



OFFICE OF THE  
INFORMATION &  
PRIVACY COMMISSIONER  
FOR BRITISH COLUMBIA

Order F23-68

## DISTRICT OF LANTZVILLE

Emily Kraft  
Adjudicator

August 22, 2023

CanLII Cite: 2023 BCIPC 79  
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 79

**Summary:** The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the District of Lantzville (District) for copies of texts to and from a named District councillor regarding District matters. The District withheld the responsive records on the basis that they are not in its custody or under its control within the meaning of ss. 3(1) and 4(1) of FIPPA. The adjudicator found that the records are not in the District's custody or control under s. 3(1) and therefore FIPPA does not apply.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 ss. 3(1) and 4(1).

## INTRODUCTION

[1] An individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the District of Lantzville (District) for copies of texts to and from a named District councillor (Councillor) regarding District matters. The District identified 63 pages of responsive records, but withheld them on the basis that they were not in the District's custody or under its control for the purposes of ss. 3(1) and 4(1) of FIPPA.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the District's decision. Mediation did not resolve the matter and it proceeded to inquiry.

## ISSUE

[3] The issue in this inquiry is whether the responsive records are in the District's custody or under its control within the meaning of ss. 3(1) and 4(1). The District has the burden of proof in this case.<sup>1</sup>

## DISCUSSION

### Background

[4] The Councillor was a member of the District council from 2018 to 2022.<sup>2</sup>

[5] In 2020, the Councillor donated her cell phone to an individual who was collecting old cell phones for charitable purposes. The Councillor did not remove the Facebook or email applications from her phone before donating it. The individual who collected the phone accessed the Councillor's emails and Facebook messages and shared screenshots of that correspondence to his personal Facebook page and a Facebook group for Lantzville residents. The individual also shared copies of some of the correspondence with another District council member, who provided paper copies of the same to the District's Chief Administrative Officer (these are the records in dispute in this inquiry).<sup>3</sup> The applicant made her access request shortly thereafter.<sup>4</sup>

[6] The Councillor filed a civil claim against the individual who collected her cell phone for breach of privacy, and that claim is ongoing.<sup>5</sup> The individual has since returned the cell phone to the Councillor and the correspondence has been removed from the Facebook pages.<sup>6</sup>

### Records

[7] The records total 63 pages and consist of multiple Facebook message threads<sup>7</sup> between the Councillor and six different third parties.<sup>8</sup> I will describe the content of the messages in parts of my analysis below.

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<sup>1</sup> Order 02-30, 2002 CanLII 42463 (BCIPC) at para 4.

<sup>2</sup> District's initial submission at para 9.

<sup>3</sup> The District did not indicate whether the records were provided to the District council member electronically or in paper format.

<sup>4</sup> This background information comes from the District's initial submission at paras 11, 12, 15, 17, and 18. The applicant did not dispute the accuracy of this information in her response submission.

<sup>5</sup> Councillor's affidavit at para 10.

<sup>6</sup> District's initial submission at paras 20-21.

<sup>7</sup> Whether the Facebook messages are responsive to the access request is not at issue in this inquiry.

<sup>8</sup> Schedule 1 of FIPPA says that a "third party" in relation to a request for access to a record or for correction of personal information means any person, group of persons or organization other than the person who made the request, or a public body.

### **Sections 3(1) and 4(1) – custody or control**

[8] Section 3(1) states that FIPPA applies to all records “in the custody or under the control” of a public body. Section 4(1) gives an applicant a right of access to a record “in the custody or under the control” of a public body, including a record containing personal information about the applicant. The right of access under s. 4(1) does not extend to information that is excepted from disclosure under Part 2 of FIPPA.<sup>9</sup>

[9] The issue in this case is whether the records are in the District’s custody or under its control within the meaning of ss. 3(1) and 4(1). If they are, then FIPPA applies and the applicant has a right of access to them, subject to any exceptions under Part 2 of FIPPA. If they are not, then FIPPA does not apply, and the applicant has no right of access to them.

[10] Either custody or control over a particular record will bring it within the scope of s. 3(1) – both are not required.

