

A New Battleground

by Sophia M. Stadnyk, Senior Associate Counsel

Increasingly, savvy citizens are waging war against municipalities using the weapon of freedom of information statutes. This is nothing new, but a look at the decisions from the Office of the Information and Privacy Commissioner of Ontario (IPC) shows almost all of the Office's recent rulings involve a municipality or a municipal agency or board. Two such cases deserve a closer look – Interim Order MO-2425-I (May 29, 2009), involving information disclosed during an in-camera meeting of the City of St. Catherines, and Order MO-2408, issued on April 09, involving the City of Ottawa and the question of "custody or control" over the City Solicitor's personal emails.

In the City of Ottawa ruling, the City initially received a request under the province's *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) for access to all emails, letters and faxes sent or received by the City Solicitor and/or his named legal assistant, and the listed persons, entities, or domain names between February 2007 and the current date. The City response was that, because the emails were sent to the Solicitor in his capacity as a volunteer with an entirely distinct entity – the Children's Aid Society Board of Directors – the communications did not relate to his duties as City Solicitor and it had neither custody nor control of the records. Under s. 4(1), the Act applied only to records that were in the "custody *or* under the control of an institution" (emphasis added).

The requester appealed to the IPC, narrowing the scope of his request somewhat, with the records in dispute being several emails sent by or on behalf of the Children's Aid Society (CAS) Executive Director to employees and volunteers, including the City Solicitor at his City email address. The City's Responsible Computing Policy permitted incidental personal use of City assets such as computers, but also stated that "[u]sers with privacy concerns should refrain from using IT services and/or assets to process, store or transmit personal-use information." The Solicitor kept the CAS emails "completely segregated" from any other records, and they were never integrated into City files or records, either in paper or electronic format. A City bylaw on records retention defined a transitory record as "an email message that is not an official business record," and allowed for its deletion or destruction on the same day the record was created or received. The City argued that the requested emails were personal emails, and to the extent that they were regulated by the City at all, they fell within the category of "transitory records."

The IPC applied a list of factors to determine whether or not a record was in the City's custody or control, including whether the record was created by an officer or employee of the institution; whether it related to the institution's "core, central, or basic" function; whether the institution had physical possession of the record (either voluntarily from the creator or pursuant to a mandatory statutory or employment requirement); whether it had the authority to regulate the record's use and disposal, plus any limits placed on the record's use; and others.

The hearing officer accepted that the records were sent to the Solicitor entirely and exclusively in his capacity as a volunteer; that they did not pertain to City business nor were they relied on by the City in any way; and that they were personal emails stored on the City's system for the Solicitor's "ease of convenience." Nonetheless, the City retained custody or control of the records and they fell within the scope of the Act. The relevant factors were the physical possession of the records on the City email server, as well as the right to such possession; and the City's authority to regulate the use of the email system on which the records were kept (as well as the disposal of such records). "I am not persuaded that, by allowing for personal usage and by addressing the disposal of such e-mails in its Records Retention By-law the City has given up its authority over personal e-mails stored on City servers ... the fact that the City has explicitly stated that employees are permitted to use the e-mail system for incidental personal use but that personal use of City computers may be monitored for unauthorized use by the [City] ... supports a conclusion that the City does have the authority to regulate the treatment of those records even if it chooses not to do so."

In the second case, the City of St. Catherines received a request under the MFIPPA for a staff report considered by city council during an in-camera session, dealing with a parking problem and encroachments on the City's portion of a shared right-of-way. The report, prepared by the Financial Management Services Department, was intended to provide council with information about the encroachment issues relating to the requester's property, and outlined the position of City staff on how these issues should be resolved. It was not in dispute that the requester had asked that she be permitted to acquire the City land that her property encroached upon, and the report addressed this possible disposition as one of the issues.

The City denied access to the report pursuant to the discretionary exemption in s. 6(1)(b) of the MFIPPA, and

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Traffic Enforcement Issues

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2009); S. 211, 95th Leg., 1st Reg. Sess. (Mo. 2009).
74. H.R. 300, 81st Leg., Reg. Sess. (Tex. 2009).
75. S. 59, 2009 Leg., Reg. Sess. (Ala. 2009).
76. S. 389, 116th Leg., 1st Reg. Sess. (Ind. 2009); A.B. 504, 75th Leg., Reg. Sess. (Nev. 2009); S. 2004, 2009 Leg., Reg. Sess. (Fla. 2009); H.R. 439, 2009 Leg., Reg. Sess. (Fla. 2009).
77. S. 277, 2009 Leg., Reg. Sess. (Md. 2009).
78. *See* theNewspaper.com, *New York Legislature Approves Massive Traffic Camera Expansion* (Apr. 09, 2009) at http://www.thenewspaper.com/news/27/2742.asp.
79. NCUTLO, *Automated Traffic Law Enforcement Model Law*, at http://www.ncutlo.org/autoenforce622.htm. ML

