

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4281

Appeal MA20-00183

Township of Oro-Medonte

November 23, 2022

Summary: A request was submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Oro-Medonte (the township) for access to an electronic address book maintained by a municipal councillor. The township issued a decision stating that any records responsive to the request were not in its custody or under its control and as a result, there is no right of access to them. In this order, the adjudicator finds that any records responsive to the appellant's request would not be in the township's custody or under its control within the meaning of section 4(1) of the *Act*. Given the conclusion that any responsive records would not be under the township's custody or control, the adjudicator determines that it is not necessary to address the appellant's arguments on the reasonableness of the township's search for records responsive to the request.

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

Orders and Investigation Reports Considered: Orders M-813, MO-2824 and MO-3471.

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] This order considers whether an email distribution list, or similar type of electronic address book, maintained by a municipal councillor, is in the custody or under

the control of the municipality. Under section 4(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), only records in a municipality's custody or under its control are subject to a right of access.

[2] The Township of Oro-Medonte (the township) received a request under the *Act* for access to information related to a "Community Post Address Book" maintained by a named councillor.¹ The requester specifically requested that he be provided with a list of all of the entries from the address book related to an identified postal code.

[3] The township conducted a search for responsive records and issued a decision denying access on the basis that no such address book was located.

[4] The requester, now the appellant, appealed the township's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt to reach a mediated resolution between the parties.

[5] During mediation, the appellant raised the issue of whether the delegation of authority to make the access decision is valid. He took the position that the township's Clerk should have made the decision rather than its Freedom of Information Coordinator (FOIC). In response to the appellant's concerns, the township issued a revised decision under the signature of the Clerk, who is designated as the township's "head" under the *Act*. The appellant dropped his concern, but raised a related concern during the adjudication process, as I explain under Issue A below.

[6] In its revised decision, the township advised that it does not have custody or control over the requested records as contemplated by section 4(1) of the *Act* and that it maintains its previously stated position that it conducted a reasonable search as required by section 17 of the *Act*.

[7] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry.

[8] As the adjudicator assigned to the appeal, I sought and received representations from the township, the councillor and the appellant.

[9] For the reasons that follow, I uphold the township's decision that any records responsive to the appellant's request are not within its custody or under its control as required for a right of access to exist under section 4(1) of the *Act*. Given my conclusion that any responsive information that might exist would not be in the township's custody or under its control and therefore, would not be subject to the *Act*, it is not necessary for me to consider the reasonableness of the township's search for a record that is responsive to the request.

¹ Later in this appeal the requester clarified that his understanding was that this "Community Post Address Book" was a database of individuals created from emails received by the councillor.

RECORD:

[10] The councillor located and provided me with a copy of the record that could be considered to be responsive to the request – an Outlook Contact Group entitled “Community Correspondence.” It is an electronic distribution list that consists of a list of the names of individuals together with their corresponding email addresses. It does not contain postal codes. In this order, I will refer to it as the “contact group.” The township submits that this record and any other responsive records that might exist are not in its custody or under its control.

ISSUES:

- A. Were the township’s representations properly authorized?
- B. Are the requested records “in the custody” or “under the control” of the township under section 4(1) of the *Act*?

DISCUSSION:

Issue A: Were the township’s representations properly authorized?

[11] In his representations, the appellant disputes the legitimacy of the township’s representations filed in this inquiry because they were not signed by the township’s designated head, the Clerk, but by the township’s Record Management Clerk,² using the title of FOIC. The appellant submits that under the *Act*, the Clerk is the only person authorized to fulfill the duties and responsibilities of the head, including representing the township in IPC inquiries.

[12] In response to the appellant’s submissions, the township’s Clerk explained, in a sworn affidavit, that the Records Management Clerk has the authority, in consultation with the Clerk, as head under the *Act*, to respond all matters related to access requests made under the *Act*. She stated that all decisions regarding Freedom of Information (FOI) matters are made in consultation with the Clerk as head. She also stated that the Records Management Clerk, acting in the capacity as FOIC, has the authority to act on the township’s behalf, in consultation with the Clerk, to address all aspects related to access requests received by the township, including preparing documents for and making recommendations about matters related to access requests and appeals under the *Act*.

