

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3607

Appeal MA16-115

Township of Springwater

May 17, 2018

Summary: The township received a request under the *Act* for access to all emails from the non-township email accounts of the Mayor, Deputy Mayor and a councillor relating to a specific land development within the township. After contacting the three individuals, the township denied access to any responsive records that might exist on the basis that it does not have custody of or control over the records within the meaning of section 4(1) of the *Act*. In this order, the adjudicator upholds the township'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 4(1).

Orders and Investigation Reports Considered: Orders M-813, MO-2821, MO-3281, MO-3287, MO-3471.

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

OVERVIEW:

[1] The Township of Springwater (the township) received a request for access to records under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) which read as follows:

We are writing to request access to all emails sent from and received by:

- All non-Township email accounts of [the Mayor]
- All non-Township email accounts of [the Deputy Mayor]
- All non-Township email accounts of [a named councillor – councillor A]
- All non-Township email accounts of [a second named councillor – councillor B]

that involve any members of Township Council and senior staff concerning Township business.

In addition, we request access to all electronic records concerning Township business created or received by the above-noted Councillors through any other means, including, but not limited to, text messages and social media records.

[2] The request identified that it covered the time period from November 2014 to the date of the request.

[3] The township responded to the appellant's request by letter in which it confirmed its understanding of the request, and issued an interim access decision. The letter also identified the five components of the request, and confirmed the identities of the individuals with the township whose information was sought, including the names of the other "members of township council" (three other named councillors) and "township staff" (seven named senior staff members). Attached to the decision were three appendices which identified its responses to the various aspects of the request.

[4] The township subsequently notified a number of affected persons about the request, inviting their views on access to the requested records. It then issued a further decision to the appellant, in which it indicated:

- with respect to the requested records of [councillor A and the other three members of township council], the township advised it had received responsive records and representations from these four councillors, and that it would be issuing a decision regarding access to the responsive documents for these individuals (subject to further notification requirements);
- with respect to the requested records of the Mayor, the Deputy Mayor, and councillor B, the township stated that these individuals had "declined" to provide records to the township based on their view that their "non-Springwater" accounts are not subject to the *Act*. The township therefore stated:

Access to [non-Springwater accounts of these three account holders] is denied, as the Township does not have access to the

non-Springwater accounts, the account holders have declined access by the Township, therefore [the township is] unable to make an informed decision.”

[5] Following the township’s issuance of that decision, it wrote a further letter to the appellant in which it noted that Order MO-3281, recently issued by this office, was relevant to this access request. The township then confirmed its earlier decisions, and attached an index which summarized its decision regarding the various parts of the request.

[6] The appellant appealed the township’s decision.

[7] During mediation, the appellant confirmed it was only appealing the township’s denial of access with respect to the individuals who declined to provide the township with access (the Mayor, Deputy Mayor and councillor B). It also confirmed that it had narrowed its request such that “township business” means “growth management in the Township, including, but not necessarily limited to, land development within the Midhurst Secondary Plan Area” for the period from December 1, 2014 (6:00 pm) to August 31, 2015.

[8] Mediation did not resolve this appeal and the file was transferred to the inquiry stage of the process.

[9] The sole issue in this appeal is whether the requested records remaining at issue (if they exist) are in the custody or control of the township.

[10] I sent a Notice of Inquiry to the township and the three individuals whose information remains at issue (the affected parties), initially. I invited representations on whether the requested records were in the custody or control of the township. In addition, the three affected parties were asked to address specific questions concerning their use of non-Springwater accounts.

[11] The township and the three affected parties all provided representations in response.

[12] I then sent the Notice of Inquiry, along with the representations of the township and affected parties, to the appellant. The appellant provided representations in response.

[13] In this order I find that, in the absence of any reason to believe that personal email accounts are being used to conduct township business, emails to and from such accounts are not in the custody or control of the township within the meaning of section 4(1) of the *Act*, and I dismiss the appeal.

RECORDS:

[14] The requested records at issue in this appeal are:

All [emails sent from or received by] Non-Springwater email accounts and text messages regarding "Township business" (defined as growth management in the township, including, but not necessarily limited to, land development within the Midhurst Secondary Plan Area) sent from and received by the Mayor, Deputy Mayor and Councillor B that involve any members of Township Council and senior staff ([7 named staff]) for the period from December 1, 2014 (6:00 pm) to August 31, 2015.¹

DISCUSSION:

Preliminary matter – request for emails sent from or received by personal email accounts

[15] The request resulting in this appeal is for all emails in *non-township* email accounts of the affected parties. It is not for records in the township email accounts of these individuals. It is clear from the representations of the parties that, as a general rule, the affected parties have and use their township email accounts for township business.

