

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4533

Appeal MA23-00370

Town of Milton

June 17, 2024

Summary: This order is about an access request for certain municipal election records. The *Municipal Elections Act, 1996 (MEA)* makes such records public for 120 days after the election results are declared. The appellant requested access to certain of these records after the 120-day period. The town denied access on the basis of section 53(2) of the *MFIPPA*, referring to section 88(6) of the *MEA*, which overrides the general right of access of *MFIPPA*. In this order, the adjudicator upholds the town's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 53; *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched., as amended, sections 88(1), 88(2), 88(5), and 88(6); *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F., as amended, sections 46, 47, 88, 89 (1), 89(2), and 89(5).

Order Considered: Order MO-4176.

OVERVIEW:

[1] This order addresses an access request made under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for municipal election records, which are addressed in the *Municipal Elections Act, 1996*¹ (*MEA*). This order explains why the requester has no right of access to the requested records.

¹ S.O. 1996, c. 32, Sched.

[2] The clerk of the Town of Milton (the town) declared the results of the 2022 municipal election on October 24, 2022. Several months later, the town received a request under *MFIPPA* for records relating to two school election candidates.²

[3] The requester sought the following five records:

Here are the records I require for trustees [named individual] and [named individual] (blank sample copies of the documents requested sent in another email) [sic]:

1) Nomination Paper Form 1

2) Form EL 18 B - Declaration of Qualifications - School Trustee Municipal Elections Act, 1996, as amended (Two sided **signed and dated** the Town Clerk or Designate and Candidates [named individual] and [named individual])

3) Candidates Package Contents (checked each item reviewed with candidate)

4) Checklist for Accepting Candidate Nomination Papers

6) Internet Voting list of Voters with date and time voted with passcodes. [Emphasis in the original.]

[4] The requester emailed or telephoned the town on various dates, starting February 21, 2023. He was advised to file a formal request under *MFIPPA*. He did so on March 20, 2023. In response to that request, the town issued a decision denying access to the responsive records under section 53(2)1 of the *Act*, which addresses the relationship between *MFIPPA* and other statutes (laws passed by the Legislature), including the *MEA*.

[5] The requester (now the appellant) appealed the town's decision to the Information and Privacy Commissioner of Ontario (IPC).³

[6] I conducted an inquiry into the appeal. The parties provided representations on the issues. The town's representations were shared with the appellant. After considering the appellant's representations, I initially closed the inquiry. However, I later briefly reopened it when I invited him to provide representations about certain sections of the *Legislation Act, 2006*.⁴ The appellant provided additional representations, maintaining his

² This order sets out and addresses only the records remaining at issue.

³ The IPC appointed a mediator to explore resolution. During mediation, the dispute was narrowed, as the town noted that one of the records requested does not exist and the appellant accepted that. The town also issued an index of records, which it said was a clarification/revision of its access decision.

⁴ S.O. 2006, c. 21, Sched. F. I determined that the appellant should be given an opportunity to submit representations regarding the *Legislation Act, 2006* and sent him a letter inviting him to do so.

position.

[7] For the reasons that follow, I uphold the town's decision under section 53(2)1. As a result, it is not necessary to consider whether the town conducted a reasonable search for one of the records (record 6), and I dismiss the appeal.

RECORDS:

[8] Records 1, 2, 3, 4 and 6 as identified on the index of records.

DISCUSSION:

[9] The central question of this appeal is whether the appellant made his request for election records within 120 days of the town's 2022 municipal election results being announced. If he did not, there is no right of access to the records under *MFIPPA*. That is because under section 88(6) of the *MEA*, such records are no longer accessible to the public, and that section of the *MEA* overrides *MFIPPA* (as indicated by section 53(1) of *MFIPPA*). That is the case here.

[10] The town's position is that, under the *MEA*, election records are accessible to the public during the 120-day period after the election result is announced, and that the *MEA* overrides *MFIPPA* after that (preventing access). The town states that the request was made after the 120-day period, so the appellant has no right of access to the records. The town's 120-day calculation includes all days (including Saturdays, Sundays, and other holidays).

[11] The appellant does not dispute the relevance of section 53(2), but he counts the 120-day period differently and, therefore, disagrees with the town's position. He argues that only "workdays" count towards the 120 days and that, therefore, his request was submitted within the 120-day period and that his right of access remains. More specifically, his view is that the 120 days referenced in section 88(1) must be "workdays" because section 88(5) of the *MEA* allows for public inspection of election records "at a time when the office is open."

