



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-142

Appeal M-9200137

Township of Michipicoten



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ORDER

BACKGROUND:

The Township of Michipicoten (the Township) received the following request under the Municipal Freedom of Information and Protection of Privacy Act (the Act):

1. I wish to have and examine the 1990 Bell Canada billings to the Township, for the months of August and September. Calls that were placed to the Ministry of Municipal Affairs and to legal consultants for the Township, in regards to myself. As well as, any documented staff reports, recorded in any fashion, associated with those calls.
2. I would also request, any and all information, recorded in any fashion, regarding myself, including that which may be in the records of the Municipal Police Dep't. or any other areas of the municipality which fall under the care and control of the corporation of the Township of Michipicoten, in the District of Algoma.

The Township responded to the request by providing the requester with Bell phone records and an invoice for the Township's "Out-Wats" line, indicating that there was no record of phone calls being made to the Ministry of Municipal Affairs or the Township's legal consultant. The Township also provided the requester with access to certain records, but denied access to others pursuant to section 12 of the Act. The part of the request concerning police records is the subject of another appeal and is outside the scope of this appeal.

The requester appealed the Township's decision to deny him access and also claimed that additional responsive records had not been identified.

During mediation, the Township indicated that there were additional records related to the appellant that it had initially considered to be unresponsive to the appellant's request. The appellant indicated that he wanted access to those records. The Township released several of them to the appellant and denied access to others pursuant to section 12 of the Act. For his part, the appellant indicated that he was not interested in minutes of meetings, payroll records, correspondence that he sent to the Township, copies of news articles, or records related to the processing of this request.

Further mediation was not successful, and notice that an inquiry was being conducted to review the Township's decision was sent to the Township and the appellant. Written representations were received only from the Township.

The records which remain at issue in this appeal are four letters from the Township's lawyer to the Township, one memorandum from the Township to the Township's lawyer and three facsimile transmissions

between the Township's lawyer and the Township.

ISSUES:

The issues arising in this appeal are:

- A. Whether the Township has conducted a reasonable search for additional responsive records.
- B. Whether the discretionary exemption provided by section 12 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the Township has conducted a reasonable search for additional responsive records.

In discussions with this office, the requester elaborated on his claim that additional responsive records had not been identified. Specifically, the requester stated that the Township discussed his activities with the Township Police or the Township's legal consultants and that there should be some record of these discussions, such as internal memoranda or notes of telephone conversations.

In its representations, the Township provides a detailed outline of the steps taken to locate responsive records and provides two sworn affidavits. The individuals who provided affidavits are the Township's Chief Administrative Officer and Clerk Treasurer. Both affidavits set out in exhaustive detail the steps taken to locate responsive records including providing details of the specific files that were manually searched and of consultations with the persons within the Township who would be familiar with the matter.

Having carefully reviewed the representations submitted and the affidavits, I am satisfied that the search conducted by the Township for additional responsive records was reasonable in the circumstances.

ISSUE B: Whether the discretionary exemption provided by section 12 of the Act applies.

Section 12 provides:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide the Township with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Township contends that the records qualify for exemption under both branches. I will first consider the Branch 1.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Township must provide evidence that the record satisfies either of the following tests:

1.
 - a) there is a written or oral communication, **and**
 - b) the communication must be of a confidential nature, **and**
 - c) the communication must be between a client (or his agent) and a legal advisor, **and**
 - d) the communication must be directly related to seeking, formulating or giving legal advice;
- OR
2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49, M-2 and M-19]

Having carefully reviewed the records, I am satisfied that they meet the first test for exemption under Branch 1 of the section 12 exemption: they are written communications; the communications are confidential; the communications are between the Township and its legal counsel; and, the communications are directly related to seeking and giving legal advice.

Therefore, I find that the records at issue qualify for exemption pursuant to section 12 of the Act.

Section 12 is a discretionary exemption which allows the Township to disclose a record which qualifies for exemption. Having reviewed the representations of the Township, I find nothing improper in the manner it exercised its discretion in favour of denying access to the records.

ORDER:

1. I find that the Township's search for responsive records was reasonable in the circumstances.
2. I uphold the Township's decision to deny access to the records at issue.

Original signed by: _____ June 15, 1993
Asfaw Seife
Inquiry Officer