

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4229

Appeal MA20-00529

Town of Milton

July 25, 2022

Summary: This order resolves an appeal in which an individual made a request to the Town of Milton (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* for the emails of the mayor and five specified town councillors sent or received via their non-town email accounts, in relation to a list of over 40 entities. Although the appeal proceeded to adjudication on the basis of the reasonableness of the town's search for responsive records, the adjudicator finds that if records responsive to the request exist, they would not be in the custody or the control of the town, under section 4(1) of the *Act*. As a result, she dismisses the appeal.

Statutes Considered: *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, section 224; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1).

Orders Considered: Orders M-813, M-846, MO-2821, MO-3607, MO-3281, and MO-3618-I.

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.

Reports considered: IPC's *Working with the Municipal Freedom of Information and Protection of Privacy Act: A Councillor's Guide*, November 1, 2001; IPC's *FOI Fact Sheet 1: The Municipal Freedom of Information and Protection of Privacy Act and Councillors' records*, April 2016.

OVERVIEW:

[1] This order resolves an appeal from an individual who made a request to the Town of Milton (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA, or the *Act*) for emails of the mayor and five specified town councillors, as follows:

- any emails passing between Mayor [named person] and any of the entities or persons, or involving that entity or person as the subject matter, set out in the list below -- for the period January 1, 2000 to date.
- any emails passing between Councillor [named person] and any of the entities or persons, or involving that entity or person as the subject matter, set out in the list below -- for [a specified time period].¹

List of Entities or Persons

[numbered list of over 40 named people or companies]

[2] Through further communication between the requester and the town, and as confirmed in town correspondence to the requester, the requester narrowed the request to emails sent to or received from town-owned email accounts, but later expanded it to include the mayor and councillors' non-town owned email accounts.

[3] The town asked the individuals in question to conduct searches on their personal accounts.² Since these individuals advised the town that there were no responsive records, the town issued a decision to the appellant stating that there are no records responsive to this part of the request.

[4] The requester, now the appellant, appealed the town's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The IPC appointed a mediator to explore resolution. During mediation, the appellant confirmed that he seeks only emails found in non-town owned accounts, and advised the mediator that he believes the town has additional such records that have not been disclosed to him.

[6] The parties were unable to resolve the issue under appeal through mediation. Accordingly, the appeal was referred to adjudication, where an adjudicator may conduct an inquiry.

¹ The wording of the request relating to the various councillors was the same, with the exception of the timeframes, so I will not set out that repeated wording here.

² In an access decision dated October 19, 2020, with respect to a request for emails on the *town's* email system, the town indicated that it found responsive records and that the requester had indicated an interest in obtaining one of them.

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and inviting representations on the issue of reasonable search, to the town. The town provided representations in response. I then asked the appellant for representations, and provided the appellant with a copy of the town's non-confidential representations; I withheld portions of the town's representations due to confidentiality concerns.³ Considering the appellant's representations, I invited the town to provide reply representations. The town provided representations, which I then invited the appellant to reply to, and the appellant did so.

[8] Although from the sole issued identified at the end of mediation was reasonable search, upon further consideration of the nature of the information sought and the parties' representations, I determined that I must seek representations on the issue of whether records the appellant was seeking would be within the custody or the control of the town. The town provided representations on this issue, which I shared with the appellant for a reply. The appellant provided representations in response.

[9] For the reasons that follow, I find that the records the appellant seeks, any emails of the mayor and five specified town councillors on their non-town accounts and relating to the subject matter of the original request, are not in the custody or the control of the town. As a result, I will not order the town to conduct any further searches for them.

DISCUSSION:

[10] As set out above, the appellant advised the mediator that he only pursues access to non-town account emails of the mayor and certain councillors relating to the subject matter of his original request (communications involving or about over 40 individuals and entities). The parties do not agree about whether such records even exist. However, as discussed below, based on the information before me, even if responsive records exist, I find that they would not be in the custody or control of the town – and as a result, the appellant would have no right of access to them under the *Act*.