[13] I find nothing improper in the way in which the township responded to this appeal and in particular, during the course of my inquiry, in having the Records Management Clerk, acting as FOIC, prepare and submit representations on the

² Records Management Clerk is not the same role within the township as that of the Clerk.

township's behalf. The position of FOIC is an administrative position that is not defined in or created by the *Act*.³ It is clear to me, from the affidavit sworn by the Clerk,⁴ that all township decisions made regarding requests and appeals under the *Act* are made in consultation with the designated head of the institution. I find nothing improper in having a township employee, whether it be the Records Management Clerk acting as FOIC, or any other individual employed by the township, provide administrative support in all aspects of the township's response to an access request, including preparing representations for the purposes of an inquiry before the IPC in relation to a township decision on access.

[14] Accordingly, I am satisfied that all actions taken by the township's representatives in this appeal and, in particular, the representations submitted by the Records Management Clerk to the IPC, were properly authorized.

Issue B: Is the contact group "in the custody" or "under the control" of the township under section 4(1) of the *Act*?

[15] At issue in this appeal is whether the contact group maintained by the councillor is in the custody or under the control of the township, and therefore subject to access under the *Act*

[16] Section 4(1) of the Act provides for a general right of access to records that are in the custody or under the control of an institution governed by the Act. It 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

[17] Under section 4(1), the *Act* applies only to records that are in the custody **or** under the control of an institution; the record need not be both.⁵ "Custody" and "control" are not defined terms in the *Act*.

[18] 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.⁶ A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

³ Order PO-2536.

⁴ There appears to be no dispute that the township's council designated the Clerk as the head under section 3(1) of the *Act*.

⁵ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁶ Order PO-2836.

Factors relevant to determining custody or control

[19] The courts and the IPC have applied a broad and liberal approach to the custody or control question.⁷ 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.⁸ The list is not intended to be exhaustive and the factors applicable to a particular case will depend upon the facts. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

[20] Some relevant listed factors include: whether the record was created by an officer or employee of the institution;⁹ the use that the creator intend to make of the record;¹⁰ whether the activity in question is a “core”, “central” or “basic” function of the institution;¹¹ whether the content of the record relates to the institution’s mandate and functions;¹² if the institution had possession of the record, whether it is more than “bare possession;”¹³ whether the institution has a right to possess the record¹⁴ or regulate its content, use and disposal;¹⁵ and whether the record is integrated with other records held by the institution.¹⁶

[21] If responsive records exist that are not in the institution’s possession, the institution may still have an obligation to search for them because, under section 4(1) of the *Act*, the right of access applies to any record that is in the custody *or* under the control of an institution.¹⁷ For records not in the institution’s possession, the question is whether the records are under the institution’s control.

[22] 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.¹⁸

[23] Additionally, in *Canada (Information Commissioner) v. Canada (Minister of*

⁷ *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

⁸ Orders 120, MO-1251, PO-2306 and PO-2683.

⁹ Order 120.

¹⁰ Orders 120 ad P-239.

¹¹ Order P-912.

¹² *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.

¹³ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁴ Orders 120 and P-239.

¹⁵ Orders 120 and P-239.

¹⁶ Orders 120 and P-239.

¹⁷ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

¹⁸ *City of Ottawa v Ontario*, 2010 ONSC 6835 (Div. Ct.).

National Defence),¹⁹ the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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

[24] According to the Supreme Court, control can only be established if both parts of the test are met.

Records in the hands of municipal councillors

[25] The issue of whether records held by elected officials, including municipal councillors, are in the custody or under the control of a municipality is complex and not clearly spelled out in the *Act*.

[26] As mentioned, the *Act* only applies to records that are in the custody or under the control of an "institution." The term "institution" is defined in section 2(1), and includes a municipality. However, the definition of "institution" does not specifically refer to elected offices such as a municipal councillor.

[27] In *St. Elizabeth Home Society v. Hamilton (City)*,²⁰ the Ontario Superior Court of Justice described the relationship between a municipal council and its elected members as follows:

It is [a] principle of municipal law that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. Elected members of council are not employed by or in any way under the control of the local authority while in office. Individual council members have no authority to act for the corporation except in conjunction with other members of council constituting a quorum at a legally constituted meeting; with the exception of the mayor or other chief executive officer of the corporation, they are mere legislative officers without executive or ministerial duties.

