listed in section 78 of the procedure by-law include taking the chair and calling the members of a committee to order; announcing the business before the committee; receiving and submitting in the proper manner, motions presented by member of the committee; putting motions to a vote; enforcing the rules of procedure; permitting questions to assist debates; providing information to members; receiving and announcing communications; authenticating meeting minutes, etc. These duties relate to the order of proceedings and do not include authorising the chair to act as an agent of the council. As the Ontario Superior Court said in *St Elizabeth Home Society*, elected members of municipal council are legislative officers without executive or ministerial duties.<sup>15</sup>

[35] As explained by the city in its representations, the chair has a single vote on matters heard by a committee. In the case of development applications before the planning committee, the committee's role is to vote on whether to put the recommendation before the full city council. The ultimate authority on approval of a development application rests with city council, with each councillor and the mayor allowed a single vote on the matter.

[36] There is no information before me to suggest that the identified councillor was assigned any special duty by the council or the planning committee in relation to the Salvation Army or communications with their staff, volunteers or other representatives.

[37] The appellant's submission that the chair's role is more than procedural and includes influencing the work, deliberations and decisions of the committee is not supported in the provisions of the procedure by-law that set out the procedural framework for the chair's role. In my view, these provisions give no basis for finding that the chair of the planning committee discharges a special duty assigned by the council or that the role could be considered an "officer" or "employee" of the city.

[38] Similarly, I am not persuaded that the provisions of the *Planning Act*, referred to

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<sup>15</sup> See note 7 above.



by the appellant, provide for any special or assigned role for the chair of the planning committee regarding the approval of the city's "official plan" that could lead to a finding that in their capacity as chair, the identified councillor acts as an officer or employee of the city.

[39] Citing the *Planning Act*, the appellant states that the council relies upon the planning committee, which in turn relies upon the administrative body, to fulfil its statutory responsibilities. The appellant's submission is that it is therefore incorrect to say that the role of the chair of the planning committee is purely procedural. The appellant describes the chair's role as pivotal within the context of the relationship between the decision-making authority of the planning committee and the municipality.

[40] Finally, the appellant cites section 204 of the *Municipal Act* and the identified councillor's appointment to the BIA board and states that this gives the councillor an administrative role for the city and not only a political one.

[41] I do not agree with the appellant's analysis. Sections 16 and 17 of the *Planning Act* set out the requirements for approval of the city's official plan and section 204(3) of the *Municipal Act* provides for a municipality's appointment of board members for areas designated as improvement areas. These sections do not confer power or authority on the chair of the planning committee or board members of improvement areas to act as an officer or employee of the city nor do they extend the authority of any appointee to act on behalf of the city.

[42] For these reasons, I find that there is no statutory basis for finding that the identified municipal councillor was acting as an officer or employee of the city or performing a duty assigned by council such that they might be considered part of the city in their role as chair of the planning committee or as member of the specified BIA board. Accordingly, I find that any records created or held by the councillor relating to communications exchanged with the Salvation Army in these roles do not relate to the discharge of any special authority to act on behalf of the city.

[43] In addition, I find that there is no information in the representations to suggest that there were "unusual circumstances" of the type highlighted by Adjudicator Cropley in Order M-813, those that might have indicated that the identified councillor in this case was acting as an officer or employee of the city in relation to their communications with the Salvation Army concerning their development request.

[44] This conclusion alone does not end the analysis. Even if the identified councillor was not acting as an officer or employee of the city, their records may still be found to be under the city's custody or control based on a review of the non-exhaustive list of factors outlined earlier in this order.

### **Factors that determine custody or control**

[45] The non-exhaustive list of factors developed by the IPC go beyond the physical

location of a record, and involve factors such as the purposes of the record, its originator and whether the record pertains to the institution's mandate or functions.

[46] During mediation, the identified councillor conducted a search and located responsive records, which they voluntarily provided to the city and advised that no further records exist. Upon receipt of the records, an analyst in the city's Access to Information and Protection of Privacy Office identified those records that, in the city's view, were in the custody and control of the city because city staff or the Mayor's office were copied on them. These records were released to the appellant. The remaining records are those identified as responsive by the councillor and not copied to the city staff or the Mayor's office.

[47] It is the city's position that the chair of the planning committee, as with all members of the committee or the city council, may be approached by individuals or organizations with specific interest in an application or other matter before the committee. Those communications occur within the context of the councillor's role as an elected representative.

[48] As mentioned earlier, there is no information before me to suggest that the identified councillor was assigned any particular duty by the council or the planning committee in relation to the Salvation Army or communications with their staff, volunteers or other representatives.

[49] The city's position is that it does not have authority over the content, use or disposal of a councillor's political or constituency records, having at most bare possession of the records, which does not amount to custody or control under the *Act*. The city relies upon the distinction between the "political" records and "city" records (the latter being those copied to city staff or the Mayor's office) as the basis for its submission that the former are not within its custody or under its control for the purposes of the *Act*.

