

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3618-I

Appeal MA14-590

The Corporation of the Town of Mississippi Mills

May 29, 2018

Summary: The town received a request under the *Act* for records related to a project to expand an existing hydroelectric facility within its municipal boundaries. The town issued an interim access decision that the appellant appealed. During mediation, the appellant significantly narrowed the request, seeking correspondence received by any of the town's councillors from members of the public about the expansion project. The town issued a revised decision advising that any records responsive to the narrowed request were outside of its custody or control and not subject to the *Act*. The appellant also appeals the town's revised decision addressing her narrowed request.

In this interim order, the adjudicator upholds the town's decision that correspondence received by town councillors regarding the expansion project are not within its custody or control. She remains seized of the appeal to continue her inquiry into whether records held by the Mayor with respect to the project, would fall under the custody or control of the town.

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

Orders Considered: Order M-813, MO-1403, MO-1967, MO-2821, MO-2878 and MO-2993.

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 24, [2011] 2 SCR 306.

OVERVIEW:

[1] The Corporation of the Town of Mississippi Mills (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...any and all documentation in any format whatsoever concerning the project by [named company] and/or [named company] to create or expand a head pond and dam at Almonte Ontario and to building a generator and housing to increase power generation. The request includes but is not limited to any memos, correspondence, studies, application for permits, documentation concerning permits and permits issued as well as environmental impact documentation concerning this project and created by any party. This request relates to records received, created or otherwise coming into possession of the Town, its officers, councillors or any other person connected with the Town from and after the date of my last request of April 20, 2013.

[2] The requester also asked that the town grant her a fee waiver and indicated that her preferred method of access to the responsive records was to receive them on a CD.

[3] The town issued an interim decision, advising that access was granted to all records that are "available to be reproduced," and advising that the estimated fee was \$244.00.

[4] The requester, now the appellant, appealed the town's decision.

[5] During mediation, the appellant advised that the town had confirmed the responsive records consist of public reports, as well as correspondence. She advised that she is specifically interested in pursuing access to correspondence, including emails and letters, sent to councillors by members of the public about the identified project. She also advised that she seeks only the original correspondence and "not copies ... unless they have notes or additions on them or are forwarded to another individual." Finally, she clarified that she was specifically pursuing access to councillors' correspondence, such as emails and letters.

[6] The town takes the position that it does not have custody or control over councillors' correspondence that make up records responsive to the appellant's narrowed request. The appellant disagrees and continues to seek access to them.

[7] Also during mediation, the appellant stated that she is appealing the fee and that she is pursuing a fee waiver. The town advised the fee of \$244.00 did not account for the councillors' emails located on a third-party server and it would have to conduct a separate search to retrieve electronic backups. Although the town continues to take the position that it does not have custody or control over councillors' emails contained on a third-party server, it agreed to issue a fee estimate for retrieving electronic backups of emails. It subsequently did so, estimating a fee of \$3,200.00 to retrieve electronic

backups of emails. It also issued a decision denying the appellant's request for a fee waiver.

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry by sending Notice of Inquiry to the town, initially. The town provided representations.

[9] Following receipt of the town's representations, I sought representations from the appellant on the issue of the town's custody or control of the records only, as the determination of that issue might have an impact of the fee charged by the town. As the appellant's representations raised issues to which I believed the town should have an opportunity to respond, I sought reply representations from the town. At that time, I also asked the town to provide further information on the circumstances surrounding the councillors' emails including the capacity in which the emails were received and whether the subject matter of the emails relates to matters that fall within the mandate of the town.

[10] I then provided the appellant with an opportunity to respond to the town's reply representations. In her sur-reply representations, the appellant advised that she has:

...withdrawn a request for councillors' emails, with the exception of the Mayor, unless the councillor is also an "officer" of the town, that he or she has been appointed as a commissioner, superintendent or overseer of any work pursuant to section 256 of the *Municipal Act*.