[28] In Order M-813, the adjudicator considered issue of whether municipalities have custody or control over councillor records. In this discussion, the adjudicator discussed 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." The adjudicator found that, in light

¹⁹ 2011 SCC 25 (CanLII), [2011] 2 SCR 306 (*National Defence*).

²⁰ (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.) (*St. Elizabeth Home Society*).

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*²¹ (the *Municipal Act*).

[29] Following the analysis set out in Order M-813, IPC decisions have taken the approach that councillors’ records 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.

[30] When answering these questions, the IPC makes a distinction between “city [or municipal] records” on the one hand (which would be subject to the Act) and “personal or political records” on the other (which would not).²²

[31] In Order MO-3471, the adjudicator summarized the approach taken by the IPC to records held by municipal councillors as follows:

Based on consideration of [the above] factors, several previous orders of [the IPC] have found that the city councillors’ communications were not in the custody or under the control of the city in the circumstances of those appeals.²³ ...The adjudicator in that appeal distinguished between city records, on one hand (which would be subject to the *Act*) and the personal or political records, on the other (which would not), and found the records at issue to fall into the latter category.

The parties’ representations

The township’s representations

[32] The township submits that any “Community Post Address list”, as described by the appellant in his request, was “never drafted, captured or prepared by the township.” It submits that it does not exist. The township further submits that any address list used by the councillor is in his custody and under his control for his use as representative of the residents of his constituency. It submits that any address book

²¹ S.O. 2001, c.25.

²² Order MO-2821.

²³ See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

maintained by the councillor does not belong to the township.

The councillor's representations

[33] The councillor submits that he frequently updates residents of his constituency who have chosen to be on his email and Facebook list about matters that impact his constituency. As part of his representations, he provided a copy of the record at issue, an Outlook Contact Group, entitled "Community Correspondence" that contains names and email addresses of some of his constituents. He submits that the list consists of residents who have chosen to receive updates from him and have provided their email addresses only. He notes that the appellant's request is for a database with associated postal codes. He submits that, as ward councillor, he never collected postal codes as part of the contact group that he maintains for the purpose of sending updates. He submits that he does not have an address book or database containing postal codes.

The appellant's representations

[34] The appellant notes that he seeks access to the "Community Post Address Book," which he submits is a phrase used by the identified councillor to describe "a township held database consisting primarily (or exclusively) of individuals." He submits that his understanding is that the database was created from emails received by the councillor, using his official township email address and that all emails are stored in the township email database, on its server. The appellant argues that the township has "custody and control of all emails sent to it."

[35] The appellant argues that his "request is for a numbered list of entries with an associated postal code, not a request for councillor records." He submits that he has not asked for any communications to or from the councillor's constituents; his request is for information on a database in the custody or control of the township. He also notes that although in his original request he sought access to a list of addresses with associated postal codes, if a record with postal codes does not exist "it does not automatically negate the remainder of [his] request." I understand the appellant's argument in this respect to mean that he continues to seek access to the address book identified by the councillor even if it does not contain postal codes.

[36] The appellant submits that the councillor's representations demonstrate that a database containing individual addresses exists on the township's computer system.

[37] The appellant also submits that the councillor appears to be acting as an employee and/or officer of the township by submitting his representations on township letterhead rather than on his own constituency letterhead.

[38] The appellant further submits that the councillor must have been acting as an employee and/or officer of the township in order to have been provided with access to an email thread between the appellant and the township's FOI analyst. He submits that information about access to information requests "is normally shared only with

employees on a need-to-know basis and [that the councillor was provided] this information, in the midst of an ongoing appeal, is indicative of an employee and/or officer relationship." He further notes that the councillor was provided with a copy of the decision letter that was issued to him in response to his access request.

[39] Finally, the appellant notes that the councillor submits that because he does not maintain a database or address book with postal codes "the information [sought by the appellant's request] was not collected and therefore, does not exist." He submits that this statement about whether records responsive to his request exist or do not exist, amounts to a conclusion about the appeal process that can only be made by township employees authorized to respond to access requests by the *Act*. The appellant submits that the fact that the councillor made such a statement indicates that he was granted, or assumed, a secondary role of FOI coordinator, and decision maker, which is not in accordance with the *Act*.