#### ***Does the District have custody of the records?***

[11] FIPPA does not define “custody,” but previous orders have established how to determine whether a public body has custody of a record. The first step is to establish whether the public body has physical possession of the record. If it does, the second step is to determine whether it also has a legal right or obligation to the information in its possession.<sup>10</sup> In deciding custody, previous orders have also considered whether the records are integrated with other records the public body holds.<sup>11</sup>

[12] There is no dispute that the District has physical possession of the records.<sup>12</sup> However, the District says that it would not have possession of the records had a third party not provided them to the District through improper means.<sup>13</sup> The District provided affidavit evidence from the Councillor that the records are messages exchanged through her personal Facebook account and that she did not give anyone permission to access or disclose any of the messages.<sup>14</sup> The Councillor deposes that the records were taken off of her personal cell phone that was neither given to her nor paid for by the District.<sup>15</sup> The District submits that the records are private and personal correspondence between the Councillor and third parties and that it has no rights or responsibilities for the records.<sup>16</sup>

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<sup>9</sup> Section 4(2) of FIPPA.

<sup>10</sup> Order F23-08, 2023 BCIPC 10 at para 9.

<sup>11</sup> For example, see Order F18-45, 2018 BCIPC 48 at para 17.

<sup>12</sup> District’s initial submission at para 7.

<sup>13</sup> District’s initial submission at para 33.

<sup>14</sup> Councillor’s affidavit at paras 8 and 13.

<sup>15</sup> Councillor’s affidavit at para 4.

<sup>16</sup> District’s initial submission at para 33.

[13] The District further submits that only two District employees have access to the records: the Director of Corporate Administration and the Deputy Director of Corporate Administration.<sup>17</sup> It provided affidavit evidence from the Director of Corporate Administration that the paper copy of the records that was provided to the Chief Administrative Officer has been shredded, and the records have been scanned and saved as a password protected PDF which is not stored or integrated with any other District records.<sup>18</sup> The District says that it has not used the records for any purpose other than the applicant's access request and this inquiry. It says it ought to have disposed of the records, but the applicant made her access request little more than a week after the District received the records, and the matter has been proceeding through the FOI process since that time.<sup>19</sup>

[14] The applicant says that the District has possession of the records and that they should be disclosed. She does not address the other indicators of custody in her submission.

[15] I accept the District's evidence and I find that, except for the fact that the District has physical possession of the records, the indicators of custody are not present in this case. I am satisfied that the records are not integrated with any other District records. Also, the District clearly does not have legal rights or responsibilities for messages exchanged through the Councillor's personal Facebook account using her personal cell phone. In my view, the fact that a third party accessed those messages and provided them to the District, who did not use them for any purpose other than the access request, does not establish that the District has any rights or responsibilities for the records for the purposes of the custody analysis.

[16] I conclude the District does not have custody of the records in dispute. I will now consider whether the District has control of the records.

***Does the District have control over the records?***

[17] FIPPA does not define "control." A public body has "control" of a record if it has some power of direction or command over a document, even if it is only on a "partial," "transient" or "de facto" basis. The content of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a public body for the purposes of ss. 3(1) and 4(1).<sup>20</sup>

[18] Previous court decisions and OIPC orders have considered a number of factors in determining whether a record is under a public body's control for the

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<sup>17</sup> Affidavit of TC at para 8.

<sup>18</sup> Affidavit of TC at paras 7-8.

<sup>19</sup> District's initial submission at para 55.

<sup>20</sup> *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 48.

purposes of ss. 3(1) and 4(1). I have identified the following factors, some of which overlap with those regarding custody, as relevant in this case:

- Whether the record was created by an officer, employee, or member of the public body in the course of carrying out their duties;
- Whether the content of the record relates to the public body's mandate and functions;
- Whether the public body has possession of the records;
- Whether the public body has relied on the records;
- Whether the records are integrated with the public body's other records; and
- Whether the public body has the authority to regulate the use and disposition of the records.<sup>21</sup>

[19] I will discuss each factor in turn below.

***Were the records created by an officer, employee, or member of the public body in the course of their duties?***

[20] As mentioned above, the records are message threads between the Councillor and six different third parties. The District provided affidavit evidence from its Chief Administrative Officer that none of the third parties were officers or employees of the District at the time the messages were exchanged.<sup>22</sup> Based on my review of the records, it is clear that the third parties are individual members of the Lantzville community. The Councillor seems to have friendly personal relationships with the third parties, given how informal and candid their conversations are.

[21] A great deal of the correspondence appears to be about other individuals' activities and comments on a community Facebook page.<sup>23</sup> Some of the correspondence is about social plans between the Councillor and a third party.<sup>24</sup> This correspondence does not relate to District matters and the Councillor was clearly acting in her personal capacity when she sent and received these messages.