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

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[12] Under section 4(1), the right of access applies to a record that is in the custody

³ These portions of the representations were withheld under *Practice Direction 7* of the IPC's *Code of Procedure*.

or under the control of an institution; the record need not be both.⁴

[13] If responsive records exist that are not in the institution's possession, the institution may still have an obligation to search for them because, under section 4(1) of the *Act*, the right of access applies to any record that is in the custody *or* under the control of an institution.⁵ For records not in the institution's possession, the question is whether the records are under the institution's control.

[14] The courts and the IPC have applied a broad and liberal approach to the custody or control question.⁶ In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.⁷

Factors relevant to determining "custody or control" when another individual or organization holds the record

[15] The Supreme Court of Canada has 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?⁸

[16] The following additional factors may be relevant considerations 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?⁹
- Is the individual, agency or group with physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record?¹⁰

⁴ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

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

⁶ *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

⁷ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

⁸ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

⁹ Order PO-2683.

- Who paid for the creation of the record?¹¹
- What are the circumstances surrounding the creation, use and retention of the record?¹²
- Are there any contractual provisions between the institution and the individual who created the record that give the institution the express or implied right to possess or otherwise control the record?¹³
- Was there an understanding or agreement—between the institution and the individual who created the record or any other party—that the record was not to be disclosed to the institution?¹⁴ If so, what was the precise undertaking of confidentiality given by the individual who created the record, to whom was it given, when, why and in what form?
- 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? Did the agent have the authority to bind the institution?¹⁵ If so, please explain the scope of that agency, and whether it gave the institution the right to possess or otherwise control the record.
- 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?¹⁶
- 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?¹⁷

Representations

[17] Given my finding that the records, if they exist, are not in the town's custody or control, I will only summarize representations that relate to that issue.

¹⁰ Order M-315.

¹¹ Order M-506.

¹² Order PO-2386.

¹³ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC).

¹⁴ Orders M-165 and MO-2586.

¹⁵ *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.).

¹⁶ Order MO-1251.

¹⁷ Order MO-1251.

The town's representations

[18] The town states simply that it does not have custody or control of the councillors' non-town email accounts.

The appellant's representations

[19] The appellant describes the over 40 persons and companies listed in his request as builders and developers.

[20] By way of background, he states that the town has granted, and grants, development approvals to build residential, commercial and, in some cases, institutional premises to "almost all" of the named 40 builders and developers named in his request. He states that the town's councillors communicate with those builders and developers on many issues relating to development approvals. He states that each development file spans several years from inquiry, application, decision, construction to completion. He also asserts that the *town's* email system "reflects a myriad of communications" between the builders and developers named in the request, and the named councillors. However, he did not submit any such communications to me in the context of my inquiry.

[21] The appellant submits:

. . . the issue is Milton conducting a search for any records *ab initio* relating to those 40 named builders and developers – not whether they could be viewed as constituency related, or personal, or not. Milton improperly and unreasonably fettered its discretion and tainted any responsive records search effort.

[22] The appellant submits that his request was in relation to those entities' records of communications with the town's councillors, and that this is also¹⁸ town business, regardless of whether those records are retained on town or individual email accounts. He says, for example, if a builder emails a councillor asking for help in getting approval for a large development within the town, where the builder also lives or carries on business, if the councillor subjectively decides that this is constituency-related (or personal), the granting of development approvals within the town would still be related to town business.

[23] The appellant asks the IPC to ensure that the town searches for records without reference to whether the emails in question are constituency-related or not.

¹⁸ As noted, the appellant did not provide me with copies of any of the emails from the town's own email accounts. The issue of whether those communications were in the town's custody or control is not before me and I make no finding on that matter.