[40] The appellant submits that these circumstances demonstrate that the councillor was acting as an officer and/or employee of the township in his response to the appeal and that this is a conflict of interest on the part of the councillor because he has a personal interest in the non-disclosure of the address book or database.

Analysis and findings

[41] Before I address the arguments regarding the issue of custody or control, I will first state that I do not accept that there is any substance to the appellant's submissions that the councillor's representations demonstrate that he was inappropriately involved in the township's decision-making regarding its response to the appellant's request, giving rise to a conflict of interest. That the councillor made his representations on township letterhead, that the township provided the councillor with de-identified information regarding the appellant's request and the township's subsequent decision²⁴ regarding information that was said to have been maintained by the councillor himself, and that the councillor made a conclusory statement about the existence (or, in this case, non-existence) of any records responsive to the appellant's request, does not alter my view in this respect.

[42] I will now turn to the issue before me, that of custody or control of the requested record. As indicated above, under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution, in this case the township. For the reasons that follow, I am satisfied that any records responsive to the appellant's request, including the contact group identified by the councillors, are not in the township's custody or under its control. In reaching this conclusion, I have considered whether the councillor can be considered to have been acting as an officer or employee of the township in the creation of such records, and then turned to other

²⁴ The copy of the email chain in which the appellant clarifies his request and the decision letter that was provided to the councillor by the township was severed to remove all information that would identify the appellant.

relevant factors that help to determine the issue of custody or control.

[43] As mentioned above, following the analysis set out in Order M-813, IPC decisions have taken the approach that municipal councillors' records 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 contact group created by the councillor while acting as an officer or employee of the township?

[44] I first considered whether the municipal councillor was acting as an officer or employee of the township when creating the contact group, or any other address book or email database that might exist that would be responsive to the appellant's request. For the reasons set out below, I find that he was not acting in either capacity.

[45] As previously noted, in *St. Elizabeth Home Society*,²⁵ the Ontario Superior Court held that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. In Order M-813, the adjudicator concluded that only in "unusual circumstances" is a councillor considered to be an officer of a municipality and, therefore, part of the institution for the purposes of the *Act*. I am bound by the ruling in *St. Elizabeth Home Society* and I agree with and adopt the rationale in Order M- 813.

[46] Having reviewed the parties' representations, I find there are no "unusual circumstances" that would indicate that the councillor was acting as an officer or employee of the township when he created the contact group. For example, there is no evidence that the councillor was appointed a commissioner, superintendent or overseer of any work pursuant to section 256 of the *Municipal Act*, and that the records relate to such. I also find that there is no evidence to suggest that the councillor was assigned a special duty by township council that required the creation of the contact group or any similar type of database of addresses that would be responsive to the appellant's request.

[47] This does not end the analysis. Even if the councillor was not acting as an officer or employee of the township, in some circumstances, his records may still be found to be in the township's custody or under its control. To make this determination, I will consider whether the contact group or any other similar type of email address book or

²⁵ (2005), 148 A.W.C.S. (3d) 497 (Ont. Sup. Ct.).

database is in the custody or under the control of the township on the basis of established principles, in the context of the two-part test established by the Supreme Court of Canada in *National Defence*, mentioned above.

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

[48] I will first consider whether the township has custody of the records by virtue of the fact that the contact group is on the township's servers. The township submits that no records responsive to the appellant's request exist in its custody. The appellant argues that any responsive record, including the contact group, maintained by the councillor on the township's email system, stored on the township's server, is in the township's possession and therefore in its custody or under its control.

[49] Previous orders have considered instances where an institution can be said to have physical possession of councillor's records because such records are maintained on township computer servers. In some instances, such simple possession is not considered to be sufficient to establish custody or control by the institution. For example, in Order MO-3471, the adjudicator considered communications sent or received by the staff of a named councillor relating to the councillor's Twitter account. In that order, the adjudicator found that the presence of emails on a city's server amounts to "bare possession" only. The adjudicator agreed with the adjudicator in Order MO-2824 who stated:

[...] because records of this nature relate to the councillor in his role as an individual constituent representative, the city does not control what the councillors create or receive, how or if they store them on the city's server, and what they choose to do with the material after that, including the right to destroy it if they wish. As a result, to the extent that records of this nature may be in the possession of the city because they are located either in hardcopy at the office of the municipal councillor, or electronically on the city's server, I find that such possession amounts to "bare possession" and that the records are not in the custody or the city in these circumstances.

