

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4366

Appeal MA20-00434

Town of Gravenhurst

April 21, 2023

Summary: The appellant made a request to the Town of Gravenhurst pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records of a named individual's communications with the town mayor and named councillors pertaining to the town's fire department and specified personnel. The town identified responsive records of email chains and issued an access decision denying the appellant access on the basis of the employment or labour relations exclusion in section 52(3) of the *Act*. During the appellant's appeal, the town took the further alternative position that some of the emails were not in its custody or control for the purposes of section 4(1) of the *Act*.

In this order, the adjudicator finds that the records are, in part, within the town's custody or control. However, the adjudicator also finds that the employment or labour relations exclusion in section 52(3)3 applies to the records that are in the town's custody or control. Accordingly, she upholds the town's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1), 52(3).

Orders Considered: Orders M-813 and MO-3471.

Cases Considered: *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.)] and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII).

OVERVIEW:

[1] This order disposes of the issues arising from a request received by the Town of Gravenhurst (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to a named individual's communications with the Mayor and/or named members of the town council that referred to the requester or the town fire department by name or inference or the position of Director of Fire and Emergency Services/Fire Chief by title or inference for a specified time period.

[2] The town identified 8 responsive records comprising email chains to/from the individual named in the request and issued an access decision. The town denied access to the responsive records and stated that it was relying on the employment or labour relations exclusion in section 52(3) of the *Act* and, for some of the records, the personal privacy exemption in section 14(1), in the alternative.

[3] The requester, now the appellant, appealed the town's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to explore resolution.

[4] During mediation, the town confirmed its position denying access to the records and the appellant advised that he wished to pursue access. The appellant also claimed the public interest override in section 16 of the *Act* applied. As a mediated resolution was not achieved, the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[5] I decided to conduct an inquiry and invited representations from the town addressing the issues set out in a Notice of Inquiry, initially. In its representations, the town states that it does not have custody or control of some of the records at issue. In light of the town's representations, I added the issue of custody or control under section 4(1) of the *Act* to the Notice of Inquiry. I invited and received supplemental representations from the town on the issue of custody or control. Non-confidential portions of the town's representations were shared with the appellant, in accordance with section 7 of the IPC *Code of Procedure* and *Practice Direction 7*. The appellant then submitted representations, which were shared with the town and the town provided representations in reply.

[6] In this order, I find that some of the emails in the records are not in the custody and/or control of the town for the purposes of section 4(1) of the *Act*, while others are. However, I find that the employment and labour relations exclusion in section 52(3)3 applies to the emails that are within the town's custody or control. Accordingly, I uphold the town's access decision and dismiss the appeal.

RECORDS:

[7] With one exception, the records at issue comprise email chains consisting of email correspondence between a named individual, on one hand, and town councillors, the Mayor, members of the town's fire department and town employees on the other. The exception is record 5, which is a single email. These records are listed in the table below, along with the town's position on access.

| Record # | Description | No. of pages | Exclusion and/or Exemption claimed | Town's position on custody or control? |
|----------|------------------------------------|--------------|------------------------------------|--|
| 1 | Email chain dated February 3, 2020 | 2 | s. 52(3)3, 14(1) | In part |
| 2 | Email chain dated March 4, 2020 | 2 | s. 52(3)3, 14(1) | In part |
| 3 | Email chain dated March 6, 2020 | 1 | s. 52(3)3, 14(1) | No |
| 4 | Email chain dated April 17, 2020 | 2 | s. 52(3)3 | No |
| 5 | Email dated May 7, 2020 | 1 | s. 52(3)3 | No |
| 6 | Email chain dated May 7, 2020 | 2 | s. 52(3)3 | No |
| 7 | Email chain dated May 13, 2020 | 3 | s. 52(3)3 | In part |
| 8 | Email chain dated May 13, 2020 | 4 | s. 52(3)3 | No |

ISSUES:

- A. Are the records "in the custody" or "under the control" of the town under section 4(1)?
- B. Does the section 52(3)3 exclusion for records about labour relations or employment-related matters apply to the records in the town's custody or control?