[11] As a result of the appellant further narrowing the request during the course of the inquiry, I sought additional representations from the town. The narrowing not only significantly reduces the number of potentially responsive records, but also might have an impact on the town's position with respect to custody or control. Accordingly, I requested representations from the town on whether the emails of the Mayor (and those of any councillor who is also an "officer" of the town) are within the town's custody or control. Additionally, I requested that the town provide the appellant with a revised fee estimate with respect to her narrowed request.

[12] In its additional representations, the town continues to take the position that all correspondence responsive to the request, whether it relates to councillors or the Mayor, falls outside of its custody or control. Nevertheless, the town issued a revised fee estimate of \$840.00 for the retrieval of these emails from a third-party server advising that this fee estimate did not include staff time to review the information prior to release. It explained: "it is difficult to estimate the staff search and preparation time as the volume of responsive records associated with this request is unknown." It did not submit representations explaining how it came to the revised fee estimate amount.

[13] In this interim order, I find that any responsive records that may exist with respect to any councillors are not in the custody or the control of the town and, therefore, fall outside of the scope of the *Act*. However, I find that I do not have

sufficient information to make a determination on whether any responsive records held by the Mayor are under the custody or control of the town and I remain seized of this matter.

RECORDS:

[14] The town has not specifically identified the records that are responsive to this request but to be responsive, they would consist of correspondence, including emails and letters, sent by members of the public to the Mayor and any councillor who is "officer" of the town (or who has been appointed as a commissioner, superintendent or overseer of any work pursuant to section 256 of the *Municipal Act*) in relation to the project identified in the request.

DISCUSSION:

Are the emails (and other correspondence) "in the custody" or "under the control" of the institution under section 4(1)?

[15] In this appeal, I must determine whether the requested emails and correspondence "in the custody" or "under the control" of the institution under section 4(1) of the *Act*.

[16] Section 4(1) reads:

Every person has a right of access to a record or 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 section 6 to 15, or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[17] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.¹

[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.² 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).

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

² Order PO-2836.

[19] The courts and this office have applied broad and liberal approach to the custody or control question.³ Based on this approach, this office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution.⁴ Some of the listed factors may not apply in a specific case, while others may apply. In determining whether records are in the "custody or control" of an institution, these factors are considered contextually in light of the purpose of the legislation.⁵

[20] The factors that this office has found to be relevant include whether the record was created by an officer or employee of the institution;⁶ the use that the creator intended to make of the record;⁷ whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record;⁸ whether the activity in question is a "core", "central" or "basic" function of the institution;⁹ whether the content of the record relates to the institution's mandate and functions;¹⁰ whether the institution has physical possession of the record and if so, whether it is more than "bare possession";¹¹ whether the institution has a right to possession of the record or to regulate its content, use and disposal;¹² the extent to which the institution has relied upon the record;¹³ how closely the record is integrated with other records held by the institution;¹⁴ and the customary practice of the institution and similar institutions in relation to possession or control of records of this nature, in similar circumstances.¹⁵

[21] In addition to these factors, for the purpose to determining whether an institution has custody or control over councillors records, previous orders have considered whether those records can be described as "constituency" records or "political" records where the records were created and are held by a councillor in their capacity of elected representative of their constituents and relate to their mandate and functions as a councillor. Such orders have generally found that records that councillors' "constituency" or "political" records are not in the custody or under the control of the

³ *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.

⁴ Orders 120, MO-1251, PO-2306 and PO-2683.

⁵ *City of Ottawa v. Ontario (Information and Privacy Commissioner)* 2010 ONSC 6835 (CanLII).

⁶ Order 120.

⁷ Orders 120 and P-239.

⁸ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

⁹ Order P-912.

¹⁰ *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.

¹¹ Orders 120 and P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above

¹² Orders 120 and P-239.

¹³ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

¹⁴ Orders 120 and P-239.

