
Working with the *Municipal Freedom of Information and Protection of Privacy Act*

A Councillor's Guide



Information and Privacy Commissioner,
Ontario, Canada



City of Ottawa

November 2001

Introduction

The *Municipal Freedom of Information and Protection of Privacy Act* (“the Act”, “MFIPPA”) came into effect on January 1, 1991. The *Act* applies to all municipalities in Ontario as well as local boards, agencies and commissions, including school boards and police services.

The purposes of the *Act* are two-fold. On the one hand, the *Act* provides the right of public access to records held by municipalities, subject only to limited and specific exemptions to disclosure. The *Act* provides a right to access one’s own personal information and to correct it if it is inexact, ambiguous or incomplete. With respect to **privacy**, the *Act* also requires municipalities to protect personal information contained in their record holdings by imposing protection of privacy requirements governing the proper collection, retention, use, disclosure and disposal of personal information. In effect, MFIPPA attempts to strike a balance between both access to information and protection of personal privacy.

This publication provides a brief description of the City of Ottawa’s corporate program for access to information and protection of privacy, and focuses particularly on how the *Act* applies to both records requested by, and in the possession of, elected members of Council.

MFIPPA Corporate Program

Under MFIPPA, municipal Councils must appoint a head who is responsible for overseeing the administration of the legislation within the municipality and for decisions made under the legislation. In the City of Ottawa, the Mayor is the designated head for the purposes of MFIPPA. The duties of the head have been delegated to the Director, Secretariat Services/City Clerk. The MFIPPA Core Office, under the direction of the Manager of Municipal Elections & MFIPPA, carries out and is responsible for the daily administration of the *Act*, including receiving and processing access requests, providing advice and communicating with corporate staff, serving members of the public and helping to ensure that the privacy requirements of the *Act* are met.

When an MFIPPA request is received at the City, it must be forwarded immediately to the MFIPPA Core Office so that proper processing of the request may begin and be completed within the prescribed 30-day response time. Within this time frame, MFIPPA staff gathers the records relevant to the request and reviews them to determine whether any exemptions may apply. Under MFIPPA, a record can be any machine-readable record, paper documents, draft documents, notes on post-its, photographs, e-mails, voice-mails, and electronic data. In all cases, the City provides the requester with a written decision detailing whether the records can be disclosed in accordance with MFIPPA. When disclosure is possible, the City provides the requester with photocopies of the records, or, if requested, the requester may view the records at City offices.

All decisions of the City with respect to access to information may be appealed to the Information and Privacy Commissioner of Ontario (“IPC”). This independent body has advisory, investigation and order-making powers to ensure that

municipalities are compliant with the provisions of MFIPPA. When the IPC receives an appeal, the matter generally proceeds through three stages: the intake, mediation and adjudication stages. If the appeal is resolved during the intake or mediation stage, it will not be necessary to proceed to adjudication. If any issues remain unresolved, an inquiry will be held and an adjudicator will issue a written order disposing of the outstanding issues. The City must comply with any provisions contained in the order.

Access by Councillors to General Information at the City of Ottawa

Every person has a right of access to a record in the custody or under the control of the municipality, unless the record falls within one of the exemptions specified in the *Act*. An exemption is a reason why information may not be released. If only part of the record is exempt, it will be severed and portions of the record will be released.

An elected official does not have any special right of access to information under the *Act*. The rules of the *Act* concerning access requests apply to councillors in the same manner as they do to the general public. A City councillor, like all City managers and employees, may only have access to information if such access is not contrary to MFIPPA. The same is true for former members of council or employees who, at one time, may have had access to records in the performance of their duties.

Notwithstanding this, **councillors may have a right of access to certain types of information that would not be available to the general public, if they require the information in their**

capacities as members of council in order to carry out duties related to that function. At the City of Ottawa, the following process and guidelines apply:

1. Council members seeking access to information that is not ordinarily available to the public should direct their requests to the appropriate general manager. MFIPPA staff, together with the general manager, will review the information and the applicable provisions of the *Act* to ensure that disclosure of information to the councillor is in accordance with legislative requirements.
2. Depending on the nature and type of information requested, the information provided to Councillors may be stamped “NOT FOR PUBLIC RELEASE” (for example, in the case of draft reports on pending projects or policies, legal advice, or details of ongoing negotiations or transactions). In these circumstances, the information in question is considered to be confidential and the council member is prohibited from releasing the information in any format, without the express authorization of council. The same is true for information provided to councillors in preparation for *in camera* council or committee meetings.

Access Outside One’s Capacity as Member of Council

There may be circumstances in which a councillor, who is not acting within his or her official capacity as member of council, requests access to information. The councillor may submit a formal application under the *Act*. In this case, the councillor has the same status as any member of the public when requesting this information, and staff will apply the *Act* in the normal manner to determine whether access may

be granted. At the City of Ottawa, access request forms are available at the reception area of the councillors’ offices or on MOE (the City’s intranet site) under the heading, *Freedom of Information*. Instructions for submitting an MFIPPA request are included on the form, and MFIPPA staff is available to answer any questions.

Access to Personal Information at the City of Ottawa

Where a councillor acting in the capacity of member of council seeks access to personal information of a third party (for example, an employee or a constituent), the councillor may only obtain the personal information if disclosure is specifically authorized under section 32 of the *Act*. Examples of authorized disclosure are:

- With consent of the individual;
- In compelling circumstances affecting the health or safety of an individual;
- In compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill, or deceased; or
- Where disclosure to City Council as a whole (i.e., in council or committee meetings) or to the individual councillor is required to fulfil a duty as an officer under the *Municipal Act* or other federal or provincial legislation.

