

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4389

Appeal MA21-00077

Corporation of the Township of Wilmot

May 31, 2023

Summary: The appellant submitted an access request to the township for emails and other communications about the Sir John A. Macdonald statue on township property, and related matters. The township provided access to some records, but withheld the communications of three councillors on the basis that the township does not have custody or control of them. In this order, the adjudicator finds that the councillors' emails and other communications are not in the township's custody or control. She upholds the township's access 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 MO-2821, MO-3287, MO-3281, M-813, MO-2824 and MO-3608.

Cases Considered: *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.); *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

BACKGROUND:

[1] The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the Township of Wilmot (the township), seeking the following records:

Emails, text messages and other forms of communications i) between councillors, ii) amongst councillors, iii) between and/or amongst residents and non-residents and councillor(s) related to the Sir John A.

Macdonald statue, other statues, the PM Path and related matters sent or received since January 1, 2020.

[2] The township issued a time extension and interim fee estimate decision, which are not at issue in this appeal. The township subsequently issued a final access decision granting access to records and advising that:

A digital file will be sent to you through the 2Big4Email platform as there is a significant number of documents. As many of the documents received were sent to all members of Council, we did our best not to duplicate documents where there were no differences between the documents received from the various members of Council.

[3] The appellant appealed the township's decision to the Information and Privacy Commissioner of Ontario (IPC), objecting to the fact that three councillors' records were withheld. During mediation at the IPC, the township advised the mediator that the records of the three councillors were withheld based on the township's position that it does not have custody or control of them under section 4(1) of the *Act*.

[4] Mediation did not settle the issues and the appeal moved to adjudication. I invited and received representations from the township and the three councillors, followed by the appellant.¹ I did not need to seek reply representations from the township or the councillors.

[5] In this order, I find that the communications of the three councillors are not in the township's custody or control because they are constituency or political records. I uphold the township's decision and dismiss the appeal.

RECORDS:

[6] The records at issue are communications of three specified councillors relating to the Sir John A. Macdonald statue and related matters.

DISCUSSION:

[7] The sole issue in this appeal is whether the three councillors' records are in the township's custody or control. Section 4(1) provides for a general right of access to records that are in the custody or under the control of an institution governed by the *Act*. The right of access applies to a record that is either in the custody or under

¹ The township's representations were shared with the appellant in accordance with the IPC's *Practice Direction 7*. The three councillors submitted representations which I withheld from the appellant in accordance with the confidentiality criteria found in *Practice Direction 7*. However, I paraphrased their respective positions for the benefit of the appellant, as described below in this order.

the control of an institution; the record need not be both.²

[8] There are exceptions to the general right of access set out in section 4(1).³ The record may be excluded from the application of the *Act* by section 52, or may be subject to an exemption from the general right of access.⁴ However, if the record is not in the custody or under the control of the institution, none of the exclusions or exemptions need be considered since the general right of access in section 4(1) is not established.

[9] The courts and the IPC have applied a broad and liberal approach to the custody or control question.⁵ In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.⁶

Factors relevant to determining “custody or control” when an institution holds the record

[10] The IPC considers the following non-exhaustive list of factors when deciding if a record is in the custody or under the control of an institution.⁷

- Was the record created by an officer or employee of the institution?⁸
- What use did the creator intend to make of the record?⁹
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?¹⁰
- Is the activity in question a “core,” “central” or “basic” function of the institution?¹¹
- Does the content of the record relate to the institution’s mandate and functions?¹²
- Does the institution have physical possession of the record, because its creator provided it voluntarily or pursuant to a statutory or employment requirement?¹³

² Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

³ Order PO-2836.

⁴ Found at sections 6 through 15 and section 38 of the *Act*.

⁵ *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

⁶ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).

⁷ Orders 120, MO-1251, PO-2306 and PO-2683.

⁸ Order 120.

⁹ Orders 120 and P-239.

¹⁰ Order P-912, upheld in *Ontario Criminal Code Review Board v. Hale*, cited above.

¹¹ Order P-912.

¹² *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, cited above, and Orders 120 and P-239.

- If the institution does have possession of the record, is it more than “bare possession”? In other words, does the institution have the right to deal with the record in some way and does it have some responsibility for its care and protection?¹⁴
- 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 their duties as an officer or employee?¹⁵
- Does the institution have a right to possession of the record?¹⁶
- Does the institution have the authority to regulate the record’s content, use and disposal?¹⁷
- Are there any limits on the ways the institution may use the record? If so, what are those limits, and why do they apply to the record?¹⁸
- To what extent has the institution relied on the record?¹⁹
- How closely is the record integrated with other records held by the institution?²⁰
- What is the usual practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature?²¹

[11] This list is not exhaustive. Some of these factors may not be relevant in a specific case, while other factors not listed above may be.

Factors relevant to determining “custody or control” when another individual or organization holds the record

[12] The Supreme Court of Canada has adopted the following two-part test on the question of whether a government 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?²²

¹³ Orders 120 and P-239.

¹⁴ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁵ Orders 120 and P-239.

¹⁶ Orders 120 and P-239.

¹⁷ Orders 120 and P-239.

