

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3697

Appeal MA17-368

Township of Georgian Bay

November 28, 2018

Summary: The appellant submitted an access request to the Township of Georgian Bay under the *Municipal Freedom of Information and Protection of Privacy Act* for emails from the township's server or the personal email accounts of two councillors related to two corporations. The township provided the appellant with access to the responsive emails on its own email server. The councillors named in the request did not provide the township with copies of the responsive emails from their personal email accounts and the township denied access to these emails on the basis that the emails in the councillors' personal accounts were not in the township's custody or control.

The adjudicator finds that any responsive emails that are in the possession of the councillors are not in the custody or under the control of the township under section 4(1) of the *Act*.

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

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

OVERVIEW:

[1] The appellant submitted an access request to the Township of Georgian Bay (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

Any record including emails from the township server or personal email accounts of Councillor [two named councillors] of items related to [two corporations (the corporations)].

[2] The township issued an access decision providing partial disclosure to the appellant of 20 emails from the @gbtownship.ca township email accounts of the two named councillors. Some information in the emails was withheld under the mandatory personal privacy exemption in section 14(1) of the *Act*.

[3] During the search for responsive records it became clear to the township that the named councillors do not use their township email addresses, but rather use their personal email addresses in carrying out their roles as councillors.¹ Both councillors declined to provide the township with any emails responsive to the request from email accounts other than their township email accounts.

[4] The appellant appealed the township's decision. During mediation, the appellant advised that he wished to pursue access to the councillors' emails on their personal accounts, as well as the information withheld under section 14(1) from one of the responsive emails.

[5] The appeal was not resolved during mediation and proceeded to the adjudication stage, where an inquiry is conducted. The adjudicator formerly assigned to this appeal invited representations from the township and the two named councillors on the issues set out in a Notice of Inquiry. The township provided representations.

[6] The former adjudicator then invited the appellant to provide representations on the issues set out in the Notice of Inquiry and in response to the representations of the township. The appellant provided representations.

[7] The township advised in its representations that the information withheld from the one record under section 14(1) is a personal photograph of two township residents. As the appellant did not wish to pursue access to the photograph, the township's reliance on the personal privacy exemption in section 14(1) to deny access to it is not at issue.

[8] The appellant advised in his representations that he is satisfied that the township has supplied him with all of the responsive emails in the township's possession. However, he is of the view that the emails on the councillors' personal accounts are in the township's control and, therefore, accessible under the *Act*.

[9] In addition, one councillor sent an email to this office (reproduced below) setting out his position in this appeal.

¹ As explained later in this order, emails sent to the councillors' township accounts are forwarded to the councillors' personal accounts.

[10] In this order, I find that the responsive emails in the councillors' personal accounts are not in the custody or under the control of the township for the purpose of section 4(1) and, therefore, are not subject to the *Act*.

DISCUSSION:

Are the named councillors' emails that are not on the township's server within the control of the township?

[11] Section 4(1) 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 . . .

[12] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[13] 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.²

[14] In this appeal, unless the township has custody or control over the emails in the councillors' personal email accounts, they are not accessible under the *Act*.

[15] 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.³ 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).

[16] The courts and this office have applied a broad and liberal approach to the custody or control question.⁴

[17] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.⁵ The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

² Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

³ Order PO-2836.

⁴ *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.

⁵ Orders 120, MO-1251, PO-2306 and PO-2683.

- Was the record created by an officer or employee of the institution?⁶
- What use did the creator intend to make of the record?⁷
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁸
- Is the activity in question a “core”, “central” or “basic” function of the institution?⁹
- Does the content of the record relate to the institution’s mandate and functions?¹⁰
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?¹¹
- If the institution does have possession of the record, is it more than “bare possession”?¹²
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?¹³
- Does the institution have a right to possession of the record?¹⁴
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁵
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?¹⁶

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.

¹² Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹³ Orders 120 and P-239.

¹⁴ Orders 120 and P-239.

¹⁵ Orders 120 and P-239.

¹⁶ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

- To what extent has the institution relied upon the record?¹⁷
- How closely is the record integrated with other records held by the institution?¹⁸
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?¹⁹

[18] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?²⁰
- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record?²¹
- Who paid for the creation of the record?²²
- What are the circumstances surrounding the creation, use and retention of the record?²³
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?²⁴
- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?²⁵ If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

¹⁷ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

¹⁸ Orders 120 and P-239.

¹⁹ Order MO-1251.

²⁰ PO-2683.

²¹ Order M-315.

²² Order M-506.

²³ PO-2386.

