



Access to Information &  
Protection of Privacy

# **Councillor's Q&As**

Office of the Information and Privacy Commissioner for Nova Scotia

## Introduction

As a municipal councillor, it is important that you have a working understanding of the rules that govern the collection, use and disclosure of information by your municipality.

*Part XX of the Municipal Government Act sets out the access to information and protection of privacy rules that your municipal government must follow. These rules are intended to promote public accountability, facilitate informed public participation in policy formulation, and to ensure fairness in government decision-making. These same rules also place limits on the municipality's collection, use, and disclosure of personal information.*

As a councillor you will need to have a clear understanding of what these rules are to ensure that you abide by them and, further, so that you do not create a liability for your municipality.

### **When is a councillor subject to the access and privacy provisions of *Part XX* of the *MGA*?**

*The rules do not apply to constituency work:* Individual councillors are elected representatives. They represent the constituents in the districts in which they are elected. As politicians working for constituents, the access and privacy rules do not apply to councillors. However, keep in mind that citizens do not necessarily understand the technical application of privacy laws and will expect councillors to respect and protect their personal information.

*The rules do apply to work as a municipal officer or employee:* However, a councillor may have additional roles such as being a member or chair of a municipal committee or board. In some cases, these roles give the councillor the authority (and responsibility) to act as an officer or employee of the municipality. When that happens, the records a councillor creates in the course of his or her duties will be subject to the access and privacy provisions of the *MGA*.

Boards, committees and council-driven projects authorized by statute, and given the power to act by statute, also convey on certain persons the power and authority of a public officer.<sup>1</sup> For example, by-laws, which are statutory instruments, may make provisions for certain duties and responsibilities that would characterize that role as that of an office holder. In this case, that councillor could be viewed as acting as an official when he or she carries out the business of the municipality.<sup>2</sup> When acting as an officer, the records created or received in connection with the officer's duties are covered by the access and privacy provisions of the *MGA*.

### **Access to Information Questions:**

#### **1. What municipal records are subject to access and privacy rules?**

All records in the custody or under the control of a municipality are subject to the *MGA* access and privacy rules.

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<sup>1</sup> *McLaughlin v. Halifax-Dartmouth Bridge Commission*, 1993 CanLII 3116 (NS CA).

<sup>2</sup> See: IPC Orders M-813, MO-2821, MO-2824 and MO-1403.

## 2. **When are records in the custody or control of the municipality?**<sup>3</sup>

A record may be considered to be in the municipality's custody or control if:

- the record is either onsite, in storage or can be retrieved electronically, e.g. emails, electronic records, and information in databases;
- the record was deposited with the council or the municipality; or,
- the municipality has the authority to regulate or dispose of the record.

Occasionally, a record may not be in the municipality's possession but it has control over those records. A record may be found to be within the control of a municipality if:

- the record was relied upon as part of the councillor's mandate to represent the constituent and it later formed the basis for action by the municipality;
- the municipality has the power to compel an individual to produce the record; or,
- the record was integrated into the municipality's records in the office of the councillor.<sup>4</sup>

This right to exercise control over records may be found in statute or contract. It is important when dealing with external service providers that the duty to retain and give access to the municipality be clearly laid out in service provider agreements.

## 3. **When are a councillor's records subject to an application for access under the MGA?**

For the most part, access to information rules do not apply to councillors' or constituency records. However, there are times that records in a councillor's possession remain within the control of the municipality. An example would be supporting receipts for expenses incurred and claimed while on council business. In the event of an audit, staff would have the authority to demand production of these records in support of their decision to reimburse. This relationship to the records could support a finding that they are in the custody of the municipality under s. 463(1) of the *MGA*.<sup>5</sup>

## 4. **Are constituency records subject to the MGA?**

Records related to a councillor's constituency or personal matters would not usually be considered within the custody or control of the municipality. Therefore, they are not subject to the access and privacy rules in the *MGA*.

## 5. **Does a councillor have the right to access information in municipal records?**

Individual councillors have access to any information in municipal records that is available to the public. In addition, when councillors sit as members of committees or council, they may receive information from the municipality, sometimes on a confidential basis. Confidential information is not available to members of the public or to individual councillors and can only be used for the purpose that it was shared.

In every other case, councillors who wish to access information from municipal records can make an informal request for the records. If this request is refused, they may be asked to make an application for access under the *MGA*. Councillors making an application for access to a record must make a written request to the responsible officer, providing sufficient

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<sup>3</sup> An employment relationship may also give rise to control, however, s. 18 of the *MGA* prohibits councillors from being employed by the municipality that they represent.

<sup>4</sup> These factors were taken from Ontario IPC Order M-813.

<sup>5</sup> *Vaughan (City) (Re)*, 2012 CanLII 32908 (ON IPC), <http://canlii.ca/t/frqcb>.

detail so that the record(s) can be identified. In some cases, the councillor must pay a fee (s. 466(1)(c) *MGA*).<sup>6</sup>

Councillors might very well benefit from having access to municipal databases that would provide them with information about their constituents, such as names, mailing addresses, phone numbers, etc. The *MGA* does not provide individual councillors with statutory authority to access this information for constituency purposes.<sup>7</sup>

**6. Who has authority to decide when records will be disclosed by the municipality in response to an access to information request?**

The responsible officer for a municipality is statutorily responsible for making decisions about access to records within the custody or control of the municipality (s. 461(i) *MGA*). The responsible officer may delegate a power or duty vested in him or her to an officer of the municipality (s. 497(1) *MGA*). The responsible officer or delegate is the person responsible for making decisions related to requests for access to information in the custody or control of the municipality, town or village.