DISCUSSION:

A. Are the emails "in the custody" or "under the control" of the town under section 4(1)?

[8] As a preliminary matter, I note that the appellant requested communications between the named individual and either the Mayor or town councillors. The town

located several email chains and, as will be seen from the discussion below, some of the communications within each email chain do not involve either the Mayor or councillors. The town applied its analysis to each email and the individual that created it rather than each chain. Given the town's approach, I have adopted this same approach for the purposes of this order and considered the emails within the chains and the individuals who created them.¹

[9] It is the town's position that only emails sent to and received in its corporate accounts are within its custody or control. The town submits that emails to and from personal accounts are not within its custody or control and therefore there is no right of access to them under the *Act*.

[10] For the reasons set out below, I do not accept the town's submission. I find that the emails from members of the town's fire department and town staff, including volunteer firefighters and the Fire Chief, that relate to the town's business, are within its custody or control for the purposes of section 4(1) of the *Act*, regardless of the fact that some of these emails use personal accounts. These emails are part of the email chains comprising each of the eight records.

[11] I also find that the councillors' and the Mayor's emails are not within the town's custody or control. These emails form part of the email chains in records 1, 2, 3, 4, 6 and 8.

[12] 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...

[13] A record, or part of a record, will be subject to the right of access in section 4(1) of the *Act* if it is in the custody or under the control of an institution; it need not be both.²

[14] There are exceptions to the general right of access set out in section 4(1).³ A record may be excluded from the application of the *Act* by section 52 (as the town claims in this case), or may be subject to an exemption from the general right of access.⁴ However, if a record is not in the custody or under the control of the institution, none of the exclusions or exemptions need to be considered since the general right of access to the record in section 4(1) is not established.

¹ The ultimate result would be the same if I had considered each chain rather than each email.

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 The exemptions are found in sections 6 to 15 and section 38 of the *Act*.

[15] The courts and IPC have developed a broad and liberal approach to the custody or control question.⁵ Based on this approach, the IPC has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution.⁶ The list of factors includes whether the record was created by an officer or employee of the institution, what use the creator intended to make of the record, whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record and whether that activity is a “core”, “central” or “basic” function of the institution, whether the institution has more than “bare possession” of the record and whether there are any limits on the use to which the institution may put the record, what are those limits and why they apply.

[16] The list of factors developed by the IPC is not intended to be exhaustive and the factors applicable to a particular case will depend upon the facts. The Divisional Court has held that in determining whether records are in the “custody or control” of an institution, the applicable factors must be considered contextually with regard to the purpose of the legislation.⁷

[17] In addition to the above factors, the Supreme Court of Canada has articulated a two-part test to determine institutional control of a record in cases where a record is not held by the institution. The IPC has applied this test in such situations, including where a record is solely held by a councillor:

1. Do the contents of the record relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the record upon request?⁸

Municipal councillors

[18] The issue of whether records created or held by elected councillors are in the custody or under the control of a municipality is complex and not readily provided for in the *Act*.

[19] The *Act* does not expressly refer to records of municipal councillors. The term “institution” is defined in section 2(1) of the *Act* and includes a municipality. However, the definition of “institution” does not specifically refer to elected offices, such as a municipal councillor.

[20] In *St. Elizabeth Home Society v. Hamilton (City)*, the Ontario Superior Court of Justice described the relationship between a municipality and elected members of

⁵ *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.

⁶ Orders 120, MO-1251, PO-2306 and PO-2683.

⁷ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.).

⁸ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), *National Defence*.

council 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 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.⁹

[21] In Order M-813, Adjudicator Cropley considered the meaning of the term "officer" as it is used in municipal law and noted that the term is generally interpreted to refer 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."

