



## The *Municipal Freedom of Information and Protection of Privacy Act* and Councillors' records

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### INTRODUCTION

The Information and Privacy Commissioner of Ontario (IPC) sometimes decides appeals relating to requests for access to records created or held by municipal councillors. The *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* does not expressly refer to records of municipal councillors and, therefore, before a determination can be made on access to those records, the IPC must decide whether *MFIPPA* applies. In making this decision, the IPC examines the specific facts of each case in light of a number of principles.

The IPC has been calling for amendments to *MFIPPA* to clarify when it applies to these records, including in August 2015, when the IPC wrote to the Minister of Municipal Affairs and Housing setting out proposed amendments (this letter is available on the IPC's [website](#)).

In the absence of amendments, however, the IPC is issuing this fact sheet, which explains when and how councillors' records are subject to *MFIPPA*.

### WHEN ARE COUNCILLORS' RECORDS SUBJECT TO *MFIPPA*?

Councillors' records are subject to *MFIPPA* 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. the records are in the custody or control of the municipality.

### WHEN IS A COUNCILLOR AN OFFICER OR EMPLOYEE OF A MUNICIPALITY?

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

The term “officer” refers to a “high ranking individual within the municipal civic service, who exercises management and administrative functions, and who derives his or her authority either from statute or from council” (IPC Order M-813).

The courts have found that elected members of a municipal council are not agents or employees of the municipal corporation in all circumstances. This is consistent with the treatment of Members of Provincial Parliament under the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

In applying these principles, the IPC has found in many cases that municipal councillors are not officers or employees of a municipal institution. For example, in Order MO-2821, the IPC found that communications between municipal councillors about cycling issues were not created in their capacity as officers or employees of the city. This office decided that although the councillors were members of a city committee, the records did not relate to the discharge of any special authority to act on behalf of the city. In Order MO-2824, the IPC determined that the analysis of whether or not a councillor is an officer did not turn on who the councillor communicated with, but rather in what capacity the councillor was acting.

In other situations, the IPC has found that a councillor is an officer or employee of a municipal corporation. For example, a mayor is an officer of a municipality, as he or she is its chief executive officer (IPC Order MO-1403). Therefore, records created or received in connection with his or her duties as a mayor are covered by *MFIPPA*, in the same manner as the records of city employees or other officials of the city.

## DOES THE MUNICIPALITY HAVE CUSTODY OR CONTROL OF THE RECORDS?

Even where a councillor is not an officer or employee of a municipal corporation, the IPC may still find that the councillor’s records are subject to *MFIPPA* because they are in the custody or control of the institution. These findings are based on section 4(1) of *MFIPPA* that states “every person has a right of access to a record or part of a record **in the custody or under the control** of an institution” unless specific exemptions apply.

A record does not need to be both in the custody and under the control of an institution, but rather one or the other (IPC Order P-239).

The IPC has interpreted “in the custody or under the control” broadly, and considers a number of factors in making a determination under section 4. These factors go beyond the physical location of a record, and involve factors such as the purposes of the record, its originator, and whether the record pertains to the institution’s mandate or functions. For example, bare possession of municipal councillors’ records by itself may not establish that a municipality has “custody or control” of those records. (*City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.)). For a list of some of the factors, please see Appendix A.

In cases where the record is not held by an institution, such as where it is solely held by a councillor, the IPC looks at the factors set out in Appendix A within the framework of the following two-part test from *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII):

1. Do the contents of the record relate to the institution's business?
2. Could the institution reasonably expect to obtain a copy of the record upon request?

On the second question, the Supreme Court of Canada stated:

...all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder... The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly (*National Defence*).

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

## RECENT IPC ORDERS

In finding that the City of Vaughan had control of toll road invoices held by councillors in Order MO-2750, the IPC considered that:

- the city reimbursed the councillors for expenses incurred using the toll road because the councillors incurred them in the conduct of city business. The city made the reimbursements in accordance with city policy, and
- the city's policy required the councillors to retain supporting invoices and entitled the city to obtain copies of them on request

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

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

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

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

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

- the records related to the councillor's role as an individual constituent representative and were in their nature "political" rather than "city" records
- the councillor had no express authority to act for the city in regards to this matter
- the records (if they existed) related to a matter that was speculative or hypothetical, and
- an agreement to bring an NFL team to the city was not discussed or reviewed by the city and no agreement ever materialized

## CONCLUSION

Determining whether councillors' records are subject to *MFIPPA* very much depends on the context. It involves a consideration of a number of factors and circumstances to determine first whether the councillor is either an officer or employee of a municipality and, if not, whether his or her records are in the custody or under the control of the municipality.

Municipalities need to take steps to ensure the transparency of their business activities and the privacy of personal information entrusted to them. To address the unique role of municipal councillors, municipalities should develop comprehensive policies and procedures regarding the appropriate management of records relating to the conduct of municipal business and the protection of privacy. These policies and procedures should inform councillors that, on occasion, they will be required to provide city staff with records to respond to an FOI request. To ensure that the policies and procedures are followed, municipalities should provide training on them during orientation of councillors and on a regular basis throughout their tenure.

## APPENDIX A

The IPC has developed a list of factors to consider in determining whether a record is in the custody or control of an institution. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- 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 a statutory power or duty to carry out the activity that resulted in the creation of the record?
- Is the activity in question a “core”, “central” or “basic” function of the institution?
- Does the content of the record relate to the institution’s mandate and functions?
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the institution does have possession of the record, is it more than “bare possession”?
- 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 institution have the authority to regulate the record’s content, use and disposal?
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record?
- How closely is the record integrated with other records held by the institution?
- What is the customary practice of the institution and other similar institutions in relation to possession or control of records of this nature, in similar circumstances?