¹⁸ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

¹⁹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above, and Orders 120 and P-239.

²⁰ Orders 120 and P-239.

²¹ Order MO-1251.

[13] The following factors may be relevant 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?²³
- Is the individual, agency or group with physical possession of the record an “institution” for the purposes of the Act?
- Who owns the record?²⁴
- Who paid for the creation of the record?²⁵
- What are the circumstances surrounding the creation, use and retention of the record?²⁶
- Are there any contractual provisions between the institution and the individual who created the record that give the institution the express or implied right to possess or otherwise control the record?²⁷
- Was there an understanding or agreement—between the institution and the individual who created the record or any other party—that the record was not to be disclosed to the institution?²⁸
- 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? Did the agent have the authority to bind the institution?²⁹
- 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?³⁰
- 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?³¹

²² *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

²³ Order PO-2683.

²⁴ Order M-315.

²⁵ Order M-506.

²⁶ Order PO-2386.

²⁷ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC).

²⁸ Orders M-165 and MO-2586.

²⁹ *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.).

³⁰ Order MO-1251.

Representations

[14] The township submits that the requested councillors' communications relate to the councillors' personal or political actions outside of their duties and responsibilities as members of council. It points out that the councillors are not officers or employees of the township. It says that councillors' records are not subject to the township's retention policies and the township has no authority to regulate the use or disposal of those records.

[15] The councillors agree with the township's position that any records they have relating to the Sir John A. Macdonald statue, other statues, the PM Path and related matters are not in the township's custody or control. They state that the emails they sent and received about the subject matter of the request were received from the public; they were a community conversation about the topic of statue removal. They say the requested records relate to their roles as an individual constituent representatives and are unrelated to any specific action or mandate they were undertaking on behalf of the township.

[16] The appellant provided representations along with a number of attachments, all of which I have reviewed. He references provisions of the *Municipal Act*³² and notes that the township may only act through decisions made by council, typically documented through by-laws. He says that decisions to enter into a contract, to terminate a contract or to amend a contract are made by council, and therefore each councillor is necessarily acting on behalf of the township in that process. He points out that councillors must abide by a code of conduct and a policy on email and computer use. He says that a decision made by the township's council to deal with public assets, as in this case, falls within the mandate of council and of the *Act*.

Analysis and findings

[17] 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.

[18] In *St. Elizabeth Home Society v Hamilton (City)*,³³ 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

³¹ Order MO-1251.

³² *Municipal Act*, 2001, S.O. 2005, c. 21, sections 5(1) and 224.

³³ (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).

exception of the mayor or other chief executive officer of the corporation, they are mere legislative officers without executive or ministerial duties.

[19] The appellant is correct that sections 5(1) and 224 of the *Municipal Act, 2001* bestow certain functions on council. However, that act does not bestow those responsibilities on any individual councillor acting on their own.

[20] In Order M-813, the adjudicator reviewed this area of the law and found that records held by individual 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.

The councillors were not acting as officers or employees

[21] I find that the councillors were not acting as officers or employees of the township when the records were created. As noted above, in *St. Elizabeth Home Society v Hamilton (City)*, the Ontario Superior Court held that an elected member of a municipal council is not an agent or employee of the municipal corporation in any legal sense. In Order M-813, the adjudicator concluded that only in "unusual circumstances" is a councillor considered an officer of a municipality and therefore part of the institution for the purposes of the *Act*. I find that there are no "unusual circumstances" present in this appeal such that the councillors should be considered officers of the township. There is no evidence, for example, that the emails exchanged about the Sir John A. MacDonald statue and other related matters were a result of a special duty assigned to the councillors by council.

[22] Since the councillors were not acting as employees or officers of the township at the time in question, they are not, in the circumstances, considered to be part of the township. However, that does not end the analysis of whether the emails are in the custody or control of the township and therefore subject to the *Act*. I must now consider whether the emails are in the custody or under the control of the township on the basis of the above-listed factors or the *National Defence* test.

The records are not in the township's custody or control applying established principles

[23] As noted above, the IPC has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution.³⁴ The list is not intended to be exhaustive; some of the listed factors may not apply in

³⁴ Orders 120, MO-1251, PO-2306 and PO-2683.

a specific case, while other factors not listed may apply.

[24] Based on consideration of these factors, several previous IPC orders have found that municipal councillors' communications were not in the custody or under the control of the municipality in the circumstances of those appeals.³⁵ 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. In that appeal, the adjudicator 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.

[25] The adjudicator also commented generally on the nature of 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.

[26] In Order MO-3287, the IPC 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 IPC 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. The IPC 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. In Order MO-3608, copies of emails between a councillor and residents relating to a county's roadside spraying were found not to be in the county's custody or control.

³⁵ See Orders MO-2821, MO-2878, MO-2749, MO-2610, MO-2842 and MO-2824.

[27] Other 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 IPC 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. The IPC found that the email contained, in effect, negotiations with the investigator on behalf of the city, and that therefore the city could reasonably expect to obtain a copy of the email upon request.