[16] In its appeal letter the appellant took the position that emails generated from the personal email accounts of these three individuals, but which pertain to township business, are within the custody and control of the township. The appellant referred to Order MO-3281 in support of its position. It stated:

... There is every reason to suspect that the Mayor, Deputy Mayor, and [councillor B] carried out Township business pertaining to these initiatives from their non-@springwater.ca email accounts.

[17] The appellant also identified their understanding that the township provides computers to councillors for their use, and pays for their at-home internet connection. The appellant states that this supports their belief that it is "commonplace for councillors to carry on township business using their personal email accounts."

[18] Other than the appellant's statements above, there is no other evidence to support the appellant's "suspicion" that the affected parties use their personal email accounts to conduct township business. That the township may provide computers and at-home internet connectivity to councillors does not support the appellant's view that the councillors are using their personal email accounts to conduct township business. These tools can also be used to access and use township email accounts.

[19] The *Act* clearly applies to records in the custody or under the control of the institution. Absent circumstances which suggest that councillors (or, for that matter,

¹ The reference to records sent from or received by the Mayor, Deputy Mayor and councillor B that involve any members of Township Council includes, by definition, any correspondence involving these three individuals and any other members of Township Council (including each other and other members of council).

any township officers or employees) use their personal email accounts to conduct township business, there is no obligation in the *Act* on councillors, officers or employees to search their personal email accounts. Apart from such circumstances, (such as those resulting in Order MO-3281), emails sent or received through personal email accounts are not in the custody or control of an institution.

[20] Within this context, I have conducted this inquiry and my decisions regarding the custody or control of records in the affected parties' email accounts are set out below.

[21] Lastly, I note that the Mediator's Report confirmed that the appellant was only appealing the township's denial of access with respect to the individuals who declined to provide the township with records from their personal email accounts (the Mayor, Deputy Mayor and councillor B). The appeal does not cover any responsive records in the possession of township staff which would be in the township's possession, and in the custody or control of the township.² This appeal proceeded on the basis of the request for any records held by the three affected parties in their non-Springwater accounts, relating to the identified development issue.

CUSTODY OR CONTROL

Are the requested records "in the custody" or "under the control" of the institution under section 4(1)?

General principles

[22] Section 4(1) of the *Act* 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 . . .

[23] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.³ "Custody" and "control" are not defined terms in the *Act*.

[24] It is important to note that a finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.⁴ A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[25] The courts and this office have applied a broad and liberal approach to the

² Order MO-3511.

³ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁴ Order PO-2836.

custody or control question.⁵

Factors relevant to determining "custody or control"

[26] This office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.⁶ 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?⁷
- What use did the creator intend to make of the record?⁸
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁹
- Is the activity in question a "core", "central" or "basic" function of the institution?¹⁰
- Does the content of the record relate to the institution's mandate and functions?¹¹
- 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?¹²
- If the institution does have possession of the record, is it more than "bare possession"?¹³
- 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?¹⁴

⁵ *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.

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

⁷ Order 120.

⁸ Orders 120 and P-239.

⁹ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹⁰ Order P-912.

¹¹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.

¹² Orders 120 and P-239.

¹³ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁴ Orders 120 and P-239.

- Does the institution have a right to possession of the record?¹⁵
- Does the institution have the authority to regulate the record's content, use and disposal?¹⁶
- 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?¹⁷
- To what extent has the institution relied upon the record?¹⁸
- How closely is the record integrated with other records held by the institution?¹⁹
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?²⁰

[27] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?²¹
- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record?²²
- Who paid for the creation of the record?²³
- What are the circumstances surrounding the creation, use and retention of the record?²⁴
- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the

¹⁵ Orders 120 and P-239.

¹⁶ Orders 120 and P-239.

¹⁷ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁸ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

¹⁹ Orders 120 and P-239.

²⁰ Order MO-1251.

²¹ PO-2683.

²² Order M-315.

²³ Order M-506.

²⁴ PO-2386.

creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?²⁵

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?²⁶ If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?
- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?
- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?²⁷
- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?²⁸
- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?²⁹

[28] In determining whether records are in the “custody or control” of an institution, the above factors must be considered contextually in light of the purpose of the legislation.³⁰

[29] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,³¹ the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

²⁵ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

²⁶ Orders M-165 and MO-2586.

²⁷ *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v. Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).