[12] In addition, the appellant relies on Order MO-4176, in which a voter spreadsheet was at issue. In that order, the IPC found that the *MEA* expressly authorizes the disclosure of the voter spreadsheet and, therefore, a certain *exception* to the personal privacy exemption applies.⁵ The IPC found that the voter spreadsheet is not exempt from disclosure under the *Act* and ordered the institution to disclose it to the appellant.

⁵ More specifically, the exception to the exemption at section 14(1)(d) of *MFIPPA*, which says: "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, under an Act of Ontario or Canada that expressly authorizes the disclosure[.]"

[13] However, Order MO-4176 is not helpful to the appellant's case here because the appeal was about a request for an election record that was made within the 120-day period⁶ (unlike the appeal before me, as I explain below). As a result, Order MO-4176 did not involve the question of whether the *MEA* prevailed over *MFIPPA* preventing access after that time, under section 53(2) of *MFIPPA* (which is the basis of the town's decision under appeal here, and not the personal privacy exemption, as it was in Order MO-4176).

Why does section 88(6) the *MEA* prevail over *MFIPPA*?

[14] Section 88 of the *MEA* is the law regarding municipal election records in Ontario.

[15] There is no dispute between the parties that records 1, 2, 3, 4, and 6 are election records, as contemplated by section 88 of the *MEA*.

[16] Requests for election records are unique in some ways, as both the *MEA* and *MFIPPA* address rights of access to them. *MFIPPA* grants a general right of access, subject to limited and specific exemptions (such as the personal privacy exemptions to protect the disclosure of personal information of others), but the *MEA* limits both the general right of access and the application of exemptions – all depending on when a request was made. The *MEA* also restricts the use that can be made of information that is made accessible under it.⁷

[17] Within the 120-day period after election results are announced, there is a unique right of access to these records depending on their content and the type of election record.

[18] However, under section 88(6) of the *MEA*, after the 120-day period, there is no right of access at all and this bar on access overrides *MFIPPA* (which otherwise grants a general right of access to records, subject to limited and specific exemptions). This is clear from the wording of sections 53 of *MFIPPA*, set out below, in part:

(1) This Act [that is, *MFIPPA*] shall prevail over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

(2) The following confidentiality provisions prevail over this Act [*MFIPPA*]:

1. Subsection 88(6) of the Municipal Elections Act, 1996.

[19] Section 53(1) of *MFIPPA* states that *MFIPPA* prevails over a confidentiality provision in any other law passed by the Legislature unless either that other law – or *MFIPPA* itself – says that *MFIPPA* does not prevail. Section 53(2) lists the two statutory confidentiality provisions that *MFIPPA* says prevail over *MFIPPA*, and section 88(6) of the

⁶ See paragraph 32 of Order MO-4176.

⁷ Section 88(1) of the *MEA* says: "No person shall use information obtained from public records described in subsection (5), except for election purposes."

MEA (which the town claimed) is one of them.

[20] As is clear from the parties' representations, the real dispute between the parties is whether 120 days had elapsed when the appellant made his request. I will discuss this below.

Rules about the computation of time in the *Legislation Act, 2006*

[21] In interpreting section 88(1) of the *MEA*, I have considered Part VI of the *Legislation Act, 2006* contains the rules for interpreting all of Ontario's statutes (also known as Acts), including the *MEA* (unless specific exceptions apply).

[22] Sections 46 and 47 of the *Legislation Act, 2006* say:

46. *Every provision* of this Part applies to *every Act* and regulation.

47. Section 46 applies *unless*,

(a) a contrary intention appears; or

(b) its application would give to a term or provision a meaning that is inconsistent with the context. [Emphasis added.]

[23] Since the *Legislation Act, 2006* contains rules about the computation of time in interpreting an *Act*, I must consider them.

[24] Sections 89(1) and 89(2) of the *Legislation Act, 2006* are relevant because they explain how holidays (or other days in which the institution is not open during its regular business hours) are to be counted – and indicate that this is only an issue when a time period expires on a holiday.

[25] Sections 89(1) and 89(2) of the *Legislation Act, 2006* say:

1. Time limits that would otherwise *expire* on a holiday are extended to include the next day that is not a holiday.
2. Time limits for registering or filing documents or for doing anything else that *expire on a day* when the place for doing so is not open during its regular hours of business are extended to include the next day the place is open during its regular hours of business. [Emphasis added.]

[26] These sections mean that if a time period described in an Act (like the *MEA*) *expires* on a holiday or a day that a government institution is not open, then the time period is extended until the next day that the institution is open. However, this does not mean that the *entire* time period to take an action is extended to take into account holidays or other days that the institution is not open for business.

