

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3037

Appeals MA11-264, MA12-122, MA12-131 and MA12-132

Town of New Tecumseth

April 16, 2014

Summary: The appellant submitted four requests relating to three identified properties. The town located responsive records and provided access to most of them, withholding eight pages of records pursuant to section 12 (solicitor-client privilege) of the *Act*. The appellant appealed the town's decisions on the basis of the reasonableness of search. She also appealed the town's application of section 12 to the withheld records. At adjudication, the adjudicator joined the four appeals. She upheld the searches for all four appeals as being reasonable and upheld the section 12 exemption for the withheld records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 17.

OVERVIEW:

[1] The appellant submitted a number of requests to the Town of New Tecumseth (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), which resulted in appeal files being opened.

[2] The four files which are addressed in this order (appeals MA11-264, MA12-122, MA12-131 and MA12-132) resulted from the appellant's requests for similar types of records from various departments within the town pertaining to a number of neighbouring properties, including her own. The requests are identified as follows:

Appeals MA11-264 and MA12-132 (property A)

[3] The request resulting in appeal MA11-264 was for:

Any and all documentation and drawings submitted regarding application for and approval of building permits regarding initial construction and reconstructions (including all additions) of [a specified address – Property A], to which I am legally allowed access including lot grading and site drainage.

[4] This request was subsequently clarified to include “all outbuildings.”

[5] The request resulting in the MA12-132 was for:

... all records not captured in previous [Freedom of Information] requests regarding [Property A], including e-records.

Appeal MA12-122 (property B)

[6] The request resulting in this appeal was for:

[A second specified address – Property B] all records from following departments, all septic (all Bldg. Dept.) By-law Enforcement, Public Works, Engineering & Planning Dept., Administration Dept., including e-records.

Appeal MA12-131 (property C)

[7] In this appeal, the appellant requested:

[H]ouse plans, all records in By-Law Enforcement, Public Works, Bldg Dept files, Engineering, Planning Dept, Administration Dept. [for third specified address – Property C], including e-records.

Processing of the appeals

[8] The town responded to all four of the requests, and the appellant appealed all of the responses.

[9] Certain issues in some of these appeals were resolved through mediation. At the conclusion of mediation, the issue of whether the town’s searches for responsive records were reasonable was a remaining issue in all of these appeals. It is the sole remaining issue in three of the appeals, whereas the fourth appeal (MA12-131) includes

the issue of whether the exemption in section 12 of the *Act* (solicitor-client privilege) applies to eight pages of responsive records.

[10] These files were then transferred to the inquiry stage of the appeal process, and were assigned to me. After reviewing these four files, I decided that the most efficient procedure to follow would be to combine these four appeals, to ensure that all of the information relating to the searches conducted was received, and to avoid duplication of effort.

[11] In the circumstances, I decided to seek representations from the appellant, initially, and sent her a Notice of Inquiry asking her to provide representations regarding the search issue raised in these four appeals. The appellant provided lengthy representations in response.

[12] I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the appellant's representations, to the town. I asked it to provide submissions regarding the searches that were undertaken in responding to these requests and to address the appellant's position that additional records exist. I also asked the town to provide representations on the application of section 12 to records in appeal MA12-131. The town submitted representations, as well as affidavit evidence, to me.

[13] After reviewing this information, I sought further representations from the appellant and shared the town's submissions with her in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. The appellant submitted further extensive representations in response.

[14] In this order, I find that the eight withheld pages of records qualify for exemption under section 12 of the *Act*. I also find that the town's searches for records responsive to the four requests were reasonable.

RECORDS:

[15] The records at issue comprise the withheld portions of pages 71, 79, 80, 84, 85, 139, 148 and 149 of the records identified in Appeal MA12-131.

ISSUES:

- A. Does the discretionary exemption at section 12 apply to pages 71, 79, 80, 84, 85, 139, 148 and 149 of the records identified in appeal MA12-131?
- B. Did the town conduct a reasonable search for records responsive to appeals MA11-264, MA12-122, MA12-131 and MA12-132?

DISCUSSION:

A. Does the discretionary exemption at section 12 apply to pages 71, 79, 80, 84, 85, 139, 148 and 149 of the records identified in appeal MA12-131?

[16] Section 12 states as follows:

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.

[17] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply. The town submits that portions of the above-noted records are exempt under the solicitor-client communication privilege aspect of both branches of the exemption.