²⁸ Order MO-1251.

²⁹ Order MO-1251.

³⁰ *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, cited above.

³¹ 2011 SCC 25, [2011] 2 SCR 306.

[30] The term "institution" is defined in section 2(1), and includes a municipality. The definition of "institution" does not specifically refer to elected offices such as a municipal councillor.

[31] In *St. Elizabeth Home Society v. Hamilton (City)*,³² the Ontario Superior Court of Justice described the relationship between a municipal council and its elected members 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.

[32] In Order M-813, the adjudicator reviewed this area of the law and found that records held by municipal councillors may be subject to an access request under the *Act* in two situations:

- Where a councillor is acting as an "officer" or "employee" of the municipality, or is discharging a special duty assigned by council, such that they may be considered part of the "institution"; or
- 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.

[33] In Order MO-3471, the adjudicator identified the approach taken by this office to records held by municipal councillors as follows:

Based on consideration of [the above] factors, several previous orders of this office have found that city councillors' communications were not in the custody or under the control of the city in the circumstances of those appeals.³³ For example, in Order MO-2821, communications between City of Toronto councillors about cycling issues were found not to be under the control of the city. The adjudicator in that appeal distinguished between city records, on one hand (which would be subject to the *Act*), and personal or political records, on the other (which would not), and found the records at issue to fall in the latter category.

[34] In light of the above, I will review whether the requested records are in the

³² (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

³³ See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

custody or control of the township.

Representations

The township's representations

[35] The township states that it does not have physical or electronic possession of the requested records at issue, and that it therefore does not have custody of the records.³⁴

[36] Regarding whether the township has control of the records, the township confirms that any non-Springwater email accounts are created, accessed and maintained by the creator only. They are not located on the township servers, and the township is not able to access, retain or retrieve the records from those accounts without the consent and assistance of the holders of the accounts. The township confirms that it cannot therefore search for any possible responsive records. It then states:

It is the position of the Township that the records at issue would not have been created by an officer or employee of the institution. Members of Council are elected officials and individually do not have any legal authority to make decisions on behalf of, or bind the Township unless specifically authorized. While the Mayor is an officer of the Township under the *Municipal Act*, this authority is only exercised while performing official duties.

... members of Council [are] considered as third parties as they are not officers or employees. In accordance with *MFIPPA*, third party notices were provided to all identified members of Council ..., advising of the access request. Correspondence was received from the Mayor, Deputy Mayor and Councillor B denying access to any non-Springwater email accounts.

The Township is unable to answer questions regarding intent, use or effect of the records at issue due to not having access to such.

The representations of the affected parties

[37] As identified above, the Notice of Inquiry was sent to the three affected parties, and they were invited to provide representations on whether the requested records were in the custody or control of the township. They were also asked to address specific questions regarding their use of non-Springwater accounts including:

³⁴ As noted above, the Mediator's Report confirmed that the appellant was only appealing the township's denial of access with respect to the individuals who declined to provide the township with access (the Mayor, Deputy Mayor and councillor B), and this appeal proceeded on the basis of the request for records in the possession of these three affected parties.

- whether they sent or received communications regarding the relevant subject matter to or from the identified senior township staff or the other councillors using those accounts during the relevant timeframe and, if so,
- to identify the specific communications, including the senders and/or recipients of these communications, and explain how records of this nature would not be within the “custody or control” of the township for the purposes of the *Act*.

[38] The Mayor states that there are no business records on his non-Springwater email account that would be within the custody or control of the township. Further details of his response are set out below.

[39] The Deputy Mayor confirms that any correspondence in his Springwater email account that relates to township business is in the custody and control of the township. He confirms that he has two other email accounts. One of them is an email account relating to his business and he confirms that this account does not contain information that advances township business as defined in this appeal. With respect to his third email account, he states his belief that it “does not contain information that advances [township] business as defined in [this appeal] for the [relevant time period].” He also states he has no recollection of using these personal accounts to communicate with other council members or named staff for the time period concerning the subject matter of this appeal.

[40] Councillor B submits:

I have maintained a private Constituent email account ... to receive personal communications and provide information. I believe, as do those who communicate with me in this venue, that these exchanges are personal and confidential and trust that they will not be disclosed and/or further disseminated. This is consistent with the disclaimer included in my emails.

Because these communications are maintained in my personal account the Township of Springwater does not have care and control and is not in physical possession of my emails. The government institution could not reasonably expect to obtain a copy of the documents upon request.