No councillor can direct a responsible officer or his or her delegate to disclose information.

**7. When can a councillor disclose municipal information or records?**

If the municipal staff have provided a councillor with access to municipal records in confidence, a councillor must not disclose that information or allow that record to be compromised. Always consult with the responsible officer for your municipality before disclosing any municipal information.

**Privacy Questions:**

**1. When is a councillor bound to abide by the privacy provisions of the *MGA*?**

A councillor who collects, uses or discloses personal information while acting as a member of council, at the direction of council, or as a public officer or municipal employee, must abide by the privacy provisions of the *MGA*.

A councillor who is acting independently of the municipality, for example, in his or her role as an individual constituent representative while campaigning or fundraising, is not subject to the constraints of the *MGA*. However, councillors may also find that they are not indemnified or insured by the municipality in the event of a privacy breach.

**2. When are councillors permitted to collect personal information?**

When acting on behalf of council or the municipality, a councillor may collect only that personal information which is necessary to carry out his or her job. It is always advisable to seek guidance from the municipal staff before collecting personal information for a new project or committee. A privacy impact assessment can go a long way to preventing over collection, and avoiding improper use or disclosure of information once collected. Privacy impact assessment templates are available on the Office of the Information and Privacy Commissioner (OIPC) website at [www.foipop.ns.ca](http://www.foipop.ns.ca).

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<sup>6</sup> *Nova Scotia (Environment) (Re)*, 1999 CanLII 3667 (NS FOIPOP).

<sup>7</sup> In *Toronto (Property Assessment Corporation) (Re)*, 2006 CanLII 50683 (ON IPC), it was found that the privacy interests outweighed the public interest served by giving individual councillors access to this kind of information.

A councillor who is acting independently of the municipality has no authority to collect personal information under the *MGA*. However, people who wish to have their councillor assist them may choose to provide their personal or business information. They may also consent to have the municipality, or another public body disclose their personal or business information to their councillor so that he or she can advocate on their behalf.

**3. When are councillors permitted to access and use the personal information of employees, other councillors or citizens contained in municipal records?**

When acting on behalf of council or the municipality, a councillor may be permitted to access and use personal information provided it is necessary for the performance of his or her duties.

**4. What is “reasonable security”?**

Once in their possession, councillors must ensure that all personal information is protected against unauthorized access, collection, use, disclosure or disposal using “reasonable security” measures. Reasonable security means that records are stored in a manner that is commensurate with the sensitivity of the information. For example, never travel with unencrypted personal information, never leave personal information in your parked vehicle, always lock away any personal information at the end of a work day and if you must travel with personal information, take the minimum necessary and always return it to the office at the end of the day. For more information and a detailed checklist of what constitutes reasonable security see: *Reasonable Security Checklist for Personal Information* available on the OIPC website at [www.foipop.ns.ca](http://www.foipop.ns.ca).

**5. When can a councillor disclose personal information?**

When acting on behalf of council or the municipality, a councillor may be asked to disclose personal information or to discuss personal matters such as why a person was fired. It is not recommended that councillors disclose personal information without first consulting with the municipality’s responsible officer.

**6. What is a privacy breach?**

A privacy breach is any unauthorized access to or disclosure of personal information in contravention of applicable legislation. Privacy provisions may not be limited to the privacy provisions of the *MGA*. For example, by-laws, regulations and policies may determine whether certain personal information can be collected, used and disclosed. As well, municipalities may enter into information-sharing agreements which will provide additional guidance around when personal information may be accessed, used and disclosed. For more information on what a privacy breach is and the steps municipalities should take to manage a privacy breach see: *Key Steps to Responding to Privacy Breaches* available on the OIPC website at [www.foipop.ns.ca](http://www.foipop.ns.ca).

**7. What happens if a councillor causes a privacy breach?**

When acting on behalf of council or the municipality, a councillor who causes a breach of privacy may expose the municipality to significant civil liability. If the breach is intentional, that councillor may lose the right to request indemnification and be personally liable to the victims of the breach, the municipality for any loss or damage, and the cost of rectifying the breach.

In some cases, privacy breaches can identify young offenders, victims of sexual offences or informants under certain provincial legislation. Where this occurs, the councillor or his or her staff could face summary or criminal charges.

**8. When can the municipality disclose personal information about a councillor?**

Certain information, such as expense claims, remuneration and positions or functions of councillors are treated as public information and will either be proactively disclosed (posted on the municipality's website) or disclosed in response to an access to information request.

**Access & Privacy Questions – Who Can You Talk To?**

Under the *MGA*, the Chief Administrative Officer or the Clerk is responsible for ensuring that the municipality complies with Nova Scotia's access and privacy rules. If you have any questions about your access and privacy obligations you should speak to one of these two people. You can also call the Office of the Information and Privacy Commissioner for Nova Scotia at 902-424-4684 or visit us at [www.foipop.ns.ca](http://www.foipop.ns.ca).



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