Branch 1: common law privilege

[18] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.¹

Solicitor-client communication privilege

[19] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.²

[20] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.³

[21] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as

¹ Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders PO-2441, MO-2166 and MO-1925.

part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.⁴

[22] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁵

[23] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶

Loss of privilege

Waiver

[24] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[25] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege.⁷

[26] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁸

[27] Waiver has been found to apply where, for example

- the record is disclosed to another outside party⁹
- the communication is made to an opposing party in litigation¹⁰
- the document records a communication made in open court.¹¹

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁸ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

⁹ Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹⁰ Orders MO-1514 and MO-2396-F.

¹¹ Orders P-1551 and MO-2006-F.

[28] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties¹²
- a law firm gives legal opinions to a group of companies in connection with shared tax advice¹³
- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others.¹⁴

Branch 2: statutory privileges

[29] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[30] Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

Loss of Privilege

[31] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution*¹⁵ and
- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation.¹⁶

¹² *General Accident Assurance Co. v. Chrusz* (above); Order MO-1678.

¹³ *Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.).

¹⁴ *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.).

¹⁵ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

¹⁶ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

Representations and findings

[32] The town submits that the withheld portions of the records consist of e-mails from the town's external counsel to town employees that relate to direct communications between counsel and the client and/or form the continuum of communications relating to a legal opinion about a matter the town was dealing with. The town submits further that the communications were made and maintained in confidence and that it has not waived solicitor-client privilege in them.

[33] The appellant disputes the town's position that solicitor-client privilege has not been waived. She bases her position on the fact that the "to" line on the copy of an e-mail contained on page 95 of the records disclosed to her has been redacted. She notes that a specified report was attached to this e-mail, and states that she has asked the town who the report was sent to. She believes that, since only personal information has been withheld from this record, it is evidence that the report was sent to an individual in his or her personal capacity. She concludes, "[t]his leads me to believe that the Report was shared with a third party, *after* legal advice had been sought with respect to said Report."¹⁷

[34] Having reviewed the records at issue and the contents of page 95 referred to by the appellant, I am satisfied that pages 71, 79, 80, 84, 85, 139, 148 and 149 of the records identified in appeal MA12-131 comprise direct and confidential communications between town staff (the client) and a solicitor retained by the town, made for the purpose of seeking and giving legal advice. I find further that that town has not waived privilege. The fact that the town has withheld the name of the recipient of an e-mail to which it attached a copy of a report pursuant to section 14(1) does not establish, or even suggest, that the information contained in the e-mails at issue was disclosed to an outside party.

[35] Accordingly, I find that pages 71, 79, 80, 84, 85, 139, 148 and 149 of the records identified in appeal MA12-131 qualify for exemption under the communication privilege aspect found in both branches of section 12.

Exercise of Discretion

[36] As noted above, section 12 is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the record at issue. On appeal, the Commissioner may determine whether the institution failed to do so.¹⁸

[37] The Commissioner may find that the institution erred in exercising its discretion where, for example,

¹⁷ Emphasis in the original.

¹⁸ Orders PO-2129-F and MO-1629.

- it does so in bad faith or for an improper purpose,
- it takes into account irrelevant considerations,
- it fails to take into account relevant considerations.

[38] In such circumstances, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁹ This office, may not, however, substitute its own discretion for that of the institution.²⁰

[39] In its representations the town refers to the nature of the records at issue, and that they are direct communications between a solicitor retained by the town and town staff, in which the solicitor is providing legal advice to the client. The town refers to the importance of the solicitor-client privilege in common law, and notes that a client has an expectation that it can speak to legal counsel freely, with the assurance that the communication will remain confidential.

[40] The appellant does not directly address the issue of the town's exercise of discretion.

[41] Based upon my review of the information in the records that I have found qualify for exemption under section 12, and based on the town's representations, I find that the town exercised its discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. The records contain solicitor-client privileged information, and I uphold the town's exercise of discretion in applying the section 12 exemption.

B. Did the town conduct a reasonable search for records responsive to appeals MA11-264, MA12-122, MA12-131 and MA12-132?

[42] In appeals involving a claim that responsive records exist, as is the case in these appeals, the issue to be decided is whether the town conducted a reasonable search for the records as required by section 17 of the *Act*.

[43] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort

¹⁹ Order MO-1573.