[22] However, parts of the correspondence are more directly related to District matters. For instance, some of the correspondence discusses existing District bylaws and policies,<sup>25</sup> as well as matters being considered by the District council, specifically, an Official Community Plan, rezoning applications, and a development

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<sup>21</sup> Order 02-29, 2002 CanLII 42462 at para 18; Order F17-20, 2017 BCIPC 21 at para 26; Decision F10-01, 2010 BCIPC 5 at para 8.

<sup>22</sup> Affidavit of RC at para 9.

<sup>23</sup> For example, pp 3, 9, 11, 13-20, 25-27, 32, 33, 35, 37-39, 40-42, 47, 55, 61, and 62 of the records.

<sup>24</sup> Records at p 45.

<sup>25</sup> For example, pp 22-25, and 60 of the records.

bylaw.<sup>26</sup> In two of the message threads, the Councillor tells the third parties that certain matters being considered by council are controversial in the community, and she requests that the third parties express their support for those matters by, for instance, writing letters to council.<sup>27</sup> In one of the threads, she tells a third party about a motion passed by council.<sup>28</sup> She also asks for a third party's input about ways to share information about District matters with the community.<sup>29</sup>

[23] The District submits that the Councillor was not acting in any official capacity when she engaged in this correspondence.<sup>30</sup> The District says that, in the absence of a duly adopted resolution directing or authorizing a councillor to carry out specified duties, no individual council member has authority to conduct business on behalf of the municipality.<sup>31</sup> The District provided affidavit evidence from its Director of Corporate Administration who says she is not aware of any resolution appointing the Councillor as a spokesperson for the District or directing her to solicit feedback from the public about matters referred to in the records.<sup>32</sup>

[24] The District further submits that it is common and expected that individual council members may have informal conversations with members of the public. It says that not every discussion a council member has with a third party constitutes the business of the District simply because it might refer to a matter of interest within the District. It says that not every conversation a council member has with third parties that touches on matters of local interest is akin to the council member carrying out their official municipal "duties."<sup>33</sup>

[25] The applicant submits that the Councillor was furthering District business or attempting to influence District affairs in the records, so they must be disclosed to the public.

[26] I accept the District's evidence that there was no resolution authorizing the Councillor to act as a spokesperson or solicit feedback from the public, and I find that the Councillor was not acting on behalf of the District or carrying out any duties assigned to her by council when she engaged in the correspondence at issue. However, in my view, the role of municipal councillors, as elected representatives, also includes communicating with constituents about municipal matters. I do not think that the Councillor was acting in her role as a constituent representative in every discussion she had with the third parties about District-related matters – most of the correspondence about District-related matters appears to be casual conversation between friends. However, in my view, the Councillor was acting as a constituent representative in the small number of messages where she requested

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<sup>26</sup> Records at p 1, 18, 30, and 31.

<sup>27</sup> Records at p 1, 30, and 31.

<sup>28</sup> Records at p 33.

<sup>29</sup> Records at pp 49-52.

<sup>30</sup> District's initial submission at para 35.

<sup>31</sup> District's initial submission at para 36.

<sup>32</sup> Affidavit of TC at paras 13-14.

<sup>33</sup> District's initial submission at para 37.

that the third parties express their support to council about certain District matters. Accordingly, I find that she was carrying out her duties as a member of council when she sent those messages.

[27] To conclude, I find that the Councillor sent and received almost all the correspondence at issue in her personal capacity, which generally weighs against a finding of control. However, I find that the Councillor was carrying out her duties as a member of council in a small number of messages that appear in two of the message threads at issue. This supports a finding that those records are under the District's control.

***Does the content of the records relate to the District's mandate and functions?***

[28] Most of the records do not relate to the District's mandate and functions. However, as mentioned above, some of the records involve discussions about matters being considered by the District council (i.e. an Official Community Plan, rezoning applications, and a development bylaw).<sup>34</sup> I am satisfied that information relates, in a broad sense, to the District's functions. However, as stated by former Commissioner Loukidelis, this factor generally will not weigh as heavily as other factors in the control analysis.<sup>35</sup>

***Does the District have possession of the records?***

[29] I have already found that the District has physical possession of the records in dispute. However, physical possession does not, on its own, establish that a public body has control of records.<sup>36</sup>

[30] Further, in my view, the way the District came into possession of the records in dispute is a relevant consideration here. This is not a case where the messages were sent or received using District devices or systems. I accept the District's evidence that the individual who collected the Councillor's cell phone accessed and provided the records to the District without the Councillor's consent.<sup>37</sup> Although physical possession is generally an indicator of control, given these unusual circumstances, I give it very little weight in this case.