¹⁵ Order MO-1251.

municipality to which they have been elected as representative.¹⁶

[22] Additionally, where records are in the hands of elected representatives, the Supreme Court of Canada, in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,¹⁷ adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

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

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

Representations

[24] As background to this appeal, the town explains in its representations that the project identified in the request is not related to a development application being pursued by the town, but to “an expansion and redevelopment of an existing private hydroelectric waterpower facility generating station.” It further explains that the project is governed and regulated by federal and provincial statutes. It states:

Ontario waterpower projects are required to comply with the *Class Environmental Assessment for Waterpower Projects (Class EA)*, established by the Ontario Water Power Association under the Ontario *Environmental Assessment Act (EA Act)*. The project is also expected to require review and approvals under the *Canadian Environmental Assessment Act, Fisheries Act, Navigable Waters Protection Act, Lakes and Rivers Improvement Act, Endangered Species Act, Ontario Water Resources Act, Environmental Protection Act* and other legislation. The notice and the public consultation process for the project under the *Class EA* is intended to coordinate and meet the notification requirements relevant to the planning stage of the project under these statutes....

The [town], as were members of the general public, was given the opportunity to comment on the proposed redevelopment and through the Heritage Impact Assessment, was given the single opportunity to sit on a committee (formed by the applicant) to review the project plans, however with no approval authority. [emphasis in original]

[25] The town reiterates numerous times in its representations that it is not considered the approval authority and has only been identified as a “potential interested party.” The town also likens its interest and influence with respect to the project to that of its townspeople.

¹⁶ Orders M-813, M-846, MO-2821, MO-2878.

¹⁷ 2011 SCC 25, [2011] 2 SCR 306.

[26] The town also explains that it cannot confirm whether councillors received emails from members of the public with respect to the project as such information is stored on a third-party server. It submits that if any of the information contained in any such emails was relevant to the town's business, it would have been placed on a public meeting agenda package, and dealt with by council at an open public meeting. It submits that public agenda packages are published on its website and can be accessed by members of the public.

[27] The town elaborates that all councillor emails are received by an exchange server maintained by a third party who forwards the messages to the councillors' personal email accounts. It submits that replies to those emails do not flow back through the exchange server, nor is that exchange server a repository for records. It submits that it does not have the authority to regulate the content, use or disposal of any councillors' emails. It further submits that any responsive emails would not relate to the town's mandate or functions but, generally speaking, any emails and electronic records relevant to the town's business, mandate or functions or introduced at a public meeting, would be reproduced and saved as hard copy records held by the town.

[28] In her representations, the appellant submits that previous orders have established where a councillor is found to be acting as an "officer" of the town, they would be considered to be acting as part of the institution and any records maintained in conjunction with this position would be subject to the *Act*. She also references the Supreme Court of Canada's test for control, set out in *Minister of National Defence*, referenced above. She submits that if any of the council members' activities or records fall within the parameters of the criteria set out in the two-part test, the records "in any form, including emails, are subject to an access request."

[29] In her representations, the appellant also addresses records held specifically by the Mayor and cites a number of orders issued by this office that have found that, as chief executive of a town, a mayor is an officer of the municipality. She submits that "the records, including emails of the councillor who was Mayor of [the town] at the time of the request are subject to the *Act*."

[30] On reply, the town confirmed that in the context of the project identified in the request, no councillors were considered officers of the corporation and reiterated the town does not have custody or control of any emails that members of the public may have sent to their councillors. It confirms that no emails with respect to the identified expansion project came through the public meeting process, and therefore none are within its custody or control. The town continues to take the position that any emails relating to the expansion project that may have been sent to its councillors do not relate or contribute to the town's mandate or functions.

[31] In sur-reply, the appellant disputes the town's submission that all emails relevant to town business are included in public agendas. She submits that she herself has "had correspondence with the previous and current mayors related to their duties and the mandate of council" and "[n]one of this correspondence has shown up in public agenda." She states that "[i]t is a very narrow interpretation of relevance to state that

all correspondence and documentation relevant to an issue will, of necessity or as a matter of custom, be attached to the public agenda.”

[32] The appellant submits that although the town may not be the formal approval authority for the project, council and in particular the Mayor, have a role to play in communicating with the community, other levels of government and with third parties. She points to section 226.1 of the *Municipal Act* which states:

As chief executive officer of a municipality, the head of council shall,

- (a) uphold and promote the purposes of the municipality;
- (b) promote public involvement in the municipality’s activities;
- (c) act as the representative of the municipality both with and outside the municipality, and
- (d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.