²⁰ Section 43(2).

to identify and locate records responsive to the request.²¹ To be responsive, a record must be "reasonably related" to the request.²²

[44] Furthermore, in Order M-909, I made the following finding with respect to the obligation of an institution to conduct a reasonable search for records:

In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[45] Finally, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.²³

[46] I adopt the approach taken in the above orders for the purposes of the present appeals. If, after reviewing all of the evidence, I am satisfied that the searches carried out were reasonable in the circumstances, the decisions of the town will be upheld. If I am not satisfied, further searches may be ordered.

[47] After reviewing the considerable representations submitted by both the town and the appellant, I find that the town's search for responsive records was reasonable. I note that the town has made significant efforts throughout the processing of the initial request through to the adjudication stage to respond to the appellant's position and to provide her with additional detail that goes well beyond simply responding to an access request. In order to understand the issues raised by the appellant throughout this appeal, I have set out in some detail the town's responses.

Preliminary observations and determinations

[48] To begin, I note that these four appeals became quite complex for a number of reasons including: the number of requests filed by the appellant; their interrelation with each other and with other requests and appeals filed with the Nottawasaga Regional Conservation Authority (the NRCA); the number of questions raised by the appellant and the number of answers/clarifications provided by the town in response; the additional disclosure of records which occurred throughout these appeals; and the extensive mediation these appeals went through.

²¹ Orders P-624 and PO-2559.

²² Order PO-2554.

²³ Order MO-2246.

[49] I also note that the appellant has provided lengthy representations in which many issues are raised, questions are asked, and concerns are communicated. A number of these issues and concerns, which relate to all of the appeals, are general in nature. I will summarize some of these concerns and address them as follows:

Complaints/concerns about the initial searches conducted for records responsive to the requests

[50] Many of the concerns raised by the appellant in her representations (both her initial representations and her reply representations) relate to the initial searches conducted for responsive records, or the subsequent searches conducted for additional records during the mediation stage of these appeals. Essentially, she is concerned that the town interpreted the requests too narrowly, that the town did not initially conduct searches in the proper areas, that the town's subsequent clarifications confirm that the town's searches were not reasonable, and that the fact that the town located additional responsive records prove that the earlier searches were not proper.

[51] The extensive mediation conducted in these appeals did result in additional searches being conducted by the town, and in additional records being located. These additional searches and resultant records arose either as a result of the clarifications of the requests, the further information provided to the town about possible responsive records, or as a result of the town locating additional records for other reasons.

[52] In this order, my determinations will be based on the searches that have now been conducted for responsive records. I will not be reviewing or commenting on the earlier actions of the town, unless I refer to them in order to clarify my decisions. I understand the appellant's interest in reviewing all of the previous actions in these files in detail; however, I note that the additional searches that were conducted throughout the course of these appeals and the additional records that were located as a result, arose for a variety of reasons including the town's willingness to conduct further searches to address various issues identified in mediation.²⁴

[53] As a result, the issue before me is whether the searches that have now been conducted for responsive records were reasonable.

Complaints/concerns about the alleged failure of the town to answer the various questions raised by the appellant in the course of this appeal

[54] Throughout these appeals the appellant has asked numerous questions of the town. Some of these questions relate to the searches conducted for responsive records and whether additional records exist; however, many other questions are ones raised by the appellant which do not relate to the searches conducted, but rather ask for

²⁴ See: Order MO-2096, where similar issues were raised by the appellant, in that appeal.

explanations by the town about the actions it took in dealing with the properties which are the subject of the requests. During mediation, the town addressed some of these questions. The appellant accurately describes the consequence of these responses when she states (on page 23 of her reply representations) that the "answers ... seem to lead to further questions...."

[55] In its representations, the town has also answered a number of additional questions raised by the appellant about the records, in which she seeks explanations about why records are kept in certain ways, and answers to questions she has about the information in the records.

[56] Generally speaking, there is no requirement under the *Act* that an institution answer the questions that the contents of records might raise. I addressed this issue in some detail in Order MO-2096, where an appellant asked a number of questions of the Municipality of Greenstone. In that case, the appellant asserted that the Clerk of the Municipality was responsible for providing answers to her questions under the *Act*.

[57] In deciding this issue, I commented as follows:

Although the documents that the appellant received may raise questions in her mind to which she thinks there should be answers, this does not necessarily mean that answers exist in the documents that she received or in other documents. As I indicated above, there is no requirement under the *Act* that an institution answer the questions that the contents of records might raise. The issue is whether there are records in existence that might provide an answer to these questions. As I noted in Order PO-1655:

Previous orders of this office have considered the circumstances in which requests for information are set out in the form of questions (Orders M-493, M-530 and P-995). In two of these cases, it was determined that the questions could be interpreted as requests for records. In my view, this is not the case here. Based on my reading of part 7 and the Ministry's explanation, I agree that the appellant has asked a question of the Ministry and is seeking an answer rather than seeking information or records which would respond to it.