[50] I agree with the reasoning applied in Orders MO-3471 and MO-2824 and find that it is relevant to my consideration of the requested record in this appeal.

[51] Having considered the parties' representations and the nature of the contact group including the record itself, I find on a balance of probabilities that the township has physical possession as it resides in its Outlook email system on its computer servers. However, I also note that such possession does not automatically mean that the record is in the township's custody or under its control. For possession to amount to custody, there must be found to be some right to deal with the record and some

responsibility for its care and protection.²⁶

[52] In my view, the township's possession over any responsive records in this case does not amount to custody. There is no evidence before me to support a finding that the township requires the councillor to maintain the contact group or any other database of contact information. There is also no evidence that the township has the right to possess the contact group, or that it has any corresponding authority to regulate its content, use or disposal.

[53] Therefore, I find that the township's possession of the contact group or any database of emails addresses that might exist and is maintained by the councillor for the purpose of contacting his constituents amounts to "bare possession" only.

[54] I must now consider whether the contact group, or any other records that would be responsive to the appellant's request, is under the township's "control."

[55] As noted above, in *National Defence*, 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 but in the hands of elected representatives. For ease of reference, I reproduce the test here:

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?

[56] For a finding of control to be made, both parts of the test must be met. In the circumstances of this appeal, the "department" is the township.

[57] In its discussion of the concept of "control" for the purposes of freedom of information legislation, the majority in *National Defence* stated:

As "control" is not a defined term in the *Act*, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "de jure" as well as "de facto" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the

²⁶ *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.).

meaning of a word such as "control" with the aid of dictionaries. The Canadian Oxford Dictionary defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "de facto" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the *Act*.²⁷

[58] I now turn to each element of the two-part test.

(1) Do the contents of the contact group relate to a township matter?

[59] The evidence before me does not support a conclusion that the contact group, or any other list of addresses that would be responsive to the request, relates to a township matter. Rather, I find that the contact group relates to matters related to the councillor's role as ward councillor and is better characterized as being relating to constituency matters.

[60] A number of previous orders issued by the IPC have considered whether the content of records held by municipal councillors relates to municipal matters or constituency matters in the determination of custody or control issues.

[61] In Order MO-2821, the adjudicator considered 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 in *National Defence*, because they related to a "city matter," the adjudicator did not have to decide the issue because the second part of the test was not satisfied. However, the adjudicator made some general comments about the policy rationale for why there is a distinction between "constituency" or "political" records and "city records", which I find relevant to the present appeal:

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

²⁷ *Ibid* at para 48.

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.

[62] Subsequent orders have found that records related to a councillor's role as an individual constituent representative are in the nature of "constituency" or "political" records rather than "city" or "municipal records."²⁸ In particular, 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

²⁸ Orders MO-2749, MO-2821, MO-2842, MO-3471 and MO-3823.

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*.

[63] As a result, the adjudicator in Order MO-2749 found that email correspondence with a named city councillor about a laneway closing was in the custody or under the control of the city.

[64] Above, I have already found that the councillor did not create or use the contact group or any other similar address book in the capacity of an officer or employee of the township. As will be discussed in more detail below, in considering the purpose of the contact group or any record that would be responsive to the request and the use to which it is to be put, namely, to update residents of the councillor's constituency of matter that are relevant or would be of interest to them, I accept that it is a record related to the councillor's constituency work as representative of the residents of a particular ward of the township.

[65] On this basis, I am satisfied that the contact group is not related to a township matter, but rather to matters of a political or constituency-relations nature.

(2) Could the township reasonably expect to obtain a copy of the contact group, or similar address book or email database, upon request?

[66] Even if I were to accept that the contact group relates to a "township matter", the question then becomes whether the township could reasonably expect to obtain a copy of the contact group, or any other address book maintained by the councillor, were it to ask him to produce it. For the reasons below, I do not accept that it could.