[27] Furthermore, since section 88(1) of the *MEA* says “120 days after declaring the results of the election,” section 89(5) of the *Legislation Act, 2006* is also relevant because it explains how a period of time described as “after a specified day” is to be counted. Section 89(5) of the *Legislation Act, 2006* says: “A period of time described as beginning before or *after* a specified day *excludes* that day [emphasis mine].” This means that the 120-day period begins the day after the election results are declared (and not the day of the declaration, as submitted by the town).

What does the *MEA* require the town to do during the 120-day period?

Retain records

[28] The *MEA* requires the clerk of a town or municipality to *retain* election records – election ballots and all other documents and materials related to a municipal election – for 120 days after declaring the results of a municipal election.

[29] Section 88(1) of the *MEA* says: “(1) The clerk *shall retain* the ballots and all other documents and materials related to an election for 120 days after declaring the results of the election under section 55 [of the *MEA*]” (emphasis mine). The 120-day period is referred to again in sections 88(2) and 88(6).

[30] Section 88(1) does not address access by the public to these records. However, sections 88(5) and 88(6) do, as discussed further below.

Make records available to the public, with conditions

[31] During the 120-day period, the town is also required to make election records available to the public for viewing at the clerk’s office. The time and place conditions for accessibility are mandated by section 88(5) of *MEA*, which says:

Despite anything in the *Municipal Freedom of Information and Protection of Privacy Act*, documents and materials filed with or prepared by the clerk or any other election official under this Act are public records and, until their destruction, may be inspected by any person at the clerk’s office at a time when the office is open.

After the 120-day period, what happens?

Destruction of records

[32] Section 88(2) of the *MEA* addresses *destruction* of the election records that the town would have been required to retain (under section 88(1), discussed above).

[33] Section 88(2) says:

(2) When the 120-day period has elapsed, the clerk,

(a) *shall destroy* the ballots, in the presence of two witnesses; and

(b) *may destroy* any other documents and materials related to the election. [Emphasis mine.]

[34] In other words, reading sections 88(1) and 88(2) together, the clerk must retain election records for 120 days after declaring the results of the election, and cannot destroy any of them until after that 120-day period is over. When it is over, the ballots *must* be destroyed, but any other documents and materials related to the election *may* be destroyed.

Records are no longer available to the public

[35] While section 88(5) of the *MEA* granted access to election records during the 120-day period, section 88(6) removes that right.

[36] Section 88(6) says:

Subsection (5) does not apply to documents and materials filed with or prepared by the clerk or any other election official under this Act *once the 120-day period has elapsed*. [Emphasis mine.]

Does section 88(1) of the *MEA* exclude Saturdays or holidays?

[37] Section 88(1) of the *MEA* does not say “120-day workday period,” as the appellant refers to it in his representations. Based on the appellant’s calculations, the 120-day period expires on April 20, 2023 (not February 21, 2023, as I explain below). His calculation does not include Saturdays, Sundays, and other holidays.

[38] However, section 88(1) of the *MEA* does not clearly and specifically *exclude* Saturdays or “holidays” from the 120-day period. (“Holidays” are Sundays and certain days other days listed in the *Legislation Act, 2006*).⁸ Put another way, section 88(1) of the *MEA* does not clearly and explicitly state that only days in which the institution is open (or, to use the appellant’s terminology, “workdays”) count in the 120 day-period.

[39] Rather, section 88(1) of the *MEA* says: “The clerk shall retain the ballots and all other documents and materials . . . for 120 days after declaring the results of the election.”⁹ I cannot interpret those words to mean “workdays,” or to exclude Saturdays and holidays, unless the *MEA* specifically says so. The Legislature could have drafted section 88(1) of the *MEA* to do so but it did not. While this means that election records are not available for inspection by the public every single day of the 120-day period (assuming that the municipality is not open every day), that was the Legislature’s choice.

⁸ See section 88 of the *Legislation Act, 2006*. Examples of listed “holidays” are Christmas Day and New Year’s Day.

⁹ The full text of section 88(1) is set out at paragraph 29 of this order.

What is the relevant 120-day period in this case?

[40] Applying the wording of section 88(1) of the *MEA*, and sections 89(1), (2), and (5) of the *Legislation Act, 2006*, this is how the 120-day period must be calculated in this case:

- The municipal election was on October 24, 2022 and the results were declared that day.
- Therefore, the first day of the 120-day period must be the day after that: October 25, 2022.
- The last day of the 120-day period was February 21, 2023 because the *MEA* does not indicate that Saturdays or holidays should be excluded from that period. Since February 21, 2023 was not a Saturday or a holiday, there is no reason to extend it by a day for any time limit.
- The appellant filed an access request under *MFIPPA* on March 20, 2023, clearly outside the 120-day period.