The town's reply representations

[24] The town submits that there are many IPC orders, including Order M-846, regarding searches in councillors' personal email accounts¹⁹ which consistently support the town's position that it has no custody or control over those email accounts. The town also relies on the IPC's *Working with the Municipal Freedom of Information and Protection of Privacy Act: A Councillor's Guide*,²⁰ in support of its position that personal or constituency email records have been deemed to be out of the jurisdiction of the *Act*. Therefore, the town submits that the appellant has no right to access those emails.

[25] In addition, the town argues that the appellant has not provided any evidence that any of the named councillors have used their non-town/personal email accounts to communicate with these 40 named entities, other than mere suspicion. The town explains that all members of Council have their town email accounts to conduct their official duties and the town has provided guidance to members about proper use of those accounts.

The appellant's sur-reply representations

[26] The appellant submits that the issue is whether emails relating to town business were sent or received by the named councillors and the named entities, for the period in issue.

[27] He also submits that it is reasonable to conclude, on a balance of probabilities, that the councillors would not wish to implicate themselves or the town by acknowledging the existence of the responsive records that he is seeking. He argues that what he calls a parallel record communication system that is not subject to the *Act* would allow the town agree to and participate in the establishment of a system that thwarts the accountability and transparency of municipal operations by not providing access to records under the *Act*. He argues that the *Act* does not give the town, or its councillors, such power.

[28] Finally, the appellant states that he already has records from neighbouring municipalities through freedom of information requests which show that the mayor of the Town of Milton and others received emails from the named builders and developers. I note that the appellant did not provide any copies of such records with his representations.

¹⁹ The town cites Orders MO-2821, MO-3697, MO-3607 as examples.

²⁰ This IPC guide can be accessed on the IPC's public website at: <https://www.ipc.on.ca/wp-content/uploads/Resources/counc-e.pdf>. In coming to my decision, I also considered the IPC's *FOI Fact Sheet 1: The Municipal Freedom of Information and Protection of Privacy Act and Councillors' records*, April 2016, which can also publicly be accessed at: <https://www.ipc.on.ca/wp-content/uploads/2016/08/ipc-foi-factsheet-1.pdf>.

Supplementary town representations

[29] The town reiterates that it does not have custody nor control of the records in question. The town explains that the requested emails, if any, are all in individual councillors' personal email accounts, which are hosted by external companies. The town further explains that it has no control over these external companies and does not have any agreements with them. Therefore, the town states that it does not have access to the emails requested, unless they are provided to the town by individual councillors.

Supplementary appellant representations

[30] The appellant submits that the town's "bald assertions" that it has no control over the records miss the point. He submits that if town business is being conducted directly, or indirectly, by the third-party entities named in his request through communications with the five town councillors in question (who vote on such matters, or enter into agreements on the town's behalf), then the councillors hold records as agents of the town. As a result, the appellant submits that the records are subject to the *Act*.

[31] The appellant submits that the town councillors represent the town, in fact and law because corporations cannot act without agents, employees, or officials. He states that these councillors can legally bind the town in all respects, under section 224 of the *Municipal Act, 2001*, which sets out the role of council. He argues that this role, which includes ensuring accountability and transparency, is consistent with the purpose of *MFIPPA*, to provide access to government records. He argues that the builders and developers named in the request engage with town councillors over work that is town business, and do not engage with councillors for private matters. Therefore, he argues that allowing the town to "off-source" its records about these matters to private email accounts of elected officials would defeat the purpose of *MFIPPA*.

[32] In addition, the appellant asserts that the town pays for some or all of the councillors' personal email accounts, so the town should have a right of possession or control of them.

[33] The appellant also notes that the town has never denied that they are aware that persons doing business with the town may attempt to privately communicate with or influence elected decision-makers. He submits that this is problematic.

[34] Therefore, the appellant submits that responsive emails on any so-called personal email accounts are, in fact, in the custody or control of the town.

Analysis/findings

[35] For the following reasons, I find that responsive emails of the mayor and the councillors on their non-town accounts, if they exist, are not in the town's custody or control.

[36] To begin, it is helpful to review the law and the IPC's jurisprudence regarding a municipality's custody or control of councillors' records.

