

CASE LAW UPDATE

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City of Ottawa v. Ontario (Information and Privacy Commissioner)

[2010] O.J. No. 5502 (Ont. Div. Ct.) (Released 13 December 2010)

Judicial Review – Access to Information and Protection of Privacy under the *Municipal Freedom of Information and Protection of Privacy Act*

This case addresses the question of whether a government employee’s personal e-mails are subject to freedom of information legislation when those e-mails are sent from a workplace e-mail address.

The City of Ottawa initially took the position that personal e-mails of its employees were not subject to section 4(1) of the *Municipal Freedom & Protection of Privacy Act* (“MFIPPA”) as the e-mails were not “in the custody or under the control of” the city. On appeal, the Information and Privacy Commissioner concluded that private e-mails that are sent via a government e-mail account were subject to the legislation and ordered the City to provide the requested disclosure. The City of Ottawa sought judicial review of the Commissioner’s decision.

Writing for a unanimous court, Justice Molloy concluded that the impugned e-mail correspondence was not subject to MFIPPA and was therefore not accessible by members of the public. In applying a purposive approach to the analysis, Justice Molloy determined the intent of the legislation was to enhance democratic values by providing its citizens with access to information. Justice Molloy then concluded that expanding the terms “custody and care” to include personal e-mails of an employee that are unrelated to government business would not advance the purpose of the legislation. Further, a citizen’s right to participate in the democratic process would not be impinged by prohibiting access to private e-mails of government employees. In coming to this conclusion, Justice Molloy likened personal e-mails to personal documents that are physically kept in a government employee’s workspace. Just as personal physical documents in a government employee’s workspace are not susceptible to freedom of information legislation, personal e-mails are similarly protected.

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