[50] In its representations, the city states that the lobbyist registry was established to enhance transparency and it confirms that the Salvation Army volunteer is registered as a lobbyist and that there is one instance of substantive communications between the lobbyist and the identified councillor documented in the register. It is the city's position that the Lobbyist Registry By-law 2012-309 does not require councillors to create, keep or disclose records in relation to any contacts recorded in the registry but that the registry itself provides a "publicly available record of details of lobbyists' communications with councillors."

[51] It is the appellant's position that the fact that the communications between the Salvation Army volunteer, who is a registered lobbyist, and the identified councillor are recorded in the city's online lobbyist registry and that the councillor used an email address and IT equipment provided and maintained by the city, are factors pointing to the information received in this way being in the custody and control of the city. In

addition, the appellant states that the records would be held on the city's network servers.

[52] The records requested by the appellant have been created either by the identified councillor or by the registered lobbyist (the identified volunteer at the Salvation Army). Applying some of the listed factors together with my findings above, the records were not created by officers or employees of the city. There is no information in the representations about what use the councillor sought to make of their communications with the Salvation Army or whether they were intended for anything other than the councillor's own use as an elected official. Any finding in this regard would be speculative.

[53] Regarding the nature of the communications, the appellant asserts that the requested records concerned communications in relation to development applications being filed with the planning committee. In his representations, the appellant refers to a blog post he published in which he has written about his observations that the lobbyist met with the identified councillor shortly prior to the council meeting at which the development applications were approved.

[54] It could be said that the content of the communications relates to matters within the city's mandate in its broadest sense, namely the regulation of city planning and development. While these are matters within the city's mandate, there is no evidence before me that the identified councillor had a specific duty in respect of the Salvation Army's development applications.

[55] I agree with the city's position that any members of city council or its committees may be approached by those with specific interests in applications before council or the committee. It is reasonable to expect these matters to be the subject of communications between the public and their elected councillors, lobbyists and between councillors. In this regard, it is also reasonable to expect interested parties to express their views to elected councillors about issues that may come to a committee or council vote.

[56] In my view, these communications occur within the context of a councillor's role as an elected representative and records relating to those communications are part of their constituency records. I find that the nature of the identified councillor's communications with the Salvation Army is more properly described as being constituency business in this analysis and for these reasons it is a factor that points to them being 'political' rather than 'city' records applying the distinction made by the senior adjudicator in Order MO-2821.

[57] I note the city's submission that the planning committee's meetings are broadcast and available online, including comments of public delegations. In addition, the city states that written submissions received by the planning committee are considered part of the public record and kept on file. City records relating to specific

development applications can be obtained on request to the city clerk. The availability of public records relating to the business of the planning committee informs the distinction between political and city records. While committee business forms part of the city's public record, councillor business as an elected official does not, including communications with interested parties that are not part of the public record through being shared with the committee at large nor forwarded to city staff.

[58] The records identified in the councillor's search were voluntarily provided by the councillor's office to the city in order for it to prepare its response to the appellant's access request under the *Act*. As a result, the city may have physical possession of some of the councillor's political records. I also note that the city may have some of these communications on its servers. However, physical possession in these circumstances is bare possession<sup>16</sup> and previous orders have held that bare possession does not amount to custody for the purposes of the *Act*, which requires some right on the part of the institution to deal with the records and some responsibility for their care and protection.<sup>17</sup>

[59] The appellant notes that the identified councillor's email records are held on the city's computer servers and have been created through the use of their city email address. The city asserts that it does not have authority over the "content, use or disposal of" a city councillor's political or constituency records. In these circumstances, the city may have "bare possession" of the councillor's emails, by virtue of their existence on the city's servers; however without a reasonable expectation that they can be obtained on request, this does not amount to custody or control.

[60] On this point, I accept the city's submissions regarding the extent of its control over correspondence of elected representatives using a city e-mail address. The city points to two factors that lead me to find that the city does not have custody of correspondence to a councillor's city e-mail account by virtue of it being held on the city server.

[61] The city states that it does not monitor or control councillor's email correspondence, except when it is sent directly to city staff and that its internal city policies regarding the use of office equipment do not apply to city councillors or their staff. The version of the city's "Responsible Computing Policy" in effect until January 2018 specifically excludes the use of the city's information technology assets and information assets by members of council.

[62] Further, the city states that the personal, political and constituency correspondence of councillors is not governed by the city's Record Retention and

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<sup>16</sup> MO-3281.

<sup>17</sup> P-239.

Disposition By-law.<sup>18</sup> A councillor's constituency correspondence does not fall within the definition of an "official business record" for record retention purposes.