[22] Following the analysis set out in Order M-813, IPC decisions have taken the approach that councillors' records may be subject to the *Act* where:

1. A councillor is acting as an officer or employee of the municipality, or performs a duty assigned by council, such that they might be considered part of the "institution", or
2. Where, even if the above circumstances do not apply, the councillor's records are in the custody or under the control of the municipality on the basis of established principles.

[23] When answering these questions, the IPC makes a distinction between "town records" on the one hand (which would be subject to the *Act*) and "personal or political records" on the other (which would not).¹⁰

The town's representations

[24] It is the town's position that with the exception of the emails created by town staff using their corporate email addresses, the other emails within the email chains have been created using personal email addresses and they are therefore not within the town's custody or control for the purposes of section 4(1). The town addresses the relevant factors listed above.

[25] The town states that some of the emails contained in the records were created by an employee of the town and the creators of the emails are commenting on issues

⁹ (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.) at para 264.

¹⁰ Order MO-2821.

pertaining to employment matters concerning former town employees. The town submits that there is no statutory duty surrounding the subject matter of the records and that personnel matters are not a core, central or basic town function. However, the town also submits that the contents of the emails reflect employee management matters, which could be considered part of the town's mandate or function.

[26] The town states that it has physical possession of some of the emails since they were sent to/from town staff using corporate email accounts. The town states that other emails were sent to/from municipal councillors' personal email accounts and it does not have rules in place for the use of personal email by councillors or volunteer firefighters in relation to the *Act*. The town submits that it is therefore questionable whether these emails are in the town's possession.

[27] The town acknowledges that its possession of emails sent to/from town staff using the town's corporate email accounts amounts to more than "bare possession" because these emails were created for the town's business purposes.

[28] The town submits that most municipalities would have email accounts set up for staff and councillors to use for business purposes and policies in place that govern the use of these emails. Regarding the town's right to possession of the emails sent using employees (including volunteer firefighters) and councillors' personal email addresses for town business purposes, the town states that there are currently no policies explaining expectations or the town's right to control these records. The town states that it does not have authority to regulate the content of emails not created by its employees. Nor do policies exist for the use of personal email accounts for business purposes by volunteer firefighters or members of council.

[29] Except for the emails created by town staff using their corporate email accounts, the town states that the emails were housed outside the digital infrastructure maintained by the town until they were provided to the town by councillors as part of the town's response to the appellant's access request.

[30] It is the town's position that the emails sent from personal accounts are not within its custody or control or, alternatively, are excluded from the *Act* under section 52(3)3.

The appellant's representations

[31] The appellant's representations provide context for his access request, including a summary of his career history and his role within the town's fire department and its duties and responsibilities.

[32] The appellant enclosed with his representations Codes of Conduct and excerpts from the town's Integrity Commissioner's bulletins to the town council regarding interactions with the public. The appellant makes assertions regarding the town council's spending decisions that formed part of the 2020 budget process based on his

belief that communications took place between the individual named in the request and members of the town council.

[33] The appellant's representations do not directly address the issue of the town's custody or control of the records at issue or the factors that I have to consider when making my determination. The appellant submits that it is irrelevant how the town came into possession of the emails; what is relevant is that they exist.

[34] Regarding the councillors' emails, the appellant submits that the town council members are town employees to the extent that they are paid a salary, issued T4 tax forms for reporting purposes and are covered by the Workplace Safety and Insurance Board (WSIB), so that their records are "official town records."

[35] The appellant submits that the emails concern town-related business and activities that are tied to the town by virtue of the employer-employee relationship that exists between council members and the town corporation, notwithstanding that the emails may emanate from the town councillors' private email addresses.

[36] The appellant states that the town councillors' email addresses were included in various town publications and on the town website so that there was a widely held public expectation that anyone could contact their town representative via their private email addresses to communicate about town business.

[37] The appellant submits that the issues described in the records are not "labour relations" issues as the town asserts. I appreciate that the appellant has not had sight of the email chains at issue and is therefore unable to submit detailed representations addressing the content of the email correspondence.

