

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3450

Appeal MA16-369-2

Town of Kapuskasing

May 26, 2017

**Summary:** The appellant requested records from the Town of Kapuskasing related to the audited financial statements of the Federation of Northern Ontario Municipalities. The town's decision that the requested records are not in the custody or under the control of the town for the purposes of section 4(1) of the *Municipal Freedom of Information and Protection of Privacy Act* is upheld and the appeal dismissed.

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

### OVERVIEW:

[1] Following his review of the audited financial statements of the Federation of Northern Ontario Municipalities (FONOM), the appellant made a request to the Town of Kapuskasing (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for cheque images, receipts and bank statements as well as memos, designations for funds, meeting minutes, emails, written communications and other information referred that could further explain entries in the financial statements.

[2] The town advised the appellant that the information requested was not under the custody or control of the town. The appellant appealed the town's decision. Mediation did not resolve the appeal and the appellant asked that the appeal proceed to adjudication, where an inquiry is held.

[3] During the inquiry, I sought and received representations from the town, FONOM and the appellant. Representations were shared in accordance with *IPC Practice Direction 7*.

[4] In this order, I find that the records sought by the appellant are not in the custody or under the control of the town for the purposes of section 4(1) of the *Act*.

## **DISCUSSION:**

[5] The sole issue in this appeal is whether records relating to the audited financial statements of FONOM are in the custody or control of the town.

[6] FONOM is not an "institution" for the purposes of the *Act* and therefore not subject to the *Act's* provisions regarding access to records. Seeking greater transparency about the workings of FONOM, the appellant made a request to the town for FONOM records, arguing that the FONOM records he seeks are in the custody or control of the town.

[7] Section 4(1) 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 . . .

[8] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[9] A record is subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.<sup>1</sup> The courts and this office have applied a broad and liberal approach to the custody or control question.<sup>2</sup> This office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution.<sup>3</sup>

## **Parties' arguments**

[10] The appellant's arguments that are relevant to the issue of whether the requested records are in the custody or control of the town are:

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<sup>1</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>2</sup> *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.

<sup>3</sup> Orders 120, MO-1251, PO-2306 and PO-2683.

1. The town's mayor is the President of FONOM and the mayor uses the same contact information, including an email address, for both functions;
2. Since the town's mayor became president of FONOM, FONOM's physical office and mailing address has been the same as the town's and the appellant notes that FONOM does not appear to pay to lease its premises;
3. When making submissions on a provincial bill on behalf of FONOM, the FONOM president was also acknowledged as the town's mayor and addressed accordingly.

[11] FONOM's representations are that it holds and controls all of its financial records.

[12] The town submits that it receives information from FONOM by virtue of its membership of FONOM, including presentations and news releases, and other information available on FONOM's website. It says the requested information is not in its custody or control but is created by and in the possession of FONOM. It says the requested records do not relate to a town matter.

### **Analysis**

[13] The appellant seeks detailed information that underlies FONOM's financial statements. Given the evidence of FONOM's clearly distinct organizational structure and financial status, the appellant's evidence is insufficient to support a conclusion that the FONOM financial records the appellant seeks are in the custody or under the control of the town for the purposes of section 4(1) of the *Act*.

[14] FONOM is a municipal association whose members are composed of cities, towns and municipalities. FONOM's website states that it represents over 110 cities, towns and municipalities in Northern Ontario. FONOM has a written constitution which governs its operation including membership eligibility and executive composition. FONOM's constitution sets out its mandate and objectives:

FONOM is the unified voice for the people of Northeastern Ontario municipalities.

Our Mission is to improve the quality of life for all citizens and to ensure the future of our youth.

[15] FONOM produces an annual report and holds annual business meetings for its members.

[16] FONOM's constitution sets out that its affairs are managed by an executive committee, comprised of one representative from each of four named major municipalities or cities and one representative from each of seven named territorial districts. FONOM employs an executive director to assist in carrying out its mandate and

objectives.

[17] It is clear that though FONOM's mandate and purpose have some commonality with the town's function, FONOM clearly has a broader constituency than the town. It operates accordingly, with its own finances, including revenue sources and expenditures, as set out in its audited financial statements. The financial statements show that FONOM's revenue sources include membership fees, conference fees, sponsorships and grants. There is no evidence that the town has any connection to FONOM's financial affairs, except for, presumably, paying a membership fee and its mayor receiving a honorarium as FONOM's president, as provided for in FONOM's constitution.

[18] Finally, that FONOM shares a physical and mailing address with the town may mean that the town has a transitory physical possession of mail sent to FONOM. However, this falls well short of the evidence needed to support a conclusion that the town has custody or control of the records the appellant seeks.

[19] In reaching my conclusion I have also considered section 2(3) of the *Act*, which states:

Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated under clause (c) of the definition of "institution" in subsection (1) is deemed to be a part of the municipality for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality.

[20] It is clear from FONOM's constitution and its operation, as demonstrated by its annual reports, that FONOM is not part of the town by operation of section 2(3) of the *Act*. FONOM's constitution guarantees that its executive comprises representatives from across the geographic area it represents, not just from the town. The town's one representative on the FONOM executive is currently the FONOM president, but the town is not guaranteed any representation on the executive under the FONOM constitution. The town's involvement with FONOM does not, and, under the constitution, could not, meet the threshold for section 2(3) to apply.

**ORDER:**

I find that the records the appellant requested are not "in the custody" or "under the control" of the town for the purpose of section 4(1) of the *Act*. The appeal is dismissed.

Original Signed by: \_\_\_\_\_  
Hamish Flanagan  
Adjudicator

\_\_\_\_\_ May 26, 2017