Privacy, Access to Information & Elected Officials

MONCTON

The International Municipal Lawyers Association
October 14-18, 2017
Niagara Falls, Canada

Overview

- Legislation
- Access vs privacy
- Personal email for public business
- Best Practices

MONCTON

Legislation

- Similar for municipalities across Canada
- No special right to access records ("need to know", e.g. enforcement)
- Don't forget custody or control of record!
- Most consider elected officials in some way
- Common exceptions for "personal

MONCTON

“Personal” Records

“Personal Records”

- Alberta IPC Order 99-025:
  - “one’s own; individual, private”
  - “intended for a particular person rather than a group”
- If related to business of local body, not likely to be “personal”

MONCTON

“Constituency” Records

- Alberta IPC Order 99-032:
  - As an exception, narrow interpretation
  - Related to being “elected”, not the local body’s mandate and functions
- Alberta IPC Order F-2005-010:
  - The difference is not always clear
  - Could include letter from constituent to EO seeking action … but not in this case (think

Custody or control of the record?

- 1st step in analysis if record is subject to disclosure under an ATI/FOI request
- “in custody or under control” of the public body
- Custody: implies physical possession, right to deal with the record and responsibility for its care

Custody or control: factors

Non-exhaustive lists:

- Ontario:
  - IPC Order 120
  - Order MO-1251
  - Order M-813 (when not in custody or control)
- Alberta:
  - Order 99-032

Custody or control?

- EO has office at City Hall, keeps business records there:

  Control, but not custody

- City email for non-business purposes:

  Custody, but not control

- Business records kept at home:

  Control, but not custody

- Non-business records in City Hall office:

MONCTON

Custody or control

Importance of good RIM practices!

- Keep personal and constituency records separate from business records of public body

MONCTON

Protection of Privacy

- Legislated privacy obligations re: access, use, and disclosure of PI apply to elected officials.
- *R v. Skakun*, 2014 BCCA 223:
  - Councillor disclosed confidential workplace harassment report to CBC
  - municipal councillor is an “officer” for

Protection of Privacy

Personal liability:

- Statutory torts: BC, MB, SK, NL
- Common-law tort: *Jones v. Tsige*, "intrusion upon seclusion"
  - Intentional, highly offensive invasion of privacy without lawful justification causing distress, humiliation or anguish

MONCTON

Protection of Privacy

City of Oshawa:

- Real Estate Manager terminated, confidential settlement reached
- City Manager email to City Council advising not to discuss termination of “a staff member in the Real Estate division” was leaked to the media and on Facebook
- Subsequent online chatter specifically named the terminated employee

MONCTON

Protection of Privacy

- Claim against the City and “John Doe” for $1 million damages for breach of contract, negligence, breach of confidentiality, and $20,000 for intrusion upon seclusion

MONCTON

Protection of Privacy

It gets worse…

- Confidential investigation by the City later confirmed leak by Councillor M
- M's lawyer sent letter to City Solicitor threatening to sue if his name was released
- City Solicitor sent copy of letter to City Council and senior staff… which was then leaked to the media

Protection of Privacy

- Example of potential municipal liability for actions of elected official
- It all started with a Facebook post – potential liability for disparaging comments made by members of the public as a result of leaked confidential personal information

MONCTON

Personal email for public business



MONCTON

Personal email for public business

- Don’t do it!
- General rule: any business email sent/received will be under “control” of public body
  - Can’t use personal email as a way to avoid obligations under legislation!

MONCTON

Personal email for public business

- Risks:
  - "Reasonable security measures"?
    - Web-based email vs in-house storage
    - Terms of service – 3rd party access?
  - Stored in Canada (BC, NS)?
  - Meeting ATI/FOI legal obligations for adequate search of records?

MONCTON

Personal email for public business

Best practice - If you must use personal email…

- Develop and implement policy
  - Identify what tools are permitted
  - Copy to municipal email/filing system
  - Disclosure and retention requirements
  - Obligation to produce all relevant records upon request

MONCTON

Conclusion

- Elected officials are subject to access and privacy legislation
- How they behave may have personal and municipal consequences (legal, financial, reputation)
- Importance of education and policies
- Develop, implement, monitor policies

MONCTON