

Municipal & Planning Law

AIRD & BERLIS LLP
Barristers and Solicitors

IPC Orders the Release of Email Sent From City Councillor's Personal Account

By John Mascarin, Jody Johnson and Laura Dean

Municipalities and their councillors are advised to pay close attention to a recent decision of the Information and Privacy Commissioner of Ontario ("IPC") which has ordered the release of an email sent from a city council member's private email account.

Facts

Two years ago, the City of Oshawa was mired in a very controversial and public dispute with its Auditor General respecting allegations of wrongdoing related to the acquisition of land by the city. At a meeting of the council on May 21, 2013, a motion to appoint a well-known municipal lawyer to investigate the allegations of misconduct on the part of city employees and departments was passed. A few hours prior to the meeting, a city councillor had emailed the lawyer from the councillor's own personal email account, asking for the lawyer's feedback on a draft motion to appoint him as investigator.

A subsequent request was made under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 ("MFIPPA") for "all communication" between the councillor in question and the lawyer between March 1 and October 1, 2013.

The city refused the request on the grounds that:

all records responsive to [the] request, should they exist, would have been generated by the Councillor in their personal capacity as an elected official and not as an officer or employee of the City of Oshawa. Accordingly, access cannot be granted as the records are not within the custody and control of the City.

The requestor appealed the city's decision to the IPC.

Issue

Subsection 4(1) of MFIPPA provides that every person has a right of access to a record or a part of a record in the custody or under the control of a municipality unless one of the statute's exceptions apply.

The issue considered by the IPC in this decision was whether the email was "in the custody" or "under the control" of the city under subsection 4(1) of MFIPPA.

Decision

In Order **MO-3281**, the IPC determined that records held by municipal councillors may be subject to an access request under MFIPPA 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.

Previous decisions and orders from the IPC have consistently determined that some records to or from municipal councillors are not records that are necessarily subject to disclosure. These determinations, while consistent, have attempted to justify the refusal to disclose on various disparate grounds. Despite the principles underlying the right to disclosure of information which provides that municipal records should be available to the public and that any exceptions should be limited and specific, the IPC has enunciated that "personal," "constituency" and "political" records are not subject to disclosure (none of these types

of records are expressly set out in any exemptions under MFIPPA).

Many decisions have held that councillor records are not in the custody and under the control of the municipality because municipal councillors are not considered employees or officers of the municipality. Where a councillor may be acting as an officer or employee of the municipality, however, related records may become subject to disclosure.

In this case, the IPC found the councillor was not acting as an employee or officer of the city at the time in question and could not, therefore, be considered to be part of the city. As such, the IPC turned its analysis to whether the email was in the custody or under the control of the city on the basis of established principles.

In conducting this analysis, the IPC considered the test for “custody or control” set out in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306:

(1) Do the contents of the document relate to a city matter?

The IPC found that the record related to a city matter. In making this determination, the IPC determined that the creation of the record at issue played an integral part in council’s decision to retain the investigator.

(2) Could the city reasonably expect to obtain a copy of the document upon request?

The IPC placed considerable weight on the circumstances surrounding the use and creation of the record. The IPC noted that the records contained, in effect, negotiations between the councillor and the investigator relating to the city’s potential hiring of him and that this related directly to the city’s mandate and functions. The IPC further found that the city relied on the record in order to secure the engagement of the investigator. Given those circumstances, the IPC found that the city could reasonably expect to obtain a copy of the email from the councillor upon request. As such, the IPC found the email record was under the city’s control within the meaning of subsection 4(1) of MFIPPA.

The IPC specifically distinguished this case from Order **MO-2842**¹ in which it refused to order the disclosure of councillor communications exploring the possibility of bringing an NFL team to Toronto. The IPC noted that in that case the records in question related to a city matter that was speculative or hypothetical whereas here, the hiring of the investigator was contingent on a vote of council members that was imminent. The IPC found that another significant difference was the fact that the record in the present case related to an agreement that materialized, noting that mere hours after the councillor sent the email, council made the decision to hire the investigator. The logic of both determinations can be certainly questioned.

Based on the above, the IPC ordered the release of the email.

The determination in Order MO-3281 marks a significant departure from past decisions of the IPC which have, to date, refused to treat councillor emails as records within the custody and control of the municipality. Whether this decision signals a shift in IPC policy is yet to be seen but councillors should be advised that emails relating to municipal business, whether sent from a municipal account or a private account, may no longer be protected from disclosure.

¹ This problematic decision was analyzed by John Mascarin in “Sheltering Council Records from Disclosure,” 6 *D.M.P.L.* (2d) (April 2013) No. 4, pp 1-7.

If you have questions regarding any aspect of municipal, land use, planning or development law, please contact any member of the Aird & Berlis LLP Municipal & Land Use Planning Group:

Lawyers:

Lauren Chee-Hing	416.865.7786	lchee-hing@airdberlis.com
Eileen Costello	416.865.4740	ecostello@airdberlis.com
Laura Dean	416.865.7706	ldean@airdberlis.com
Robert Doumani	416.865.3060	rdoumani@airdberlis.com
Patricia Foran	416.865.3425	pforan@airdberlis.com
Tom Halinski	416.865.7767	thalinski@airdberlis.com
Patrick Harrington	416.865.3424	pharrington@airdberlis.com
Jody Johnson	416.865.3438	jjohnson@airdberlis.com
Kim Kovar	416.865.7769	kkovar@airdberlis.com
Sidonia Loiacono	416.865.7763	sloiacono@airdberlis.com
Leo Longo	416.865.7778	llongo@airdberlis.com
John Mascarin	416.865.7721	jmascarin@airdberlis.com
Josephine Matera	416.865.3061	jmatera@airdberlis.com
David Neligan	416.865.7751	dneligan@airdberlis.com
N. Jane Pepino, C.M., Q.C., LL.D.	416.865.7727	jpepino@airdberlis.com
Andrea Skinner	416.865.3423	askinner@airdberlis.com
Christopher Williams	416.865.7745	cwilliams@airdberlis.com
Steven Zakem	416.865.3440	szakem@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com

This *Municipal & Planning Law* newsletter offers general comments on legal developments of concern to municipalities, businesses, organizations and individuals, and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.

© 2016 Aird & Berlis LLP
Municipal & Planning Law may be reproduced with acknowledgment.