[37] Records of city councillors are not generally considered to be in the custody or under the control of the municipality, because an elected member of municipal council is not an agent or employee of the municipal corporation in any legal sense.²¹ The Ontario Superior Court of Justice set out the rationale for this in *St. Elizabeth Home Society v. Hamilton*:²²

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.]

[38] There is a clear distinction between a councillor's constituency or political records, over which a municipality generally does not have control, versus the records in which the councillor is acting on behalf of the town in relation to the business of the municipality, which would generally be in the town's control. In Order MO-2821, the IPC examined the rationale set out above in *St. Elizabeth Home Society* and discussed a distinction between "constituency" records, "political" records and personal records, as well as why these distinctions do not defeat or conflict with the goals of the *Act*:

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

²¹ Order M-813, MO-1403 and MO-3287.

²² (2005), 148 A. C. W. S. (3d) 497 at paras 264 and 267.

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.²³

The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministers, do not have responsibility for a government department and are more like MPP’s or MP’s without a portfolio. A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the *Act*. A finding that the city, as an institution covered by the *Act*, is not synonymous with its elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.

[39] Past IPC orders have held that 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
- 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.²⁴

[40] I agree with the reasoning in these past orders, and I adopt it this appeal.

[41] Interim Order MO-3618-I is also helpful to review. In that order, the adjudicator determined that councillors’ records related to a project to expand an existing hydroelectric facility within its municipal boundaries were not in the custody or the control of the town in question. I note this because the appellant’s representations discuss at length the authority of councillors to approve building and development in the town, relating to the builders and developers listed in his request. However, councillors cannot individually approve projects on behalf of a municipality. Council

²³ *National Defence*, cited above, para. 41.

²⁴ See, for example, Orders M-813, MO-1403, MO-1967, MO-2773, MO-2807, MO-2821, MO-2824, MO-2878.

conducts the business of a municipality as a collective, not any individual actions of councillors. Absent a finding that the councillor was acting as an "officer" of the municipality in the circumstances, their records will generally not be in the municipality's control – they are the councillor's political or constituency records. Such records might well include communications from businesses attempting to influence a councillor to bring a particular development proposal to council.

[42] In Interim Order MO-3618-I, in addition to the factors that the IPC considers for the purpose to determining whether an institution has custody or control over councillors' records (which I have set out above), the adjudicator noted that the IPC has 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. Considering these factors and jurisprudence, the adjudicator concluded that the correspondence from members of the public to any of the town's councillors regarding the hydroelectric expansion project was not in the custody or under the control of the town.

[43] The appellant's request is specifically for emails of the mayor and five councillors, on non-town accounts, in relation to one or more of over 40 specified builders and developers. I accept the appellant's position that these builders and developers would likely only be corresponding with the mayor or councillors to further their interests in relation to the town. However, as I explain above, councillors have decision-making power only as a vote on council. There is nothing in the circumstances of this appeal to suggest that the emails in question, if they exist, would be anything other than political or constituency records. There is no evidence, for example, to support the appellant's speculation that one of the councillors acted as an officer of the town and entered into agreement on the town's behalf. To the extent that these builders would be corresponding with their elected officials to further their interests as constituents, such correspondence would not be in the town's custody or control.

[44] In applying the aforementioned two-part test in *National Defence* (the test for control of records not in the possession of an institution), I also find Interim Order MO-3618-I relevant, and I adopt its reasoning in this appeal. I find that if emails exist between any entity named in the request and any one of the town's councillors regarding the matters set out in the request, although they could be said to relate, broadly speaking, to town business, they would constitute 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, based on the evidence before me. Therefore, the second part of the test in *National Defence* is not met. Since both parts of the test must be met for a finding of institutional control, I am satisfied that the town does not have control of records responsive to scope 3, if they exist.

[45] Furthermore, the appellant's assertions regarding the town's ability to grant development approvals, and his vague assertions that the town did business with

“many” of the listed developers, do not establish, without more, that the mayor might have corresponded with these entities in his capacity as officer of the town.