In PO-1655, I concluded that the institution had no obligation to simply answer questions or provide explanations of information contained in the records.

[58] Applying the reasoning in the previous orders cited in Order PO-1655, I concluded that:

The Municipality has clearly turned its mind to whether records might exist that are responsive to the questions the appellant asked and has indicated that some of her questions are addressed by the records, some are not and some must be answered by individuals rather than by records...

[59] I adopt the approach I took in Orders PO-1655 and MO-2096, and apply it to the circumstances of this appeal.

[60] Many of the points raised by the appellant in her initial and reply representations are actually questions the appellant has, arising from the records – questions about why certain information is or is not contained in the records, why certain decisions were made which are reflected in the records and requests for supporting documents and background information relating to these decisions. To its credit, the town has answered a number of these questions and provided some information, explanations, or supporting documents (ie: bylaws, policies, etc.). However, the town was not required to provide these answers and, in my review of the reasonableness of the searches conducted by the town, I will not review in detail issues arising from these questions and the answers to them (which resulted in further questions).

[61] I do note, however, that in some instances the questions raised by the appellant relate to the possible existence of records and therefore whether the searches conducted for records were reasonable. I address these issues in my analysis of the search issues, below.

Representations relating to all of the searches conducted

[62] The town provides general representations on the nature of the searches it conducted in all of these appeals. It acknowledges that the appeals have been through extensive mediation efforts, and states that the town has “worked diligently to respond to the appellant’s numerous FOI requests” and has “released all documents found to be responsive to the requests with the exception of portions of documents that are subject to exemptions.”

[63] The town then states that the appellant’s concern that more responsive records exist is based largely on the fact that additional documents were produced during the request and mediation processes. The town argues that this is predominantly as a result of the appellant either broadening her search request or providing more information to clarify the information she was seeking. It then states “With the exception of a few documents missed inadvertently, and described more fully below, the additional information released relates to the appellant providing more specific information to assist in the search of documents.”

[64] Regarding the nature of the searches conducted, the town states that:

- it employs over 155 full-time permanent staff;
- thousands of email records and documents are sent and received each business day at the town;
- town employees conducting the searches searched manual/paper records and used various search terms to capture relevant electronic documents responsive to the request;
- town employees searched 8 departments for records responsive to the requests and produced 867 documents;
- the town has cooperated with the mediator and conducted further searches when asked to do so;
- the Records Co-ordinator met with department managers to review their searches and determine if any records had been missed; and
- if records were overlooked or could not be readily found, the Records Co-ordinator requested more extensive searches and the relevant portions of said records were produced.

[65] The town indicates further that it "has worked diligently to be responsive to the Appellant's [access] requests and address the numerous issues she has raised."

[66] I will consider these general representations on all of the appeals as I review the specific representations in each appeal and make my findings, below.

Appeals MA11-264 and MA12-132 (property A)

[67] As I noted above, the request resulting in appeal MA11-264 was for:

Any and all documentation and drawings submitted regarding application for and approval of building permits regarding initial construction and reconstructions (including all additions) of [a specified address – Property A], to which I am legally allowed access including lot grading and site drainage.

[68] This request was subsequently clarified to include "all outbuildings."

[69] This request and the mediation process resulted in eight separate responses from the town. Although identified throughout the process as eight "decisions," I note

that some of these responses were supplementary decisions (ie: additional portions of records being disclosed, further records being located and provided or access denied), and some of these responses simply provided answers to the appellant's questions or clarified the town's position on certain matters.

[70] The request resulting in appeal MA12-132 was for:

... all records not captured in previous [Freedom of Information] requests regarding [Property A], including e-records.

[71] It appears that this request arose from the appellant's concern that additional records relating to the property exist, which may not have been captured by the wording of her earlier request for records of this property.

[72] The town's response to this request was that there are no responsive records, and that all records had now been provided "as per [Appeal MA11-264]."

Representations

[73] The appellant initially provided lengthy representations relating specifically to the searches conducted for records responsive to these two requests (relating to the same property – Property A). Her representations identify areas where she has concerns about the searches, questions about the information in the records, and questions about why additional records do not exist.