There may be questions or comments in my emails related to “growth management in the Township including but not necessarily limited to land development within the Midhurst Secondary Plan Area.” ...

[41] Councillor B also identifies his concerns that providing these private constituent emails to the township or others for review would violate the expectations of privacy and confidentiality of those who corresponded with him using that email account.

The appellant's representations

[42] In its appeal letter, the appellant took the position that emails generated from the personal email accounts of these three individuals, but which pertain to township business, are within the custody and control of the township. The appellant also provided some background to the request.

[43] It states that an identified group owns land within the Midhurst Settlement Area (Midhurst) of the township, and that planning for the development of Midhurst has been ongoing since the early 1980s. The Midhurst Secondary Plan, providing for the development of the group's lands for certain uses, was adopted by the township in 2008 and approved by the County of Simcoe. It was then appealed to the OMB by what was then the Minister of Municipal Affairs and Housing (MMAH). MMAH later withdrew portions of its appeal, and other portions of the plan were approved by the OMB.

[44] The appellant states that in October 2014, certain members of the current township council were elected on a platform of open opposition to the plan. The appellant filed the current request for information in an attempt to capture all communications originating with and sent to the personal email accounts of identified members of council pertaining to the subject matter of the request.

[45] The appellant then identifies various activities that occurred in relation to the subject matter of the request during the relevant timeframe. These include public meetings hosted by the township and the township's actions in relation to its review of its Official Plan and long-range financial plan, all of which may impact development in Midhurst. The appellant draws particular attention to the following activities:

December 17, 2014 – Township Council considered and passed a resolution authorizing the Mayor and Deputy Mayor to meet and have "exploratory discussions on growth management matters" with the MMAH.³⁵

January 13, 2015 – [The Mayor] wrote, on behalf of the Township, to the MMAH and the [Minister of Energy and Infrastructure (MEI)] requesting a meeting to discuss growth in Midhurst.³⁶

March 19, 2015 – The Mayor and Deputy Mayor met with the MMAH and MEI on behalf of the Township. They provided a package requesting that the MMAH undertake several options to rescind existing and prohibit future development approvals in Midhurst.

June 1, 2015 – [The Deputy Mayor] put forward a motion to restrict the development of agricultural lands within settlement areas (including Midhurst).

³⁵ The appellant provided a copy of the referenced resolution.

³⁶ The appellant provided a copy of the referenced letter.

July 20, 2015 – [The Deputy Mayor’s] motion was debated, revised and adopted.³⁷

August 8, 2015 – [The Mayor] wrote again to the MMAH seeking a response to their March 19, 2015 meeting regarding rescinding development approvals in Midhurst.³⁸

[46] With this background, the appellant then provides representations on why the responsive records in the non-Springwater email accounts of the three affected parties are in the custody or control of the township and “should be disclosed.”

[47] The appellant argues that a liberal and purposive approach to the issue of councillor records means that the requested records ought to be disclosed, and notes that there is no exemption in the *Act* that limits disclosure of councillors’ records. The appellant then provides three alternative arguments in support of its position that the records ought to be disclosed. They are:

1. that councillors’ records are the township’s records where they pertain to municipal business;
2. in the alternative, the affected parties are officers of the township; and
3. in the further alternative, the records are within the custody and control of the township.

[48] The appellant summarizes its position by stating that the existing approach taken by this office to disclosure of councillors’ records has “created a legal fiction by separating councillors from their municipalities without a principled reason.” It states that this approach defies common sense, is contrary to the practical workings of a municipality, and frustrates the principles of *MFIPPA*. The appellant confirms its position that non-township email records of the affected parties that pertain to township business are inherently institutional records, and asks this office to order the township and the affected parties to disclose the responsive records from these non-township email addresses.

[49] The sole issue in this appeal is whether the requested records are in the custody or control of the township. All three of the appellant’s arguments address that issue, although they are based on different reasons. In the analysis of the custody and control issue set out below, I will identify the appellant’s arguments in greater detail and address them.

Previous decisions

[50] As noted above, this office has developed a list of factors to consider in

³⁷ The appellant provided a copy of the relevant excerpt from the Minutes of this meeting setting out the motion both as proposed and as passed.

³⁸ The appellant provided a copy of the referenced letter.

determining whether or not a record is in the custody or control of an institution.³⁹ The list is not intended to be exhaustive; some of the listed factors may not apply in a specific case, while other factors not listed may apply.