The town's reply representations

[38] Regarding the councillors' private email accounts, the town disagrees with the appellant's position regarding the councillors' employment status with the municipality. The town reiterates that it has neither ownership nor control of the councillor's private email accounts. There is no corporate policy in place within the town that gives it administrative rights or oversight of the councillor email accounts and, as such, the town submits that emails sent from these sources are not within its custody or under its control.

[39] Regarding the appellant's submission that the email addresses of town council members are published on the town website, the town states that councillors use email to connect with their constituents and communicate town-related business. The existence of the councillors' email accounts is not private but for those using private email, the town is unable to administrate over the accounts, which are privately controlled by council members.

[40] The town reiterates that it has no ability to retrieve emails from the councillors'

private accounts, and that it only has the records at issue in its possession because members of council willingly provided them upon request for the purposes of administering to the appellant's access request.

Analysis and findings

[41] For the reasons that follow, I find that the emails from members of the town's fire department and other town staff are within the town's custody or under its control for the purposes of section 4(1) of the *Act*. These emails are within the email chains in all eight records.

[42] I also find that the councillors' and the Mayor's emails are not within the town's custody or control. These emails are within the email chains in records 1, 2, 3, 4, 6 and 8.

[43] I have considered the emails comprising the records at issue in three categories: the councillors' and the Mayor's emails, emails from the members of the town fire department and emails from other town staff.

Councillors' and the Mayor's emails

[44] As already noted, the IPC's approach is to consider the factors outlined above to determine whether or not municipal councillors' communications are in the custody or under the control of a municipality in the circumstances of a particular appeal.

[45] Applying the established principles set out in IPC orders, I find that in those emails sent by the councillors, the councillors are not acting as officers or employees of the town or performing a duty assigned by the town council in respect of the email communications. There are no unusual circumstances present so that the councillors were party to the email correspondence as an officer of the town. For example, there is no evidence before me that the councillors were assigned duties or authorised to act in relation to personnel matters in the town's fire department.

[46] The appellant's position is that the councillors are town employees because the councillors were paid a salary, issued tax forms and covered by WSIB and the emails are town records referencing town related business. However, as I have noted above, the Ontario Superior Court of Justice in *St Elizabeth Home Society* held that elected members of a municipal council are not employees of a municipal corporation in a legal sense. The IPC has taken the approach that when determining whether councillors' records may be subject to the *Act*, an important factor is whether a councillor has authority to act as an officer or employee for the town.

[47] As I find that the councillors were not assigned duties or authorised to make decisions in relation to the fire department, I am satisfied that the councillors were not party to the email communications as employees or officers of the town.

[48] I agree with the town's position that it has only bare possession of the councillors' emails, which were provided to the town in response to the appellant's request.

[49] I note that the councillors' emails were retrieved from personal email accounts and the town states that they were not held on its servers. I will therefore consider the two-part test articulated by the Supreme Court in *National Defence*¹¹ to decide whether the town has control of records that are not in its physical possession:

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

[50] From my review of the emails, I find that the email correspondence with the councillors relates to events taking place in the town's fire department. However, I am not persuaded that the emails concern a matter of town business. The administration of the town's fire department and personnel and budget decisions is the town's business. This is the appellant's position and I appreciate that the appellant makes this submission without having seen the emails at issue. However, from my review of the emails, I find that the councillors' emails are not concerned with the town's decision-making in relation to or administration of fire department personnel.