[28] Whether a councillor's records are within a municipality's custody or control depends on contextual factors including the circumstances of their creation and use. For the following reasons, I find that the records at issue in this appeal are not in the custody or control of the township. I will begin with a consideration of the relevant above-listed factors, then will turn to the two-part test in *National Defence*.

Application of the above-listed factors in determining custody and control

[29] The most relevant factor here is that the records were not created in the conduct of township business. Although the records clearly relate to township business in a broad sense, the issue, for the purpose of determining custody or control, is not the subject matter of the emails but rather whether the communication represents the exercise of a decision-making or executive function by the councillor on behalf of the township.

[30] Based on the evidence before me, I find that the councillors here were doing what councillors typically do, which is to communicate with constituents and others on issues of interest to them. The emails would thus have been exchanged squarely within the political or constituency context. This is also true if any of the records at issue are emails exchanged among councillors, as the appellant suggests.³⁶ As noted in Order MO-2821, it would not be surprising if councillors communicate with each other about matters that fall within the mandate of a municipality:

In fact, it is entirely to be expected that councillors communicate regularly with each other and with any number of individuals and organizations about matters within the mandate of the city. Presumably, the reason for many of these communications is that an individual or organization wishes to express a view to councillors about an issue that may come to a vote at Council, or councillors wish to persuade each other about a position on an issue.

[31] Another relevant factor is whether the township has possession of the records. Although there is little evidence before me on that issue, I am prepared to accept that the township's councillors use the township's servers to send and receive emails. In that case, the emails would be in the township's possession. However, such possession is not determinative of custody, and unless the other factors point to a finding of custody, such possession is "bare possession". Bare possession does

³⁶ *St. Elizabeth Home Society v Hamilton (City)*, supra.

not amount to custody for the purposes of the *Act*.³⁷ The fact that the township may have had the authority, pursuant to its IT policy, to monitor the councillors' email accounts for misuse, is not sufficient to bring the emails at issue within the township's custody under the *Act*.³⁸

Test in National Defence

[32] For the sake of completeness, since the server on which the councillors' records are located is unclear, I have also considered the test articulated in *National Defence*,³⁹ cited above, where 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?

[33] As noted in previous IPC orders, there is considerable overlap between the factors relevant to the analysis under the *National Defence* test and the factors considered previously by the IPC and listed above.⁴⁰

[34] With respect to the first question, the records relate to statues on township property. In this respect, it is arguable that these communications relate to a "township matter" within the meaning of part one of the test in *National Defence*. This would be taking a broad and liberal view of what constitutes a "township matter" for the purposes of the custody or control question. In my view, however, and as I have stated above, the important question is not the subject matter of the records but whether the communications represent a decision-making or executive function exercised by the councillor on behalf of the township. In my view, the records do not relate to a "township matter" because they do not represent a decision-making or executive function exercised by the councillors on behalf of the township.

[35] The appellant argues that the decision to enter into or cancel a contract on behalf of the township is a township matter. That is undoubtedly true. However, that does not mean that any individual councillor's communications with a constituent or other councillors about the contract are a "township matter". Residents communicate with councillors, and councillors with each other, to express their concerns in the hope that councillors will represent their interests when council as a whole make decisions on behalf of a municipality. Based on the information before me, the records at issue fall into this category.

[36] With respect to the second question, however, even if the contents of the

³⁷ *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.)

³⁸ *Ibid.*

³⁹ 2011 SCC 25, [2011] 2 SCR 306.

⁴⁰ See, for example, Orders MO-2821 and MO-3281.

records relate to a “township matter”, I find that the township could not reasonably expect the councillors to provide the records to the township. The evidence before me is that the communications relate to the councillors’ roles as individual constituent representatives and are in the nature of constituency or political records. In coming to my conclusion that the township could not reasonably expect to receive a copy of the records upon request, I having considered the following:

- The records are emails exchanged between councillors and local residents, none of whom are officers or employees of the township
- There is no evidence that the emails relate to the discharge of any special authority to act on behalf of the township
- There is no evidence that the records were integrated with township records

[37] I find, therefore, that even if records of this nature relate broadly to a “township matter,” the township does not have the authority to regulate the use or content of any such records, and could not reasonably be expected to obtain a copy of such records upon request.

[38] The appellant argues that since the councillors are accountable through a Code of Conduct, the township exercises control over them. I do not accept that the existence of a Code of Conduct brings the records at issue within the township’s control. If that were true, all constituency or political records be in a municipality’s custody or control – a proposition that runs contrary to the distinction between a municipality and its elected officials as described in *St. Elizabeth Home Society*.

[39] The circumstances, therefore, do not meet the second part of the test in *National Defence* for a finding of township control over the records.

[40] Having considered and applied the various factors previously considered by the IPC, as well as the test in *National Defence*, I find that the records at issue are not in the custody or under the control of the township. They are the personal and/or political records of the councillors relating to their activities as elected representatives.

[41] Because the records are not in the township’s custody or control, there is no right of access to them under section 4(1) of the *Act*.

ORDER:

I uphold the township’s decision and dismiss the appeal.

Original signed by: _____

Gillian Shaw
Senior Adjudicator

May 31, 2023