[33] Specifically, with respect to the project identified in the request, she submits:

The town has intervened with the province in the consideration of this project and has met with provincial officials concerning it. The mandate of council authorizes these activities as they are within the purview of that mandate, correspondence and other records relevant to the project, particularly that of the Mayor, fall within the legislation.

[34] With respect to the town’s submission on its storage of the records, the appellant submits that although they may not be stored on a server “directly owned by the town, the town presumably has a contract with the third party for the storage of records and this means that the town has, in effect, custody and control of the records.”

[35] Finally, as set out above in the background to this appeal, in sur-reply the appellant also advised that she was narrowing her request to emails of the Mayor and any councillor who was also an “officer” of the town. I requested that the town provide me with additional representations commenting on whether the narrowing of the request altered its position with respect to their custody or control of the responsive records.

[36] In its response to my request, the town confirmed, once again, that in the context of the project identified in the request, no councillor acted in a capacity of an “officer” of the town. With respect to the emails of the Mayor, the town advised they are not within its custody or control. It submits that the Mayor’s emails have not been integrated with records held by the town or provided to the municipality. It explains:

Email records are stored off-site, on a third party email exchange server. The email exchange server is not considered a record repository for the town. The municipality maintains a paper record management system only. Emails and electronic records relevant to the town's business, mandate and functions are reproduced and saved as hard copy records.

[37] At this time, the town also stated that despite being focused on councillors' emails, its initial representations on custody or control "hold true." In my view, much of the submissions it made at that time are relevant to the issue even as it was subsequently narrowed.

Analysis and findings

[38] 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. An "institution" is defined in section 2(1), and includes a municipality. The definition of "institution" does not specifically refer to elected offices such as municipal councillors or mayors.

[39] At the end of the inquiry process, the appellant indicated in her representations, she specifically seeks access to responsive records related to any councillor(s) who was acting as an "officer" of the town with respect to the expansion project and/or the Mayor. However, as this narrowing came late into my inquiry into this appeal, in this interim order, I will also determine her right of access to records responsive to her request as it was at the beginning of the inquiry process, which included correspondence regarding the expansion project from members of the public to any of the town's councillors. Accordingly, I will first address the issue of whether the town has custody or control of councillors' correspondence relating to the expansion project and then the issue of whether it has custody or control of correspondence held by the Mayor relating to the project.

Councillors' records

[40] In the current appeal, I accept that any records held by councillors, including correspondence from members of the public regarding the hydroelectric expansion project, are not in the custody or control of the town. My analysis follows.

[41] This office has found that records of city councillors are not generally considered to be in the custody or under the control of the city, as an elected member of municipal council is not an agent or employee of the municipal corporation in any legal sense.¹⁸ However, records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" of the municipality in the particular circumstances; or

¹⁸ Order M-813, MO-1403 and MO-3287.

- where, even if the councillor is not acting as an officer of the municipality, his or her records are in the custody or under the control of the municipality on the basis of established principles.¹⁹

[42] In its reply representations, the town confirmed that in the context of the hydroelectric expansion project, no councillors were considered officers of the town. Absent evidence suggesting that the contrary is true, I accept the town's position that none of its councillors (excluding the Mayor, who will be discussed below) were acting as an "officer" of the municipality in the particular circumstances surrounding the project identified in the request.

[43] To determine whether, even if a councillor is not acting as an officer of the municipality, his or her records can nonetheless be said to be under the custody or under the control of the municipality, previous orders have the non-exhaustive list of factors indicating custody or control, set out above, together with the test in *National Defence*, also set out above.

[44] I have considered the parties' representations in light of some of the factors that this office turns to in determining whether an institution has custody or control over particular records.