Protection of Privacy Obligations

Councillors who have received access to personal information or other confidential information in the performance of their duties have a responsibility to protect this information while it is in their possession. These obligations are part and parcel of the overall obligations imposed on the City under the *Act's* protection of privacy provisions. Councillors must therefore ensure that the privacy of the individual to whom the information relates is protected at all times, and must keep the information physically secure so as to avoid unauthorized disclosure or destruction. Ways to protect personal privacy would include:

- Not leaving a document containing personal information on your desk, in your car, in your home or other areas where others may have access to it;
- Ensuring that personal information on your computer screen is not visible to others;
- Ensuring that the files in your office are secure;
- Not discussing the personal information of others in open areas, such as reception areas and hallways; and;
- Not disclosing an individual's personal information during a public council meeting without the individual's written consent.

A Councillor's Own Records – Are They Accessible?

Custody or Control

It is important to remember that the access provisions of the MFIPPA cover records that are in the custody or under the control of the City of Ottawa. According to the IPC, “a record need only be in the custody or under the control of an institution” in order to be subject to an access request under the *Act*. (IPC Order P-994). This includes information created by a third party that has been provided to, or obtained by, the City.

Councillors' records are considered “personal” records that are not subject to the *Act* where they are not related to the discharge of the councillor's responsibilities as member of council or to some aspect of City Council's mandate, and they are not in the custody or control of the City. A careful analysis of all relevant factors is required.

There are a number of criteria used to determine whether a record is in the custody or under the control of a municipality. The issue of custody and/or control will be decided on the particular facts and circumstances of each case. The following factors illustrate the analysis used in determining issues of custody or control:

IPC Order 120:

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the record?
- Does the institution have possession of the record, either because it has been voluntarily provided by the creator, or pursuant to a mandatory statutory or employment requirement?

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
- Does the institution have a right to possession of the record?
- Does the content of the record relate to the institution's mandate and functions?
- Does the institution have the authority to regulate the record's use?
- To what extent has the institution relied upon the record?
- How closely is the record integrated with other records held by the institution?
- Does the institution have the authority to dispose of the record?

Order MO-1251 cited other factors for consideration:

- Does the [municipality] have a statutory power or duty to carry out the activity which resulted in the creation of the records? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (March 7, 1997, Toronto Doc. 283/95 (Ont. Div. Ct.), affirmed [1999] O.J. No. 4072 (C.A.))]
- Who paid for the creation of the records? [Order M-506]
- What is the customary practice of the [municipality] and institutions similar to the [municipality] in relation to possession or control of records of this nature, in similar circumstances?
- Who owns the records? [Order M-315]

These lists are not exhaustive – other factors may also be considered when determining custody or control. There are no hard and fast rules to decide whether a record is under the “custody or control” of the City of Ottawa and therefore subject to the *Act*. Even records relating to constituency matters may be accessible if a consideration of the factors leads to the conclusion that they are in the custody or control of the institution.

Where a Councillor is an “Officer”

When a councillor is also an “officer” of the municipality, the records related to the duties of that office are considered to be municipal records and are subject to the provisions of the *Act*. However, a member of a municipal Council will be considered an officer only in unusual circumstances. This typically occurs only when a councillor has been appointed as a commissioner, superintendent or overseer of any work pursuant to section 256 of the *Municipal Act*.

The Mayor is an “Officer”

The Mayor, as Head of Council, is considered an “officer” of the City. The Mayor's records that relate to mayoral duties, as opposed to constituency or personal papers, may be considered to be in the City's custody or control and therefore subject to the *Act*.

Situations in which the IPC has determined that a councillor's records were not within the jurisdiction of the *Act*:

- Where the records are the councillor's personal records and are held by the councillor in the capacity of an elected representative of a constituent and relate to the councillor's mandate and function as an elected representative only (Order M-846).

- Where the records are only held by the councillor, have never been integrated into the City's files, and the City has no authority to possess, regulate, dispose of or otherwise deal with the records (Order M-846).
- Where a councillor is acting on behalf of the constituent in furthering the constituent's interest rather than the interests of the corporation or Council, and the City does not have custody or control of the records (Order M-813).
- Possession of a record does not necessarily amount to custody – for example, receiving constituency records at the City Hall office may not necessarily mean that the records are automatically in the custody of the City (Order M-813). Alternatively, custody or control may exist even where there is a lack of physical possession by the City, depending on the circumstances.

Situations in which the IPC has determined that the records were within the jurisdiction of the *Act*:

- Political records, even though they did not relate to the institution's functions or mandate, were considered to be within the institution's custody because the records had been integrated into the operation of the institution, including the institution's filing system. An employee of the institution was found to have assumed responsibility for the care of the records and the control over their use (Order P-267).
- A report commissioned and drafted by an external agency but submitted to and kept by the [municipality] (Order P-3).

Assistance with MFIPPA

The City's Freedom of Information Co-ordinator and the Information and Privacy Commissioner's Office are available to answer any questions regarding the operation of the *Act*, your right of access to information, or the protection of personal information at the City of Ottawa.

Within the City of Ottawa, please contact the MFIPPA Core Office at 580-2424, extension 21898. You may also review explanatory information on the City's Intranet site (*MOE*) under the heading, "Freedom of Information." The site includes a link to the Information and Privacy Commissioner's website, which contains the legislation, orders, privacy complaint reports and other related material. The IPC may be contacted directly at:

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