[63] An important question in this analysis is whether the city could reasonably expect to obtain a copy of the councillor's communications with the lobbyist upon request. There are a number of factors relevant to this question including the substantive content of the record, the circumstances in which it was created and the legal relationship between the institution (the city) and the holder of the record (the councillor).

[64] As I have discussed above, the substantive content of records pertaining to the identified councillor's communications with a registered lobbyist, created within the context of development applications before the planning committee, is a councillor's business as an elected municipal representative. Having not been copied to city staff or the Mayor's office, the councillor's records are not city records.

[65] There is no evidence before me that the councillor's communications were shared with the planning committee or the BIA board or that there is a nexus between them and the business of the committee or the board or the determination of the development applications submitted by the Salvation Army. I have not been referred to the public record of the planning committee's proceedings, the public delegations or any other information relating to the city planning decisions or the recommendations of the planning committee that might form the basis upon which the city, as an institution, could request the councillor's political records with the reasonable expectation that they would be provided.

[66] Related to this factor, is the extent to which the city has relied upon the councillor's records. There is no information before me that the city has placed any reliance upon the councillor's communications with the registered lobbyist.

[67] The information from the city that councillor records do not fall with the definition of official business records for retention purposes, suggests that the city does not have power to dispose of council records relating to constituency business and power to do so would be one factor pointing towards institutional control over a record.

[68] Considering these factors, which are drawn from the non-exhaustive list of established factors adopted by the IPC and the factors considered in other orders, and for the reasons set out in the discussion above, I find that the identified councillor's communications with the registered lobbyist, including communications exchanged in relation to the Salvation Army's development applications, are not within the custody or under the control of the city for the purposes of the *Act*.

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<sup>18</sup> City of Ottawa By-law No. 2003-527.

## **National Defence test**

[69] Turning to the two part test set out by the Supreme Court of Canada in the *National Defence* case, referred to above, and whether the city has control of the councillor's records, the first part of the test asks whether the requested records relate to a city matter. As I have already determined, while city planning and development are matters falling broadly within the city's mandate, I find that the contents of a councillor's communications with a lobbyist relate to the councillor's responsibilities as an elected representative, and not to city business per se.

[70] In reaching this finding, I have considered the context of the creation of the record, which is important in determining whether it constitutes a "city matter". In Order MO-3281, the adjudicator found that an email from a municipal councillor to an investigator who was later hired by the city, related to a "city matter" because the city had the authority, when directed by council, to retain an investigator. The context in that case led to the conclusion that the creation of the record at issue played an integral part in the council's decision to retain the investigator.<sup>19</sup> However, in this case, there is no evidence before me to suggest that the identified councillor's communications with the Salvation Army were integral to a council decision or any decision-making function of the planning committee.

[71] The first step of the two part test in *National Defence* is therefore not satisfied.

[72] Given this finding on the first part of the test in *National Defence*, there is no need to proceed to the second step. However, given my findings above, applying the various relevant factors, I find that the city could not reasonably expect to receive the records from the councillor. Specifically, there is no evidence before me that the councillor's communications were shared with the planning committee or the BIA board or that there is a nexus between them and the business of the committee or the board or the determination of the development applications submitted by the Salvation Army. I have not been referred to the public record of the committee's proceedings, the public delegations or any other information relating to the city planning decisions or the recommendations of the committee that might form the basis upon which the city, as an institution, could request the councillor's political records with the reasonable expectation that they would be provided.

[73] As I stated at the outset, the various factors that relate to the custody and control question must be applied contextually, in light of the purposes of the *Act*. In reaching my conclusions, I have considered whether this result is consistent with the purpose and intent of the *Act*. In *National Defence*, the Court was concerned with the federal access to information legislation and stated that the "the policy rationale for

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<sup>19</sup> See also Order MO-3471.

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."<sup>20</sup> The Court accepted the submission that Parliament sought to protect the ability of ministers to deal with distinct types of information by not extending the right of access to the minister's office.

[74] In Order MO-2821, former Senior Adjudicator Sherry Liang noted that the same policy rationale applies, arguably with greater force, to municipal councillors who, unlike ministers, do not have responsibility for a government department. The senior adjudicator then stated that:

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.<sup>21</sup>

[75] I am satisfied that my determination that the councillor's communications with a lobbyist in relation to planning and development applications are not accessible under the *Act* is consistent with the structure of the political process. In particular, my determination is consistent with a municipal process and structure that provides for public records of committee meetings and the registration of lobbyists communications that serve the goal of transparency in the city's performance of its functions, while protecting the structure of the political process.

## **ORDER:**

I uphold the city's decision and dismiss the appeal.

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

Katherine Ball  
Adjudicator

\_\_\_\_\_  
November 9, 2021

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<sup>20</sup> At para 41.

<sup>21</sup> MO-2821, at para 53