[41] Since the appellant requested the election records after the 120-day period, he has no right of access to them under *MFIPPA*, due to section 53(2) of *MFIPPA* and section 88(6) of the *MEA*.

[42] Although the appellant appears to have been communicating by phone and email with the town about accessing records before March 20, 2023, those communications are not relevant to this appeal. The IPC adjudicates appeals from decisions made about requests made under *MFIPPA* so I must consider only the March 20, 2023 date.

The reasonable search issue is moot

[43] The appellant challenged the reasonableness of the town's search for record 6. However, since section 53(2) of *MFIPPA* applies (meaning the appellant has no right of access to record 6 under *MFIPPA*), there is no need to consider whether the town conducted a reasonable search for record 6. Therefore, I make no findings about its search efforts either way.

ORDER:

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

Original signed by: _____
Marian Sami
Adjudicator

_____ June 17, 2024

APPENDIX

Election Records

120-day retention period

88 (1) The clerk shall retain the ballots and all other documents and materials related to an election for 120 days after declaring the results of the election under section 55. 1996, c. 32, Sched., s. 88 (1); 2009, c. 33, Sched. 21, s. 8 (49).

Destruction of records

(2) When the 120-day period has elapsed, the clerk,

(a) shall destroy the ballots, in the presence of two witnesses; and

(b) may destroy any other documents and materials related to the election. 1996, c. 32, Sched., s. 88 (2); 2009, c. 33, Sched. 21, s. 8 (50).

Exception, recount

(3) However, the clerk shall not destroy the ballots, documents or materials if,

(a) a court orders that they be retained; or

(b) a recount has been commenced and not finally disposed of. 1996, c. 32, Sched., s. 88 (3).

Exception, election campaign finance documents

(4) Subsection (2) does not apply to documents filed under sections 88.25, 88.29 and 88.32, which the clerk shall retain until the members of the council or local board elected at the next regular election have taken office. 1996, c. 32, Sched., s. 88 (4); 2009, c. 33, Sched. 21, s. 8 (51); 2016, c. 15, s. 45 (1).

Public records

(5) Despite anything in the *Municipal Freedom of Information and Protection of Privacy Act*, documents and materials filed with or prepared by the clerk or any other election official under this Act are public records and, until their destruction, may be inspected by any person at the clerk's office at a time when the office is open. 1996, c. 32, Sched., s. 88 (5).

Exception re filings, etc.

(6) Subsection (5) does not apply to documents and materials filed with or prepared by the clerk or any other election official under this Act once the 120-day period has elapsed. 2016, c. 15, s. 45 (2).

Exception re ballot box, etc.

(6.1) Subsection (5) does not entitle a person to inspect the contents of a ballot box or any applications made under section 24 or 25 unless authorized to do so by a court order. 2016, c. 15, s. 45 (2).

Redacted information

(6.2) Subsection (5) does not apply to information about a person that has been redacted under section 4.7 of the *Election Act*. 2020, c. 23, Sched. 4, s. 12 (1).

Extracts and copies

(7) A person inspecting documents under this section is entitled to make extracts from them and, on payment of the fee established by the clerk, to make copies of them. 1996, c. 32, Sched., s. 88 (7).

Restriction

(7.1) Subsection (7) does not entitle a person to make extracts from, or copies of, the voters' list, unless authorized to do so by a court order. 2020, c. 23, Sched. 4, s. 12 (1).

Fees for copies

(8) The fee established for copies shall not exceed the lowest rate the clerk charges for copies of other documents. 1996, c. 32, Sched., s. 88 (8).

Grounds for order

(9) The court presiding over a proceeding in respect of any matter relating to a provision of this Act may make an order under clause (3) (a) or subsection (6.1) or (7.1) if satisfied that the documents are or may be required for the proceeding. 2009, c. 33, Sched. 21, s. 8 (52); 2020, c. 23, Sched. 4, s. 12 (2).

Information to be made available

(9.1) The clerk shall make the documents filed under sections 88.25, 88.29 and 88.32 available at no charge for viewing by the public on a website or in another electronic format as soon as possible after the documents are filed. 2016, c. 15, s. 45 (3).

Restrictions

(10) No person shall use information obtained from public records described in subsection (5), except for election purposes. 1996, c. 32, Sched., s. 88 (10).

Voters' list

(11) A voters' list prepared under this Act shall not be,

(a) posted in a public place; or

(b) made available to the public in another manner that is prescribed. 1996, c. 32, Sched., s. 88 (11).