[51] In Order MO-3471, the adjudicator considered whether the content of records relating to a municipal councillor's Twitter account, which was not an official city account, related to city matters applying the first part of the *National Defence* test. The adjudicator made the following determination regarding "city matters" in the context of custody or control:

With respect to the first question, I find that at least some of the [councillor's] tweets, and the communications about the Twitter account itself, would be expected to touch on matters within the city's mandate. In this respect, it is arguable that some of the communications in the records at issue relate to "city matters" within the meaning of part one of the test in *National Defence*. This would be taking a broad and liberal view of what constitutes a "city matter" for the purposes of the custody or control question. The councillor, on the other hand, argues that the important question is not the subject matter of the tweets but whether the communication represents a decision-making or executive function exercised by him on behalf of the city. I agree with the councillor that the context of the creation of the record is important in determining what constitutes a "city matter".

[52] The adjudicator considered the context in which the records had been created

¹¹ 2011 SCC 25, [2011] 2 SCR 306.

and found that there was no evidence suggesting that any of the councillor's communications through the Twitter account or with staff about the tweets arose out of a decision-making function or was integral to a council decision. I agree with and adopt this approach in this appeal. The subject of the records before me, namely the retention of the town's volunteer firefighters, is a matter that, on a broad and liberal interpretation, falls within the domain of "town business". However, for the purposes of custody or control under the *Act*, and having regard to the context of the emails, there is no reasonable basis for me to find that the councillors' emails were created as part of the town's decision-making or are integral to a town council decision. In my view, the councillors were party to the email correspondence in their political roles as constituent representatives.

[53] In his submissions, the appellant makes assertions regarding decisions made by the town council in relation to the 2020 spending budget. These submissions are made to provide context for the appellant's access request. However, I am satisfied that the subject matter of the councillors' emails that are before me in this appeal does not relate to town council decision making.

[54] Turning to the second part of the test set out in *National Defence*, as I have found that these emails relate to the councillors' political business and not town business, there is no basis for me to find that the town could reasonably expect, in the normal course, to receive the councillors' emails on request. The provision of the emails by the councillors to the town for the purposes of responding to the appellant's access request is irrelevant for the purposes of my analysis.

[55] Accordingly, I find that the councillors' emails are not within the town's custody or under its control for the purposes of the *Act*.

[56] The email chain that comprises record 8 includes an email created by the Mayor. The Mayor's email is sent from a personal account and not a corporate account so that I understand the town's position to be that this email is not within its custody or control for the purposes of the *Act*. The town does not address this email specifically in its representations. I do not accept the town's submission that the account used to create an email determines the custody or control issue.

[57] A mayor, unlike other members of the town council, can be an officer of the town if they hold the position of head of the town council and the role of chief executive officer or carry out executive functions on the town's behalf. The IPC has previously held that records held by a mayor in their connection with their duties as an officer of the municipality may be covered by the *Act* in the same way as records of employees or other officials, subject to any applicable exclusions or exemptions.¹² I have considered whether the Mayor's email in record 8 is the town's record for the purposes of the *Act*.

¹² Orders MO-1403, MO-1867 and MO-2993.

[58] From my review of the Mayor's email, I am satisfied that it is not a record created by the Mayor acting as a town officer. In the email the Mayor is not acting on behalf of the town in relation to its administration of the fire department or any decision making of the council in that regard.

[59] As the Mayor's email is contained within an email chain that was retrieved from a personal email account and was not held on the town's servers, I have considered the two part test in *National Defence*. Regarding the first question and as I have noted above, a broad and liberal interpretation of "town business" would include the administration of the town's relationship with its firefighters. The Mayor's email is expressly related to the town administrative business. As such, the subject matter of the email can be construed to relate to a town matter. Although I have adopted the town's approach and considered the emails individually, the emails that I am reviewing are part of email chains and the other emails in the chain in record 8 provide context for the correspondence. From my review of the Mayor's email and the email chain in which it appears, I am satisfied that although the subject matter of the email is town business, the Mayor was not acting in his capacity as an officer of the town when he created it. As I state above, I find that the Mayor's email is personal, arising from his constituent role, separate to any executive role that he might hold.

[60] Addressing the second question from *National Defence*, I am satisfied that the town could not reasonably expect to obtain a copy of this email of the Mayor's, if requested.