²⁴ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

²⁵ Orders M-165 and MO-2586.

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?²⁶
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?²⁷
- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?²⁸

[19] In determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.²⁹

[20] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,³⁰ 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 document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[21] Concerning councillor records in particular, the parties were advised in the Notice of Inquiry that:

In *St. Elizabeth Home Society v. Hamilton (City)*, 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

²⁶ *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

²⁷ Order MO-1251.

²⁸ Order MO-1251.

²⁹ *City of Ottawa v. Ontario*, cited above.

³⁰ 2011 SCC 25, [2011] 2 SCR 306.

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.

In Order M-813, the adjudicator reviewed this area of the law and found that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- a) 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
- b) Where, even if the above circumstances do not apply, the councillors' records are in the custody or under the control of the municipality on the basis of established principles.

[22] The parties were also advised in the Notice of Inquiry that:

The term "officer" refers 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" (IPC Order M-813).

A councillor is likely to have several roles, such as an individual constituent representative, a politician, or a head or member of a municipal committee or board, such as a transit corporation. Some of these roles may entail the councillor acting as an officer or employee, while others do not.

For example, in Order MO-2821, the IPC found that communications between municipal councillors about cycling issues were not created in their capacity as officers or employees of the city. This office decided that although the councillors were members of a city committee, the records did not relate to the discharge of any special authority to act on behalf of the city.

In Order MO-2824, the IPC determined that the analysis of whether or not a councillor is an officer did not turn on who the councillor communicated with, but rather in what capacity the councillor was acting.

In other situations, the IPC has found that a councillor is an officer or employee of a municipal corporation. For example, a mayor is an officer of a municipality, as he or she is its chief executive officer (IPC Order MO-

1403). Therefore, records created or received in connection with his or her duties as a mayor are covered by the *Act*, in the same manner as the records of city employees or other officials of the municipality.

In Order MO-3281, the IPC found that an email sent from a councillor to an outside party was under the control of the City of Oshawa because:

- the email's content related to a city matter, namely the hiring of an investigator to review allegations made by the city's auditor general, and
- the email played a crucial role in the negotiations, which led to the hiring of the investigator, it related directly to the city's mandate and functions, and the city could reasonably expect to obtain the email upon request

In Privacy Complaint MC10-75 and MC11-18, the IPC found that emails received by the chair of the Toronto Transit Commission (TTC) in his capacity as the chair were in the custody or control of the TTC and the City of Toronto. The investigator's findings were based on the following:

- the city had enacted a code of conduct governing the conduct of members of council sitting on boards which addressed confidentiality concerns
- the record was held by the city on a server maintained by the city, and
- the record related to a matter that fell within the city's mandate and functions, and was sent to the councillor as the chair of the TTC, who then passed the record on to TTC staff for processing as a service complaint

In contrast, the IPC found in Order MO-2842 that a councillor's communications with a third party in relation to bringing a National Football League (NFL) team to the City of Toronto were not in the city's custody or control. In coming to this finding, the order noted:

- the records related to the councillor's role as an individual constituent representative and were in their nature "political" rather than "city" records
- the councillor had no express authority to act for the city in regards to this matter

- the records (if they existed) related to a matter that was speculative or hypothetical, and
- an agreement to bring an NFL team to the city was not discussed or reviewed by the city and no agreement ever materialized

[23] Concerning the emails in the councillors' personal email accounts, the parties were specifically asked in the Notice of Inquiry:

- Is it possible that in any emails of the named councillors that are not on the township's server that those councillors were acting as an officer or employee of the township?
- Which records in the personal email accounts of the two named councillors are in the custody or under the control of the township?

Representations

[24] In response to the Notice of Inquiry sent to it, the township states that it was unable to search the councillors' personal email records, but was able to log in to their @gbtownship.ca addresses to conduct a search. According to the township, all councillors have their @gbtownship.ca accounts forwarded to their personal accounts and it is possible they responded from the @gbtownship.ca accounts without being aware they had done so.

[25] In response to the Notice of Inquiry, both councillors refused to search their personal email accounts.

[26] Only one of the councillors responded in writing to the Notice of Inquiry, as follows:

...I am not a spokesman of any sort for the township re [name]. I have however been involved in trying to figure out what was going on who was calling the shots and why. Thus I think we can check off that I am not a representative of any sort of the township on [name] unless of course my attending the OMB³¹ for several days in the middle of the summer since I couldn't understand what we were being told by the mayor or the township legal counsel.

On the issue of the emails under control aspect I can narrow this down;

³¹ Ontario Municipal Board.