[45] I acknowledge the expansion project is governed and regulated by federal and provincial statutes and the town has no approval authority over it. However, the town has confirmed it has been given the opportunity to sit on a committee to review project plans and comment on the proposed redevelopment. No one disputes, and I accept the appellant's position that any correspondence sent to the town itself, addressing its review of project plans and commentary on the expansion project, would fall within the town's powers and its content can be said to relate to the town's mandate and function.

[46] With respect to factors specifically relevant to correspondence received by individual councillors, I accept that in the context of the expansion project, no councillors were considered officers of the town. Additionally, there is no evidence before me to suggest that the town has relied on correspondence between constituents and their councillors about the expansion project or that it has integrated such records with its own. Finally, as these are councillors' records that were not shared with the town, even if it can be said that the town has physical possession of such records (given that it might be able to obtain access through a third-party server), I am not convinced that it is more than "bare possession."

[47] As previously mentioned, in addition to the factors listed above, previous orders have considered whether records of councillors who are not acting as an officer of the municipality can be described as "constituency" records, or "political" records that fall outside of the scope of records under the municipality's custody or control. The rationale behind shielding records from disclosure was set out by the Ontario Superior

¹⁹ See, for example, Orders M-813, MO-1403, MO-1967, MO-2773, MO-2807, MO-2821, MO-2824, MO-2878.

Court of Justice in *St. Elizabeth Home Society v. Hamilton*.²⁰

It is an equally long-standing 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.* [emphasis added]

[48] In Order MO-2821, Senior Adjudicator Sherry Liang (now Assistant Commissioner), examined the rationale set out above in *St. Elizabeth Home Society* and discussed a distinction between “constituency” records, “political” records and personal records:

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

The councillors have described such records as “personal” records but it may also be appropriate to call them “political” records. In any event, it is consistent with the scheme and purposes of the *Act*, and its provincial equivalent, that such records are not generally subject to access requests. In *National Defence*, the Court stated that the “policy rationale for excluding the Minister’s office altogether from the definition of ‘government institution’ can be found in the need for a private space to allow for the full and frank discussion of issues” and agreed with the submission that “[i]t is the process of being able to deal with the distinct types of information 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.²¹

The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministries, do not have responsibility for a

²⁰ (2005), 148 A. C. W. S. (3d) 497 at paras 264 and 267.

²¹ *National Defence*, cited above, para. 41.

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.

[49] I agree with this analysis. In the current appeal, although some of the records at issue (correspondence sent by members of the public to their councillors about a project that is occurring within municipal boundaries) may fall within the category of "constituent" records in that they relate to the constituent's own concerns, I recognize that they may not fall exclusively within this type of record. However, in that event, I accept the broader characterization of the records applies and they can be described as consisting of "political" records as they may relate to how the expansion project impacts the town more generally in which case the constituent is contacting their councillor as an elected representative.

[50] Based on the evidence provided, I find that none of the town's councillors were acting as an officer of the town in relation to the project to which any correspondence responsive to the request would necessarily relate. I also find that a broad and liberal application of the factors that are helpful in determining whether or not a record is in the custody or control of the town indicates that they are not under its custody or control. Finally, I find that correspondence from members of the public to councillors with respect to the expansion project are the type of records that are best described as "political" records amounting to communication between constituents and their elected representatives and as a result, are not under the town's custody or control.

[51] In my view, this decision is consistent with the findings of the Supreme Court of Canada in *National Defence*, referred to above. In applying the two-part test in *National Defence* to correspondence between a member of the public and any one of the town's councillors regarding the expansion project, I find that even if such records could arguably be said to relate to a "town matter" in a broad sense, they amount to constituency or political records of the councillor who received them and the town could not reasonably be expected to obtain a copy of them upon request. The circumstances therefore do not fulfill the second part of the test in *National Defence* for a finding of institutional control, and as both parts of the test must be met, I am satisfied that the town does not have control of correspondence from members of the public to councillors regarding the project.

[52] Accordingly, I find that correspondence from members of the public to any of the town's councillors regarding the hydroelectric expansion project are not in the custody or under the control of the town and are, therefore, not subject to the *Act*. Having

made this finding it is not necessary for me to review the town's fee estimate decision, or its decision to deny the appellant a fee waiver.