[61] Accordingly, I find that the Mayor's email in record 8 is not within the town's custody or under its control.

Fire Department emails

[62] The emails in this category are created by members of the fire department, including the firefighter that held the office of Fire Chief at the relevant time. The volunteer firefighters' emails are created in personal email accounts while those of the Fire Chief are sent via his "corporate" email account with the town, i.e. using a "gravenhurst.ca" email address. From my review of the records, I note that these fire department emails appear in each of the eight email chains at issue.

[63] I find that the firefighters have a relationship with the town that is akin to an employer-employee relationship.¹³ I acknowledge that firefighters serve the town on a volunteer basis. However, from my review of the emails, I am satisfied that the firefighters' relationship of volunteer service with the town gives rise to administrative and personnel issues similar to those existing in an employment context, such as issues around performance, promotion, and termination of the relationship. I find that the majority of the emails sent by members of the fire department were sent while they

¹³ See Order MO-3672.

were serving as volunteer firefighters. I am satisfied that the content of these emails relates to matters arising from the town's administration of its relationship with the firefighters. These factors weigh in favour of the emails being within the town's custody or under its control.

[64] Since the firefighters' emails are not in the town's physical possession,¹⁴ I will consider the two-part test in *National Defence* to decide whether the email correspondence to/from the volunteer firefighters is within the control of the town. Turning to the first question, I am satisfied that the firefighters' emails relate to town matters. From my review of the email chains, I find that the firefighters' emails relate to the relationships of individual firefighters with the town and issues arising in those relationships. In my view, the administration of the town's relationship with its firefighters and the decisions made in respect of those relationships are matters of town business.

[65] Turning to the second part of the test, I am satisfied that the town could reasonably expect that its firefighters would produce the emails relating to town business, if requested. The town states that not all firefighters have corporate accounts and that it does not have policies governing the use of personal email for town business. From my review of the emails, only the Fire Chief's emails are sent from a corporate account. The other firefighters have used their personal accounts to communicate with the town. I am satisfied that, having not been provided with corporate email accounts, the firefighters are compelled to use their personal email to communicate with, and on behalf of the town. When corresponding on issues arising in their relationships with the town's fire department, the firefighters will therefore, by necessity, use their personal accounts. In these circumstances, I find that the town could reasonably expect to be provided with emails sent and received by members of the fire department, regarding personnel issues in the department, if requested.

[66] For these reasons, I am satisfied that the emails from members of the fire department are within the town's custody or control. Similarly, I find that the Fire Chief's emails, which are sent from a corporate account and concern town business are also within the town's custody or control.

Other town staff emails

[67] What remains to be considered are emails sent from town staff other than the Fire Chief (whose emails I have considered above).

[68] As I have noted above, the Fire Chief's emails use his corporate email account and I have found that these are within the town's custody or control. Within the email chains at issue there are also emails from other town staff using corporate email addresses and I agree with the town's submission that these emails are within its

¹⁴ The fact that the city was able to collect these emails for the purposes of responding to the access request is not relevant to the custody/control analysis.

custody or under its control for the purposes of section 4(1) of the *Act*. From my review of the town staff emails, I find that they all concern the town's administrative business in relation to members of the fire department.

[69] As I noted earlier, the list of factors developed by the IPC is not intended to be exhaustive and in determining whether records are in the custody or control of an institution, the applicable factors must be considered contextually with regard to the purpose of the legislation. One of the major rationales for public sector access to information legislation identified by the *Williams Commission* in its report is accountability and, in particular, access to information "about the operations of government."¹⁵ When weighing the factors discussed above, including the content of the emails at issue, I am satisfied that my finding that the emails from town staff are within its custody and control is consistent with the purpose of the *Act*.

Conclusion

[70] The councillors' and the Mayor's emails are not in the town's custody or control and therefore the appellant has no right of access to them under section 4(1).