1. Emails from the township re [name] - would be on the township server and thus available re the FOI³² without any help from me.
2. Any meeting agendas/minutes/briefings - would be coming from the township and again are on their server.
3. Any emails to township staff re [name] would be on the township server when they received them.
4. As I noted I have never represented the township with regard to [name]. I have gone to a number of meetings organized by residents, environmentalists and other concerned citizens and would suggest that any emails to constituents with respect to such meetings are not covered.
5. On the memos to councillors - any going to all of council would go through the township server.

[27] In response to the Notice of Inquiry and the township's representations, the appellant states that he is satisfied that the township has supplied all responsive emails it has to him. However, he expresses the opinion that the two councillors should have at least provided duplicate copies of the emails that the township's clerk was able to get from the township server, since the councillors' emails from the township server are automatically forwarded to the councillors' personal email accounts.

Analysis/Findings

[28] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[29] 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.³³

[30] In response to the appellant's access request, the township located and provided copies of emails found on the councillors' township email accounts. As a result, the issue of whether those emails are in the township's custody is not before me.

[31] The records that are at issue are not in the township's possession on its own email server, but rather consist of records about the two named corporations that may be in the personal email accounts of the two councillors named in the request.

[32] Therefore, the issue to be determined is whether any emails in the named

³² Freedom of information.

³³ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

councillors' personal email accounts about the two corporations named in the request are within the control of the township.

[33] All parties to this appeal were sent a very detailed Notice of Inquiry asking them to respond to specific questions about the records and to provide detailed representations to assist in the determination of whether any of the responsive emails in the possession of the councillors are in the control of the township. The parties were asked specifically to provide submissions on whether any of the responsive records relate to a township matter.

[34] Neither the township nor the appellant provided submissions as to whether the records at issue, which may be in the possession of the councillors, relate to a township matter. They have provided no background information as to what the records are about and the relationship of these records to the township's mandate and functions. Nor did the township or the appellant provide evidence as to what capacity they submit the councillors were acting in with respect to the subject matter of the records.

[35] As stated above, the IPC has determined³⁴ that the analysis of whether or not a councillor is acting as an officer or employee of the municipality did not turn on who the councillor communicated with, but rather in what capacity the councillor was acting.

[36] The position of the councillor who provided a written response to the Notice of Inquiry is that the records relate to his role as a constituent representative and not as an officer or employee of the township. I find that in attempting to inform himself about what was "going on" with respect to the two named corporations, this councillor was informing himself about a constituency issue and was, therefore, engaged in political or constituency activity typically expected of a councillor.³⁵ The appellant has not provided me with any evidence to find otherwise.

[37] This councillor's evidence supports a finding that the records relate to the councillors' roles as individual constituent representatives and that they were political in nature.

[38] I have also considered the test, as noted above, in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,³⁶ where 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 document relate to a departmental matter?

³⁴ See Order MO-2824.

³⁵ See Orders MO-3068 and MO-3680.

³⁶ 2011 SCC 25, [2011] 2 SCR 306.

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[39] If the answer is yes to each part of the two-part test above, then the records are in the control of the municipality, the *Act* applies, and the institution must issue an access decision.

[40] Based on my review of the wording of the request and the parties' representations, and taking into account the detailed Notice of Inquiry sent to the parties, I find that I do not have sufficient evidence to determine that the records in the possession of the councillors relate to a township matter.³⁷ Part 1 of the test in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* has, therefore, not been met.

[41] As part 1 of the test has not been met, it is not necessary for me to also consider whether part 2 of the test has been met. In any event, I would also find that part 2 of the test has not been met because the records, if they exist, appear to be political or constituency records. As a result, the township could not reasonably expect to obtain a copy of them upon request.

[42] Accordingly, based on the evidence presented, I find that the township does not have control of any responsive emails that are stored on the councillors' personal email accounts. In the circumstances, I find that these emails are not under the control of the township for the purpose of section 4(1) of the *Act*. Therefore, these emails are not subject to the *Act* and I am, accordingly, dismissing the appeal.

ORDER:

I find that any responsive emails stored on the councillors' personal email accounts are not subject to the *Act* and dismiss the appeal.

Original Signed by: _____

Diane Smith
Adjudicator

November 28, 2018

³⁷ See Order PO-3680, where the adjudicator found that although the emails at issue in that order might relate to municipal business in a broad sense, the issue, for the purpose of determining custody or control, is not the subject matter of the emails, but whether the communication represents the exercise of a decision-making or executive function by the councillor on behalf of the municipality.