[51] Furthermore, unless a councillor is also an officer of the municipality,⁴⁰ this office has determined in many instances that councillors' communications are not in the custody or under the control of the municipality for the purpose of the *Act*.⁴¹ These findings are based on distinguishing official "city records" (which would be subject to the *Act*), with councillor's constituent, personal or political records (which are outside of the custody or control of the municipality and not subject to the *Act*).

[52] The adjudicator in Order MO-2821 also commented as follows on the nature of the records held by municipal councillors:

Before concluding, I wish to address the question of "constituency" records. The parties made reference to this description of councillor records, as prior decisions of this office have found councillors' constituency records to be excluded from the Act. One of the factors the appellant relied on in her Appeal Form is that the records do not involve any individual constituent. She suggests, therefore, that the records must therefore be "city records."

Although the distinction between "constituency records" and "city records" is one framework for determining custody or control issues, it does not fully address the activities of municipal councillors as elected representatives or, as described in *St. Elizabeth Home Society*, above, "legislative officers." Records held by councillors may well include "constituency records" in the sense of having to do with an issue relating to a constituent. But they may also include communications with persons or organizations, including other councillors, about matters that do not relate specifically to issues in a councillor's ward and that arise more generally out of a councillor's activities as an elected representative.

The councillors have described such records as "personal" records but it may also be appropriate to call them "political" records. In any event, it is consistent with the scheme and purposes of the Act, and its provincial equivalent, that such records are not generally subject to access requests. In *National Defence*, the Court stated that the "policy rationale for excluding the Minister's office altogether from the definition of "government institution" can be found in the need for a private space to allow for the full and frank discussion of issues" and agreed with the

³⁹ Orders 120, MO-1251, PO-2306 and PO-2683.

⁴⁰ Even if an elected official is also an officer of a municipality, their constituent, personal or political records have also been found to be outside of the custody or control of the municipality and not subject to the *Act*. See Order MO-2993.

⁴¹ See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

submission that “[i]t is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records” that Parliament sought to protect by not extending the right of access to the Minister’s office.

The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministers, do not have responsibility for a government department and are more like MPP’s or MP’s without a portfolio. A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the Act does not detract from the goals of the Act. A finding that the city, as an institution covered by the Act, is not synonymous with its elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.

[53] Furthermore, Order MO-3471 (relying on Order MO-3287) found that emails passing between a City of Vaughan councillor and a former councillor were not in the custody and control of the city. The adjudicator stated:

... I found that in the circumstances of that appeal, there was no reason to believe that such records would be anything other than personal or political records of the councillor. I also found that the fact that the city’s servers may have been used to send the emails (if they existed), taken alone, was not enough to establish that the emails were in the city’s custody or under its control.

[54] However, some orders have applied the factors mentioned above and the two-part test set out in *National Defence* and have concluded that a councillor’s records are in the custody or control of a municipality. For example, in Order MO-3281, the adjudicator found that a city councillor’s email to an investigator setting out potential terms of the investigator’s hiring by the city was under the control of the city. This finding was made because the email was in relation to a city matter and the city could reasonably expect to obtain a copy of it upon request, given that the email was integral to the city’s hiring of the investigator. I also note that the adjudicator made this finding notwithstanding the fact that the councillor’s email was sent from her personal email account and from her personal electronic device.

[55] In light of the above, I will address the specific issues in this appeal.

The appellant’s position that councillors’ records are the township’s records where they pertain to municipal business

[56] In its representations, the appellant argues that the approach taken by this office

to councillor records is flawed. The appellant argues that the township is an institution, and that this definition includes all individuals and entities affiliated with the institution, including councillors. The appellant also states that the "law is unclear about the relationship of individual councillors to the municipality itself" and that whether or not councillor records constitute records of the "institution" for the purposes of *MFIPPA* is "far from settled" for the following reasons:

- there is no principled basis in treating municipal councillors as separate from the municipality (there is no "exemption" from disclosure of councillor records in *MFIPPA*);
- councillors are an integral part of the township, and both derive their authority from the *Municipal Act, 2001*;⁴²
- the distinction between a "constituency", "personal", or "political" record of a councillor and a record created by the councillor "on behalf of" or "on the authority of" the institution is not a meaningful or principled one. Councillor records should be subject to disclosure where they relate to issues affecting the municipality (broadly defined) regardless of whether they were created by a non-municipal email address or involve discussions with constituents about municipal matters that may not be directly before Council;
- the analysis in *National Defence* is not determinative in the context of *MFIPPA*, as that decision considered the interpretation of the *Federal Access to Information Act*, [the *AIA*];
- that both *FIPPA* and the *AIA* clearly exclude certain political records and offices from application of those Acts, *MFIPPA* is silent on the exclusion of councillors' political (or other) records. Reading in such an exclusion is not in keeping with a broad and purposive interpretation of *MFIPPA*;
- the relevant and appropriate question to ask in determining whether a councillor's record is subject to disclosure is whether the record falls within the scope of the general business of the municipality. This approach is most in keeping with the purposes and principles of *MFIPPA*, as well as the practical reality of municipal institutions and the role of councillors;
- where a record generated by a municipal councillor pertains to township business, broadly defined, it must be considered a record of the institution and subject to disclosure under *MFIPPA* regardless of where it is located or stored;
- the key issue is the content of the record, not whether it came from a municipal or a personal email address;