[71] The remaining emails, which are from members of the fire department, including the Fire Chief, and other town staff are in the town's custody or control. As these emails appear in the email chains of each of the eight records in issue, I find that all the records in issue are, in part, within the town's custody or under its control. For reasons that become apparent from my findings relating to the exclusion in section 52(3)3 of the *Act* below, it is not necessary for me to further identify the parts of the records that I have found are within the town's custody or control.

B. Does the section 52(3)3 exclusion for records about labour relation or employment-related matters apply to the emails in the town's custody or control?

[72] The town has refused the appellant access to the records on the basis that they are excluded from the scope of the *Act* under the labour relation or employment-related matters exclusion in section 52(3)3. In light of my finding that the emails sent from the town's staff and volunteer firefighters are within the custody or control of the town, I have considered the application of the exclusion in section 52(3)3 to those emails.

[73] Section 52(3)3 excludes certain records held by an institution that relate to labour relations or employment-related matters. If the exclusion applies, and none of the exceptions found in section 52(4) applies, the records are not subject to the access scheme in the *Act*, although an institution may choose to disclose it outside of the *Act's*

¹⁵ Ontario, *Report of the Commission on Freedom of Information and Individual Privacy*/1980, vol. 2 (Toronto: Ontario Government Book Store, 1980) at pp.77-79.

access scheme.¹⁶

[74] The types of records excluded from the *Act* by section 52(3)3 are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources are at issue.¹⁷

[75] Section 52(3)3 states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[76] For the collection, preparation, maintenance or use of a record to be "in relation to" the subject mentioned in paragraph 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.¹⁸

[77] For section 52(3)3 to apply, an institution must establish that:

1. The records were collected, prepared, maintained or used by an institution or on its behalf; and
2. This collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. These meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[78] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.¹⁹

The town's representations

[79] In the non-confidential portion of its representations, the town states that the emails are concerned with employment related matters and constitute communications between present and former employees and town councillors that relate to personnel

¹⁶ Order PO-2639.

¹⁷ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."

¹⁸ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹⁹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

matters and the town's employee management.

The appellant's representations

[80] The appellant's representations do not specifically address the application of the exclusion in section 52(3)3 but the appellant submits that the issues in this appeal are not around labour relations.

Analysis and findings

[81] I have considered the parties' representations (including the confidential portions of the town's representations) and reviewed the records. For the reasons that follow, I find that the exclusion in section 52(3)3 applies to the emails in the town's custody or control.

[82] From my review of the records, I find that the emails of the firefighters and other staff were collected, prepared, maintained or used by the town in relation to communications about employment related matters in which the town has an interest. I agree with the town's submission that the email correspondence is about personnel matters and I am satisfied that the personnel matters are not merely operational but they concern the town's employment relationships with its firefighters. The content of the emails relates to the town's administration of those relationships. As I have explained above, from my review of the content of the emails, I find that the volunteer firefighters have a relationship with the town that is akin to an employment relationship. As such, I am satisfied that the town, as a party to that relationship, has an interest in these records as employer.

[83] Having found that all three parts of the section 52(3)3 test have been met, I find that the emails of the members of the fire department (including the volunteer firefighters and the Fire Chief) and other town staff are excluded from the application of the *Act*.

Summary

[84] In light of my findings that the emails at issue in this appeal are either outside the custody or control of the town for the purposes of section 4(1) or excluded from the application of the *Act* pursuant to section 52(3)3, it not necessary for me to determine the application of the personal privacy exemption in section 14(1) or the public interest override in section 16. The public interest override can only operate to override certain exemptions from the right of access. It cannot override the application of an exclusion or a finding that a record is not in the town's custody or control.²⁰

[85] Accordingly, I uphold the town's decision to deny access to the records and I dismiss the appeal.

²⁰ See section 16 of the *Act*.

ORDER:

I uphold the town's decision and dismiss the appeal.

Original Signed By: _____
Katherine Ball
Adjudicator

_____ April 21, 2023