[67] The majority *National Defence* stated the following about the second part of the two-part test:

Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* ... The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is

subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.²⁹

[68] The list of factors developed by the IPC is of assistance in determining the second branch of the *National Defence* test. One relevant factor to consider in determining custody or control is the purpose or use for which a record has been created. In particular, if the record was created pursuant to or for the purpose of a statutory power or duty; for the purpose of an activity that is a "core," "central" or "basic" function of the township; or for the purpose of fulfilling the township's mandate and functions, this could indicate that the record is under the control of the township. I find that none of these indications are present here.

[69] The councillor's representations suggest that the contact group is a record related to his political function as councillor as it is a means for him to communicate with residents of his constituency. In the circumstances, I find that this is the most likely intended use for any records that might exist that responsive to the appellant's request.

[70] There is very little other evidence before me about the circumstances surrounding the creation of the contact group or similar type of database that would be responsive to the appellant's request, if any such records exist. However, I do not accept that the contact group was created in the context of township work. There is no evidence that the contact group was created pursuant to or for the purpose of a statutory power or duty held by the town and there is no evidence the creation or use of such address book relates to the township's mandate and functions. I also have not been provided with evidence to conclude that it was created for the purpose of an activity that can be said to be a "core," "central" or "basic" function of the township, which does not support a finding that it is in the custody or under the control of the township. It stands to reason that the councillor created it for his convenience in carrying out his work as an elected representative.

[71] Another factor to consider is how closely integrated the record is with other records that are within the township's custody or control.³⁰ The township's position is that it does not have any records responsive to the request, which suggests that it takes the position that the contact group, or any similar type of database of addresses maintained by the councillor, has not been integrated with its records and that it does not have the authority to regulate its content, use or disposal.³¹

[72] There is also no evidence before me to suggest that the township has used or relied on the councillor's contact group, on any other similar type of list of addresses or contact information gathered and maintained by the councillor, or that it has or would integrate such record, if it exists, with its own records.

²⁹ *Ibid* at para 56.

³⁰ Orders 120, P-239 and MO-1251.

³¹ Orders 120 and P-239.

[73] On the evidence, I also find that any record that would be responsive to the appellant's request would, by its nature, not relate to a responsibility assigned to the councillor by township council but rather, would relate to his activities as councillor of a particular ward. Therefore, I accept that, as previously discussed, any such record is better described as the councillor's personal or political records which, although maintained on the township's servers, are not integrated with other records that are in the township's custody or under its control.

[74] In carrying out second part of the *National Defence* analysis I have also considered the following factors developed by the IPC used to determine whether a record is in an institution's custody or under its control: whether the record was created by an officer or employee of the institution; the use that the creator intend to make of the record; whether the activity in question is a "core", "central" or "basic" function of the institution; whether the content of the record relates to the institution's mandate and functions; or whether the institution has a right to possess the record or regulate its content, use and disposal. For the above reasons, I find that an examination of all these factors points to a finding that the township could not reasonably expect to obtain a copy of the contact group, because it related to the councillor's duties as an elected representative and not a township matter.

[75] I conclude, therefore, that the township could not reasonably expect the councillor to produce a copy of the contract group, or any other record responsive to the appellant's request. The circumstances therefore, do not meet the second part of the test in *National Defence* for a finding of control by the township over any such records.

[76] For these reasons, I find that the contact group, or any other record that would be responsive to the appellant's request, is not in the township's custody or under its control within the meaning of section 4(1) of the *Act* and therefore, the appellant does not have a right of access to such records under the *Act*.

[77] As a result of my finding that any records responsive to the appellant's request would not be in the township's custody or under its control, it is not necessary for me to consider whether the township conducted a reasonable search for responsive records. This is because, even if the appellant were to provide a reasonable basis for believing that additional records might exist and I were to find that township's search was not reasonable, the township is not required by the *Act* to conduct further searches for records that the IPC has found are outside of its custody or under its control.³²

ORDER:

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

³² Order MO-3287 and MO-3808.

Original Signed By: _____
Catherine Corban
Adjudicator

November 23, 2022 _____