⁴² The appellant references section 5(1) and 224(d.1). I note that both of these sections refer to the power and duty of "council", not individual councillors.

- in the present case, the subject matter of the request is clearly township business (a meeting with the MMAH on growth management in the township, the adoption of a by-law, the township's new Official Plan, and financial planning in the township). These matters are directly within the purview of the institution itself and any email records of the affected parties pertaining to these matters should be disclosed; and
- to accept the position of the township and the affected parties would be akin to accepting a position that a Notice of Motion, Minutes of a Council meeting, or a letter from a Member of Council dealing with the same subject matter as the emails requested, would not be subject to disclosure if it was printed on paper not provided by the township at a councillor's private office or home. Such a result would be absurd in relation to physical records; the same absurdity would result in relation to electronic records pertaining to township business.

Analysis

[57] As a starting point, I agree with the appellant that whether or not a record comes from an individual's personal email account is not determinative of whether an institution has custody or control of it. In Order MO-3281, the adjudicator found that an email sent by a municipal councillor on her personal device using her personal email account was in the custody or control of the city. In that case the record related to the hiring of an investigator and the creation of the record played an integral part in council's decision to retain the investigator.

[58] However, for the reasons set out below, I do not agree that the approach taken by this office to councillor records is flawed.

[59] The adjudicator in Order MO-2821 directly addressed the policy rationale for applying the current approach taken by this office to councillor records, and stated that taking the approach to "political" or "constituent" records and finding that they are not generally subject to access requests accords with the scheme and purposes of both *MFIPPA* and its provincial counterpart, *FIPPA*. As set out above, she also referenced the Supreme Court of Canada decision in *National Defence*, where the Court stated that the "policy rationale for excluding the Minister's office altogether from the definition of 'government institution' can be found in the need for a private space to allow for the full and frank discussion of issues." She noted that the Court agreed with the submission that "[i]t is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records" that Parliament sought to protect by not extending the right of access to the Minister's office. Furthermore, as set out above, she found that the policy rationale applies with greater force in the case of councillors, and that a finding that a municipality is not synonymous with its elected representatives is "consistent with the nature and structure of the political process."

[60] I have also considered the appellant's arguments in support of a revised approach to councillor records. I do not accept the appellant's position that the analysis

in *National Defence* is not determinative in the context of *MFIPPA*. I am satisfied that the approach taken by the Supreme Court of Canada in that decision is applicable to the custody and control issue here. I am also not satisfied that the wording of *FIPPA* and the *AIA* is determinative of the approach to take to councillor records. In addition, I reject the appellant's comparison of the approach taken by this office to deciding whether a record is in the custody or control of an institution based on what paper it was printed on. Order MO-3281 clearly identifies that it is the nature of the document, not necessarily where or how it is stored, that determines custody or control.

[61] Accordingly, I will review the records using the approach to the issue of councillor's records identified in the previous orders of this office.

Were the records created by an officer of the township or are they otherwise in the custody or control of the township

[62] Throughout this appeal the township has confirmed that the Mayor is an officer of the township. It states:

... While the Mayor is an officer of the Township under the *Municipal Act*, this authority is only exercised while performing official duties.

[63] The appellant takes the position that the Deputy Mayor and councillor B were also officers of the township. Previous orders have identified the examples of possible "unusual circumstances" where a municipal councillor may be considered an "officer" of an institution; however, given the nature of the request (for personal email accounts) and the representations of the parties, whether or not these individuals were acting as "officers" of the township is not definitive of the issue.⁴³

[64] As noted above, records in the hands of elected representatives may be found to be in the "custody or control" of an institution under the *Act*. The courts and this office have applied a broad and liberal approach to the custody or control question.⁴⁴ The list of factors to consider, and the two-part test established by the Supreme Court of Canada is set out above. Furthermore, regarding the second part of the test (whether the government institution could reasonably expect to obtain a copy of the document upon request), the Court stated that:

...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

⁴³ See Order MO-3281, where certain emails from the personal email account of a councillor who was clearly not an "officer" were nevertheless found to be under the control of the municipality because of their nature and content.

