

Electronic Record Keeping Policies & Custody or Control



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Today's Agenda

- ▶ Basic Principles
 - ▶ Recent cases on “custody or control”
 - ▶ What does it mean for municipalities?
- 



Municipal Freedom of Information & Protection of Privacy Act

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.



Municipal Freedom of Information & Protection of Privacy Act

4 (1) 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,

- (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15 or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.



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

Would personal emails sent by City employees using City's email account be subject to MFIPPA disclosure?

- ▶ City Solicitor's personal emails in his capacity as a member of the CAS' Board of Directors is not within the "custody or control" of the municipality.
 - ▶ CAS not subject to MFIPPA
 - ▶ Mr. O'Connor, in his personal capacity, is not subject to have his personal documents seized and passed over to the public
 - ▶ Communications between CAS and Mr. O'Connor have no connection with the functioning of the City's business
 - ▶ Therefore, there is no advancement of democratic values with disclosure of such info.



City of Ottawa v. Ontario, 2010 ONSC 6835 (Div Ct.) – Electronic Records Policies

- ▶ Ottawa had “Responsible Computing Policy” – addressing personal use of IT services and assets by employees
 - ▶ City has rights to access its IT assets and info at any time and that monitoring may be done at any time without notice or knowledge
 - ▶ Court determined that notwithstanding the existence of such policy, there is no obligation for disclosure → it’s a factor to be considered, but it needs to be reviewed in light of the “underlying purpose of freedom of information legislation”.



IPC – FOI Fact Sheet 1

“The Municipal Freedom of Information and Protection of Privacy Act and Councillors’ records” – April 2016

When are Councillors’ Records subject to MFIPPA?

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. the records are in the custody or control of the municipality.



IPC – FOI Fact Sheet 1

“The Municipal Freedom of Information and Protection of Privacy Act and Councillors’ records” – April 2016

- ▶ Appendix A provides for a list of questions for consideration – a non-exhaustive list of factors to be considered in determining whether there is “custody or control” of an institution.
- ▶ Keep in mind: the Court would interpret the answers to that list in light of the purpose of the legislation (i.e. advancing democratic principles through appropriate access to info)



MO-3281 - City of Oshawa

- ▶ A request for access to communications between a councillor and an individual who was retained to investigate alleged wrongdoing on the part of the city and its staff.
- ▶ The city identified one responsive record, an email from the councillor to the investigator, but denied access to it on the basis that it was not in its custody or under its control.
- ▶ In this order, the adjudicator finds that the record at issue is under the city's control, and orders it to issue an access decision to the appellant.

<https://decisions.ipc.on.ca/ipc-cipvp/orders/en/144731/1/document.do>



MO-3281 - City of Oshawa

- ▶ Councillor was not acting as an “officer” or “employee” of the municipality
- ▶ Councillor was not discharging a special duty assigned by council IPC then considers factors relevant to determining “custody” or “control”
- ▶ IPC applies the National Defence 2-part test to determine whether an institution has control of records that are not in its physical possession



MO-3281 - City of Oshawa

National Defence Test Part 1: Record's contents related to a City matter:

- ▶ the hiring of an investigator re allegations about individual City employees by the City's Auditor General
- ▶ the City's Council had the jurisdiction to authorize retaining an investigator
- ▶ the record was integral to Council's decision to retain an investigator



MO-3281 - City of Oshawa

National Defence Test Part 2: City could reasonably expect to obtain a copy upon request:

- ▶ record contains "negotiations" between councillor and investigator relating to potential retainer by City
- ▶ record was an integral part of hiring the investigator
- ▶ record was used by the Councillor to confirm investigator's agreement to the terms of his potential engagement by the City
- ▶ record "played a significant role" in Council's decision to hire the investigator



MO-3607 - Township of Springwater (May 2018)

- ▶ A request under the Act for access to all emails from the non-township email accounts of the Mayor, Deputy Mayor and a councillor relating to land development.
- ▶ After contacting the three elected officials, access was denied to responsive records that might exist on the basis that it does not have custody of or control. The adjudicator upheld the township's decision and dismissed the appeal.
 - ▶ Mayor: officer of the municipality – adjudicator accepted his statements that he understood the importance of disclosure and that he was not using his personal email account for Town's business
 - ▶ Other elected officials: not officers or employees of the municipality; provided representation that they understood the request and confirmed that they did not conduct Town business using their personal emails. Private email account for constituents communication and emails there are outside of the institution's custody or control.



ORDER MO-3467(Appeal MA11-23-3) Toronto Police Services Board (July 2017)

- ▶ Adjudicator was satisfied that the Board has conducted adequate search for records under its custody and control, by making inquiries with the police officer.
- ▶ Reconfirmed the 2nd part of the National Defence case – emails containing in personal email accounts may still be deemed as being under the custody and control of an institution.



What Does This Mean For Your Municipality?

Staff:

- ▶ Reasonable expectation of privacy, even on municipal network
- ▶ Keep municipal business on municipal network (shared drives, email, collaboration sites, etc.)
- ▶ Use municipal email for municipal business

BUT what about

- ▶ Text messages on municipally-issues smart phones?
- ▶ Off network collaboration sites (e.g. dropbox, etc.), personal email?



What Does This Mean For Your Municipality?

Elected Officials:

- ▶ How much are we obligated to explain (e.g. Oshawa order)?
- ▶ We can't enforce anything, but we can encourage
- ▶ Have we communicated the expectation to confine municipal business to municipal email accounts (for example)?
- ▶ Have we explained the differences between business and constituent records?
- ▶ Have we explained expectations for the use of municipally-issued technology (smart phones, tablets, etc.)?
- ▶ Do we encourage less than optimal behaviour (e.g. replying to personal email accounts, etc.)?



Some Things That May Help Steer Councillors in a Better Direction

Policies and Training:

- ▶ Electronic communications / records
- ▶ Legal holds
- ▶ MFIPPA obligations
- ▶ E-communications best practices
- ▶ Records/Information Management



Questions & Discussions