Federal

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ciliation Act of 2005 (May 17, 2006).
3. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.
4. National Association of Counties (NACo), *Toolkit on Repeal of New Non-Wage Withholding Requirement*, undated.
5. A letter sent to IRS Commissioner Douglas Shulman by a coalition of organizations, including IMLA, and urging the Commissioner to hold public hearings on Section 511, is available online at www.imla.org/irsletterimla.pdf.
6. GFOA Issue Brief, *Withholding Requirement on Government Payments and Other General Tax Issues* (Feb. 2009) states that "[i]n 2006, the Congressional Budget Office estimated the cost to state and local governments for administering this provision to be $62 million per year."
7. NACo Fact Sheet, *Repeal Three Percent Withholding Tax on County Purchases* (March 2007).
8. National Defense Industrial Association, *Little Known Legislation Takes Federal Contractors By Surprise* (March 2007).
9. Statement available at http:/www.acec.org/advocacy/committees09priorities /3percent.cfm. ML

Supreme Court

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sorts. The Court placed great emphasis on test design and essentially held that a professionally prepared, content-valid test was a near impregnable defense to a Title VII disparate-impact lawsuit. Municipalities faced with adverse impact and the possibility of a lawsuit by minority candidates must now be prepared to stand by and defend their content-valid tests. At the same time, municipalities are free to explore selection procedures that have less adverse impact on minority candidates than traditional tests. The hope is that these alternative procedures will not only generate a more diverse promotion list, but will also do a better job of selecting candidates with intangible qualities, such as leadership, good judgment, and interpersonal skills. ML

Adam Kingsley is an attorney with Eiden & O'Donnell in Vernon Hills, Illinois, where he specializes in commercial, land use and employment litigation. As an Assistant Corporation Counsel, he defended the City of Chicago in litigation involving testing and promotions in the Chicago Police Department.

Inside Canada

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the requester appealed. Section 6 (1)(b) provided that a record that revealed "the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public," was exempt from disclosure. To benefit from the exemption, the City was required to show that a statute – in this case, s. 239 of the *Municipal Act* – authorized the holding of the meeting in the absence of the public. That Act did so in the case of a meeting addressing "a proposed or pending acquisition or disposition of land by the municipality."

After reviewing the report at issue, the hearing officer concluded that the meeting (and consequently, the report) did not come within the "closed meeting" category because "most of the report" did not deal with "a proposed or pending acquisition or disposition of land" – "the bulk of the report contain[ed] background information and set[] out other options." There was, however, sufficient evidence to establish that council's actual deliberations at the meeting included the land disposition; thus, disclosing those limited portions of the report would have the effect of revealing the substance of city council's deliberations.

He concluded that only limited portions of the report qualified for exemption under s. 6(1)(b) of the MFIPPA (the portions addressing whether the City should dispose of the encroached-upon land to the requester and the position of staff on that issue), and that the remainder had to be disclosed. Second, he "also found that the City did not take all relevant factors into account when it exercised its discretion to withhold those portions of the report from the [requester]." These factors included whether the requester had "a sympathetic or compelling need to receive the information," and whether disclosure would "increase public confidence in the operation of the institution." Consequently, the City was ordered to re-exercise its discretion in this respect.

The CanLII website lists IPC decisions at http://www.canlii.org/en/on/onipc/index.html. The CanLII cites are, respectively, *Ottawa (City) (Re)*, 2009 CanLII 16569 (Ont. I.P.C.) and *St. Catharines (City) (Re)*, 2009 CanLII 29180 (Ont. I.P.C.). Both rulings are also available from the IPC website at http://www.ipc.on.ca. ML

Ordinances

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nesses (other than restaurants) to conduct outdoor sales on their own property and adjoining streets or sidewalks, on a temporary basis, five times a year.
8. Christensen also claimed a violation of his rights under the Equal Protection Clause and the Fourth Amendment, but these claims were dismissed by the trial court and the dismissal was affirmed by the Tenth Circuit, so they are not discussed in this column.
9. 129 S. Ct. 808 (2009).
10. *See* Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996); ETW Corp v. Jireh Pub. Inc., 332 F.3d 915 (6th Cir. 2003); White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007). ML