⁴⁴ *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.

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.

[65] The two-part test in *National Defence* has been applied by this office to questions of custody or control, where the records are in the possession of elected representatives.⁴⁵

[66] The appellant takes the position that the requested records are within the custody and control of the township based on an application of the factors and the test previously applied by the IPC including:

- the subject matter of the request is relevant to "core" and "central" functions of the municipality and clearly relates to the institution's mandate and functions;
- physical possession should not be a relevant factor in determining whether a record is part of an institution.

[67] Regarding the two-part test established in *National Defence*, the appellant states:

1. The requested records clearly relate to township business, and
2. The township could reasonably expect to obtain a copy of the document upon request. The appellant notes that in MO-3281 the adjudicator placed "considerable weight" on the fact that the record in question pertained to a concrete matter before City Council. In the circumstances of this appeal, township council considered numerous matters related to the subject matter of the request.

[68] Lastly, the appellant argues that the affected parties did not provide satisfactory explanations about the requested records and failed to provide sufficiently direct answers to the questions posed to them in the Notice of Inquiry. I address these arguments below.

The requested records from the Mayor

[69] As noted, throughout this appeal the township has confirmed that the Mayor is an officer of the township while performing official duties.

[70] Previous orders have found that records held by a Mayor in connection with his duties as a Mayor are covered by the *Act*, in the same manner as the records of city employees or other officials of the city, and subject to any applicable exemptions.⁴⁶

⁴⁵ See Orders MO-2821, MO-2993, MO-3281, MO-3471 and MO-3511.

⁴⁶ Orders MO-2993, MO-1403 and MO-1867.

This office has found, however, that records of a personal nature or “constituency records” that are maintained separately from those about a city’s business, are not subject to the *Act*.⁴⁷

[71] The township has confirmed that any non-Springwater email accounts are created, accessed and maintained by the creator only. It states that any such accounts “... are not located on the township servers, and that township is not able to access, retain or retrieve the records from those accounts without the consent and assistance of the holders of the accounts.”

[72] The Mayor was asked to address the issue of whether any records on any non-Springwater email accounts are in the custody or control of the township.

[73] The Mayor states that, after reviewing the indicia of custody and control set out above, and after reading Order MO-3281, there are no business records on his non-Springwater email account that would be within the custody or control of the township. He then states:

... I am not withholding any record from my personal accounts that advance the business of the corporation or required to conduct my function as Mayor. All such records are contained in my Springwater Custody and Controlled accounts or on their devices. ...

...The institution has not relied on any communication on non-Springwater accounts of any kind. ...

[74] The Mayor also confirms that the township does not have access to his personal accounts, and that his personal records are not shared on any device or server in the custody and control of the township.

[75] With respect to the two-part test established in *National Defence*, the Mayor states that to the best of his knowledge there are no documents outside of the custody and control of the institution that meet the criteria in part one of the test. With respect to the second part of the test, the Mayor states that the township “could not reasonably expect to obtain a copy of any non-Springwater account documents.” The Mayor also specifically states that he did not send or receive any communications using non-Springwater email accounts and/or text messages regarding the identified subject matter from or to any of the named senior staff during the applicable time period, and that he is not aware of any document that would be considered in the custody and control of the institution being shared outside of official channels of communication.

[76] The appellant argues that the Mayor does not provide a satisfactory explanation in response to the questions asked regarding his personal email account. It states:

⁴⁷ Ibid.

The [parties] appear to take the position that any records from their personal email accounts are not within the custody and control of the Township. The Township and Affected Parties are relying upon the threshold issue of "custody and control" to provide a blanket refusal to disclosure or cooperation with the IPC. The IPC has previously held that whether a record comes from a councillor's personal email account is not determinative.

[77] The appellant then reviews the four questions asked of the affected parties and states that the answers "were unresponsive." With respect to the Mayor, the appellant argues that his response to one of the questions refers to his position that the records are not in the custody and control of the township, but that what constitutes custody or control is "the very legal question" in dispute on this appeal and the Mayor's opinion on this question is not determinative. It also states:

The Affected Parties' blanket refusal to cooperate with the IPC based on the issue of "custody and control" frustrates the purpose of *MFIPPA* to provide a right of access to information and precludes the IPC from performing its administrative duties to determine access to information issues. If the Affected Parties were conducting the business and affairs of the Township on non-Springwater accounts, these records fall under the scope of *MFIPPA*'s disclosure obligations, subject to any applicable exemptions as provided for in *MFIPPA*. ...