Mayor's records

[53] As explained above, in her sur-reply representations the appellant significantly narrowed her request, seeking only correspondence from members of the public to the Mayor of the town with respect to the hydroelectric expansion project. Accordingly, I will address the appellant's right of access to responsive records held by the Mayor.

[54] In Order MO-1403, Adjudicator Donald Hale relied on Adjudicator Cropley's analysis in Order M-813 and found that "the mayor of a municipality is an 'officer' of that municipality for the purpose of the *Act*." His finding is based on Adjudicator Cropley's interpretation of the meaning of the term "officer" in the context of municipal corporations. Adjudicator Hale stated:

Part VI of the Municipal Act deals with "Officers of the Municipal Corporation." It begins with section 69, which describes a mayor as the "head of council and the chief executive officer of the corporation." This in itself indicates that the mayor is an "officer" of the municipality. The inclusion of the term "head of council," which includes a mayor, in the description of statutory rights and duties of a municipality's "officers" provides a further indication that, for the purposes of the Municipal Act, the mayor of a municipality is to be considered an "officer"....

[55] Adjudicator Hale's analysis pertained to the *Municipal Act* which is no longer in force. However, the relevant provisions of the *Municipal Act, 2001* which is currently in force, do not alter this analysis. Section 225(a) of the latter act identifies that the role of head of council is, in part, "to act as chief executive officer of the municipality."

[56] Subsequently, in Order MO-1967, Adjudicator Hale expanded on his findings with respect to whether records of a mayor are subject to the *Act*. He first reiterated his findings in Order MO-1403 that the mayor of a municipality is an "officer" of that municipality for the purposes of the *Act* but went on to state:

...[I]n some circumstances, records of the mayor that do not relate to mayoral duties, and are maintained separately as constituency or personal papers, may not be subject to the *Act* (see Order P-267).

[57] More recently, in Order MO-2993 records held by the Mayor of Toronto were found not to be in the custody or control of the City of Toronto, and therefore fell outside of the scope of the *Act*. In that order, Adjudicator Cathy Hamilton found the records sought related to an event that was not authorized by the city, did not relate to the city's mandate and functions and also did not relate to the responsibilities of the Mayor as an officer of the city, or as head of council.

[58] Accordingly, for the purposes of this appeal, although I accept that the Mayor is

an officer of the town, I must still determine whether the records sought by the appellant (correspondence related to the hydroelectric expansion project identified in the request), relate to his mayoral duties. If so, they are in the custody or control of the town and subject to the *Act*. However, if they are maintained separately as constituency, political or personal records they fall outside of the scope of the *Act*.

[59] The issue of whether or not correspondence received by the Mayor from members of the public in relation to the expansion project are in the custody or control of the town was raised late in the inquiry process. Although I sought representations from the parties on this issue, the information that was provided to me is insufficient for me to make a determination on this issue. Specifically, the town stated in its representations with respect to any correspondence held by town councillors would apply equally to the Mayor. As the Mayor acts as both the elected representative of his riding and as officer of the town, I require more information to determine whether any individual responsive records relate to his responsibilities as mayor as the representative of the town for the purposes of the public consultation about the project or whether the records can be described as "constituency" or "political" records he received as the elected representative of his riding. Accordingly, I will continue my inquiry into this issue.

Summary

[60] I have found that correspondence from members of the public, received by the town's councillors, regarding the expansion project identified in the request are not within its custody or control of the town and I uphold the town's decision.

[61] With respect to correspondence from members of the public, received by the Mayor, regarding the expansion project identified in the request, I find that I have insufficient evidence to make a finding. I remain seized of this matter to review this issue.

ORDER:

1. I uphold the town's decision that correspondence from members of the public and received by councillors regarding the expansion project identified in the request are not within its custody or control.
2. I remain seized of this appeal to address the outstanding issues of records held by the Mayor.

Original signed by _____
Catherine Corban
Adjudicator

_____ May 29, 2018