[46] For these reasons, there is insufficient evidence before me that, to the extent that responsive records exist, they would be in the custody or control of the town.

[47] In coming to my findings, I have given little weight to the appellant’s assertion that the town supports the external hosting for the councillors’ non-town email accounts. This alone would not support a finding of custody or control of the emails without those personal accounts.

[48] To elaborate, the location where an email was sent from (personal account or business account), or who “owns” the account is, generally speaking, not determinative of custody or control issues. It is the context in which the communications took place, and the capacity in which the councillor was communicating, that are more important.²⁵

[49] Therefore, to the extent that the town is taking the position that it has no control over any responsive records because they are found in the councillors’ “personal” accounts, I reject that argument, too. As demonstrated by Order MO-3281, if a councillor conducts city business (as opposed to constituency or political business) on their personal email account, those emails would generally be found to be in the control of the municipality.

[50] However, the fact that the appellant seeks emails in personal accounts leads me to a related point, which is whether there is even any reason to believe that there are any responsive records in the personal accounts of the councillors and the mayor. According to the town, the relevant individuals were asked to search their personal accounts and none of the searches returned any responsive records. The town says that councillors and the mayor have been given official accounts on which to conduct their official duties. The appellant has not provided me with any evidence, beyond speculation, that the mayor or any of the councillors in question used their personal accounts to correspond in an official capacity in relation to the entities in question.

[51] This was also addressed in Order MO-3607 as follows:

- The request resulting in this appeal is for all emails in non-township email accounts of the [councillors]. It is not for records in the township email accounts of these individuals. It is clear from the representations of the parties that, as a general rule, the affected parties have and use their township email accounts for township business.
- In its appeal letter the appellant took the position that emails generated from the personal email accounts of these three individuals, but which pertain to township business, are within the custody and control of the township. The appellant

²⁵ See Order MO-3281, for example. See also *City of Ottawa*, cited above.

referred to Order MO-3281 in support of its position. It stated: ... There is every reason to suspect that the Mayor, Deputy Mayor, and [councillor B] carried out Township business pertaining to these initiatives from their non-@springwater.ca email accounts.

- The appellant also identified their understanding that the township provides computers to councillors for their use, and pays for their at-home internet connection. The appellant states that this supports their belief that it is "commonplace for councillors to carry on township business using their personal email accounts."
- Other than the appellant's statements above, there is no other evidence to support the appellant's "suspicion" that the affected parties use their personal email accounts to conduct township business. That the township may provide computers and at-home internet connectivity to councillors does not support the appellant's view that the councillors are using their personal email accounts to conduct township business. These tools can also be used to access and use township email accounts.
- The Act clearly applies to records in the custody or under the control of the institution. Absent circumstances which suggest that councillors (or, for that matter, any township officers or employees) use their personal email accounts to conduct township business, there is no obligation in the Act on councillors, officers or employees to search their personal email accounts. Apart from such circumstances, (such as those resulting in Order MO-3281), emails sent or received through personal email accounts are not in the custody or control of an institution.

[52] The appellant seeks emails from personal email accounts not hosted by the town. However, the appellant has not given me sufficient reason to believe that the councillors and mayor used their personal accounts for official business. While the appellant states that he received records about the subject matter of his request from other municipalities, it is not clear whether such records were councillor records. As I state above, the appellant did not provide copies to me. In any event, whether another municipality chooses to disclose their councillors' records is not relevant to the issue before me in this appeal.

[53] Having considered the parties' representations and the jurisprudence, I find that if responsive records exist, they would not be in the custody or control of the town. I also find, in any event, that there is not a sufficient basis to believe that responsive records would exist in the mayor and councillors personal accounts. Accordingly, I will not order the town to conduct any further searches for such records.

ORDER:

The appeal is dismissed.

Original Signed by: _____

Marian Sami
Adjudicator

July 25, 2022