[78] As noted above, whether or not a record comes from an individual's personal email account is not determinative of whether an institution has custody or control of it. However, in this appeal the Mayor has unequivocally stated that any records that advance the business of the corporation or are required to conduct his function as Mayor are located in his "Springwater Custody and Controlled accounts or on their devices." He also states that he is not withholding any such records from his personal accounts.

[79] I understand the appellant's stated concerns that the Mayor's response to the specific questions refers to the custody or control issue, which is "the very legal question" in dispute on this appeal. I agree that the Mayor's "opinion" on this question is not determinative. However, based of the information provided to me, I am satisfied that the records in the Mayor's personal email accounts are not in the custody or control of the township. I make this finding on the basis of the Mayor's clear statements that:

- he is "not withholding any record from my personal accounts that advance the business of the corporation or required to conduct [his] function as Mayor,"
- "all such records are contained in [his] Springwater Custody and Controlled accounts or on their devices", and

- “the [township] has not relied on any communication on non-Springwater accounts of any kind.”

[80] Unequivocal statements such as these satisfy me that records in the Mayor’s personal email accounts are not in the custody or control of the township. Furthermore, based on these statements, as well as the Mayor’s reference to the custody and control factors, Order MO-3281, and the test in *National Defence*, I am satisfied that the Mayor understands the importance of maintaining separate email accounts for the various roles he performs.

The requested records from the Deputy Mayor and councillor B

[81] With respect to the request for the records of the other two affected parties (the Deputy Mayor and councillor B), I have not been provided with sufficient evidence to satisfy me that records in their personal email accounts fall within the custody or control of the township.

[82] Both the Deputy Mayor and councillor B provided representations in response to the Notice of Inquiry.

[83] The Deputy Mayor confirmed that any correspondence in his Springwater email account that relates to township business is in the custody and control of the township. He also states that his business email account does not contain information that advances township business. Regarding his personal email account, he states that he does not recall using his personal accounts to communicate with other council members or named staff for the time period concerning the subject matter of this appeal, and that he believes that this account does not contain responsive information.

[84] Councillor B confirmed that he maintains a private constituent email account to communicate with constituents, and that these are “personal communications,” that they are not in the custody or control of the township and that township could not “reasonably expect to obtain a copy of the documents upon request.” I note that the councillor does acknowledge that some of these emails in his constituent account “may be questions or comments ... related to” the subject matter of the request.

[85] In light of the responses received from the Deputy Mayor and councillor B, I do not accept the appellant’s statement about the affected parties’ “blanket refusal to cooperate” in the inquiry process. These two individuals clearly considered the information in the Notice of Inquiry and responded as set out above.

[86] Furthermore, other than its very general statements made in its appeal letter, the appellant has provided no evidence that responsive records exist in the personal email accounts of these two individuals. Although the appellant’s appeal letter states that that “there is every reason to suspect that [the affected parties] carried out Township business pertaining to these initiatives from their non-Springwater email accounts,” the appellant provides no supporting evidence for this statement.

[87] As noted above, I also do not accept the appellant's position that because the township may provide computers and at-home internet connections to councillors, this supports the appellant's view that it is "commonplace" for councillors to carry on township business using their personal email accounts. Councillors clearly also have official township email accounts which could be used from various devices and locations. Whether or not councillors are encouraged to work from their residences does not speak to the custody or control issue.

[88] I conclude that any records in the identified personal email accounts of these two individuals that may relate to the subject matter of the request do not relate to a "township matter" in the sense referred to in the first part of the *National Defence* test, above. If any such records exist in the personal email accounts of these individuals, it is in their capacities as elected representatives and not in the discharge of a mandate granted by the township. There is nothing in the material before me indicating that the township has any authority over such records, the right to regulate their use or content, or the right to obtain them on request. The circumstances therefore do not fulfill the second part of the test in *National Defence* for a finding of institutional control.

[89] As a result, I also find that records in the personal email accounts of the Deputy Mayor and councillor B are not in the "custody or control" of the township.

ORDER:

I uphold the decision of the township and dismiss this appeal.

Original signed by: _____
Frank DeVries
Senior Adjudicator

_____ May 17, 2018