***Are the records integrated with other records held by the District?***

[31] The District provided evidence from its Director of Corporate Administration that the records have been saved as a PDF in their own electronic file and are not stored or integrated with any other District records.<sup>38</sup>

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<sup>34</sup> Records at p 1, 18, 30, and 31.

<sup>35</sup> Order 02-29, 2002 CanLII 42462 (BCIPC) at para 44.

<sup>36</sup> *Ibid* at para 49; Order F15-65, 2015 BCIPC 71 at para 34.

<sup>37</sup> Councillor's affidavit at para 13; Affidavit of RC at para 4.

<sup>38</sup> Affidavit of TC at paras 7-8.

[32] The applicant did not address this factor in her submission.

[33] I accept the District's evidence and I conclude that this factor supports a finding that the records are not under the District's control.<sup>39</sup>

***Has the District relied on the records?***

[34] The District provided evidence from its Director of Corporate Administration that the records have never been considered by the District council or otherwise used or relied on by the District for any purpose other than for the purposes of the applicant's access request and this inquiry.<sup>40</sup>

[35] The applicant does not address this factor in her submission.

[36] I accept the Director's evidence and I find that the District has not used or relied on the records in any way. This factor supports a finding that the records are not under the District's control.<sup>41</sup>

***Does the District have the authority to regulate the use and disposition of the records?***

[37] The Councillor provided affidavit evidence that the records were taken off of her personal cell phone that was neither given to her nor paid for by the District.<sup>42</sup> She deposes that the records are messages exchanged through her personal Facebook account.<sup>43</sup> The District says it has never had access to the Councillor's cell phone or personal Facebook account.<sup>44</sup>

[38] The applicant does not address this factor in her submission.

[39] I accept the District's evidence and I find that the District has no authority to regulate or control the Councillor's use or disposition of messages exchanged through her personal Facebook account using her personal cell phone. I see no basis on which the District had a legal authority to obtain a copy of the records. This factor supports a finding that the records are not under the District's control.<sup>45</sup>

***Summary and conclusion on control***

[40] I found above that the following factors weigh against a finding of control in this case: the records in dispute are not integrated with other District records, the

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<sup>39</sup> Order F17-20, 2017 BCIPC 21 at para 50.

<sup>40</sup> Affidavit of TC at para 12.

<sup>41</sup> Order F18-45, 2018 BCIPC 48 at para 27.

<sup>42</sup> Councillor's affidavit at para 4.

<sup>43</sup> Councillor's affidavit at para 8.

<sup>44</sup> Affidavit of RC at para 8.

<sup>45</sup> *Minister of Small Business, Tourism and Culture et al v The Information and Privacy Commissioner of the Province of British Columbia et al*, 2000 BCSC 929 at para 25.



District has not relied on the records, and the District has no authority to regulate the use and disposition of the records.

[41] I also found that several factors weigh in favour of control. Specifically, I found that the District has physical possession of the records in dispute, and that the content of some of the records relates, in a broad sense, to the District's functions; however, I found that these factors carry less weight in this case. Finally, I found that, while most of the messages were sent and received in the Councillor's personal capacity, a small number of the messages were created by the Councillor in the course of her duties as a member of council.

[42] In my view, the fact that the records are not integrated with other District records, the District has not relied on the records, and the District has no authority to regulate the use and disposition of the records outweigh the factors indicating control in this case. I conclude that the records are not under the District's control for the purposes of ss. 3(1) and 4(1).

***Conclusion – custody or control***

[43] To conclude, I find that the records in dispute are neither in the custody nor under the control of the District for the purposes of ss. 3(1) and 4(1).

**CONCLUSION**

[44] For the reasons given above, under s. 58 of FIPPA, I confirm the District's decision that the records in dispute are outside the scope of FIPPA under s. 3(1) and that the applicant has no right of access to them under s. 4(1).

August 22, 2023

**ORIGINAL SIGNED BY**

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Emily Kraft, Adjudicator

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