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# Councillors' Records and the ATIPPA, 2015

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# Outline

- Application of ATIPPA, 2015
- Custody & Control
- Inspiration


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# The *ATIPPA, 2015*

- Provides the public with a right of access to all records in the custody or control of a public body subject to limited exceptions

- All public bodies are statutorily required to search for, and produce, records responsive to an ATIPP Request


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# *Why is this important to you?*



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# It’s Important Because…

- A Happy Camper (Requester satisfied with response)
- A complaint to OIPC (and published report and/or Order filed with the Court)
- An appeal to the Newfoundland and Labrador Supreme Court


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# And…

- Possible quasi-criminal prosecution





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# Offence Provision

*115 (2) A person who **wilfully** . . .*

*(d) destroys a record or erases information in a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records; or*

*(e) alters, falsifies or **conceals a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records,***

***is guilty of an offence and liable**, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both.*


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# “Custody and Control”



# The Meaning of "Custody and Control"

- The Test:

1. Do the contents of the record relate to the Town's business?

2. Could the Town reasonably be expected to obtain a copy of the record upon request?



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# Application to Councillor Records:

*"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 a 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"* (para 16).



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# The Established Principles

- *If the institution does have possession of the record, is it more than "bare possession"?*
- *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 his or her duties as an officer or employee****?*
- *Does the institution have a right to possession of the record?*
- *Does the institution* ***have the authority to regulate the record's content, use and disposal****?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- ***To what extent has the institution relied upon the record****?*
- ***How closely is the record integrated with other records held by the institution****?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*


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- *Who has possession of the record, and why?*
- *Who owns the record?*
- *Who paid for the creation of the record?*
- *What are the circumstances surrounding the creation, use and retention of the record?*
- *Are there implied or explicit contractual terms that give the Ministry the right to possess or otherwise control the record?*
- *Is there an agreement that the record would not be disclosed to the Ministry? If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?*
- *Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the Ministry?*
- *Was the individual who created the record an agent of the Ministry for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the Ministry to possess or otherwise control the records?*
- *What is the customary practice of the individual who created the record and others in a profession in relation to possession or control of records of this nature, in similar circumstances?*
- *To what extent, if any, should the fact that the individual who created the record has refused to provide a copy of the record determine the control issue?*


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# Generally Excluded:

1. "Constituency Records": Records having to do with an issue relating to a constituent

2. "Political Records": Records that do not relate specifically to issues in councillor's ward but which arise more generally out of activities as an elected representative



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# Some Examples to Inspire You..





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A member of the public emails a Town Councillor regarding the impact of a project to expand an existing hydroelectric facility within its borders. An ATIPP Request is made for all correspondence received by Town councillors about the expansion project.

Does the Town have custody or control of the email?

A. Yes B. No



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# Answer: No

- Councillor was not acting as an officer of the Town
- The Town did not rely on the email
- The email was not integrated with the Town's records. It is contained on a third party server in the Councillor's personal email account
- The email was a "political" or "constituency" record amounting to communication between a constituent and a councillor

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An Auditor General made some allegations of wrongdoing by a City and its staff. Three Councillors discussed hiring a lawyer to investigate. One Councillor emailed the lawyer from his personal account to ask some preliminary questions. At a subsequent Council meeting a motion was passed to hire the lawyer to investigate.

Is the email from the Councillor to the lawyer asking preliminary questions in the City's Custody or Control?

A. Yes B. No

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*Re Oshawa City*, 2016 CanLII 4767 (ON IPC)

# The Answer: Yes



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## Email from Oshawa councillor's private account ordered released

By SAN GREWAL Urban Affairs Reporter
Wed., Feb. 3, 2016

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A Councillor regularly takes notes at a Town Committee meeting. They are not integrated with Town files. Rather, the Committee habitually prepares a report that outlines topics and recommendations for consideration at Council meetings. The Committee could not recall why a specific recommendation was made, and the Councillor emailed the Council advising that his notes disclosed the reason.

Are the Councillor's notes in the custody or control of the Town?

A. Yes B. No

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# Answer: Yes

The OIPC determined that the notes provided "evidence of a business activity, decision or transaction related to the functions and activities of the organization".

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# A friendly reminder…




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