[74] In response, the town also provides detailed representations about the searches that it conducted, which it summarizes as follows:

The initial ... request related to construction records for [property A]. The Records Co-ordinator sent the request to the Building Department as all construction records are maintained at the Building Department. The request was interpreted as relating to construction documents pertaining to the principal dwelling as the request asked for initial construction, reconstruction and additions. A search of the property file was conducted and records responsive to the request were produced. The Town did not disclose records pertaining to outbuildings as it was determined that such records were not responsive to the request.

Subsequent to the initial release of documents, the Building Department found a working file that contained more responsive records. The additional records were produced to the Appellant.

Through communications [during mediation], the Appellant clarified the request to include all outbuildings. The Town produced documents

responsive to this request and answered thirty-four questions asked by the Appellant about specific documents. The Town did not disclose documents in the property file that were not responsive to the request and provided reasons explaining why the documents were not responsive.

As a result of further communication, the Records Co-ordinator understood that the Appellant wanted the balance of the property file for [property A] that had not been previously released due to the fact they were unresponsive to the request. As such, the documents previously withheld for being unresponsive were released.

Through mediation, it was determined that the Appellant wanted to expand her request to all records related to [property A]. The Town conducted an expanded search and directed that By-law Enforcement, Planning, Engineering and Public Works (Roads) Departments conduct a search for records related to the property. Records were located that were responsive to the expanded request and said records were produced to the Appellant. In addition, the [Chief Building Officer's (CBO's)] log books were reviewed and relevant portions of the log books were released to the Appellant. [On a specified date], the Appellant attended the Town office and viewed 35 original records. The Town answered the Appellant's questions and gave her photocopies of two pages. She believed that there must exist hand-written copies of the two photocopied pages. The Records Co-ordinator searched the file again and determined that there were no hand-written copies of the two pages.

The Appellant then requested [in the request resulting in appeal MA12-132] all records relating to [property A] which were not captured in her initial request. As the initial request related to construction records and all communications with the Appellant involved construction-related records, the Records Co-ordinator determined that all records had been released.

During mediation of the various appeals, and as noted above, the Town found that the CBO had daily log books that had not been disclosed. Upon learning of same, the Town reviewed the log books and disclosed all records responsive to the requests. The Town produced 61 pages from the log books that were responsive to the FOI Request regarding [property A].

[75] The town refers to the affidavit sworn by its Records Co-ordinator in which she provides information about the searches conducted for records responsive to this request. She describes the initial searches that were conducted, further searches conducted as a result of further information being provided, additional searches which other staff members conducted for additional records, and how the searches were

expanded during the processing of this file. She also refers to the emails that were sent requesting the searches to be done by the various departments, and the results of those searches.

[76] The Records Co-ordinator also identifies the further searches that were conducted as a result of the second request for information about property A (resulting in appeal MA12-132). She names the individuals and departments that conducted searches, and attaches to her affidavit a "Record of Searches" chart which summarizes the areas searched, identifies the name and position of the seven individuals who conducted searches, and nature of the records located as a result.

[77] In addition to providing representations on the searches that were undertaken, the town addresses the specific issues raised by the appellant in her representations as follows:

- With respect to the CBO's log books, the Appellant states that more records should exist on the basis of an entry in the log book where the CBO spoke to [a named individual in the Public Works department], asking for information on road maintenance. The Town has searched for said records and does not have additional records regarding road maintenance for [an identified property].
- The Appellant further believes more documents exist on the basis that record 36 mentions memos being printed, but no such memos were released. Record 36 is a page from the CBO's log book. The note states "ran email search for [property A] <redacted> on computer and printed out memo's. Printed out the emails to place in property file". The CBO confirmed that he used the word "memo's" interchangeably with "emails" and thus the emails printed and released to the Appellant are the "memo's" referenced in his notes. As such, there are no further documents.
- The Appellant believes transcription of phone messages exist at the Town. The Town does not transcribe phone messages and thus such records do not exist.
- The CBO reviewed his daily logbooks and the Records Co-ordinator released all pages that were responsive to the request. The Coordinator has been directly involved in the FOI Request process, including the mediation, and concluded, based on her extensive involvement, that the redacted portions should be withheld as the notes were not responsive.

[78] The town also notes that the appellant has raised a number of questions in her representations. In order to demonstrate the extent to which the town has attempted

to address the appellant's concerns, I have set out the town responses to these questions as follows:

1) Record 181 — is a scanner email address and is not a person employed by the Town. The Appellant has requested a copy of the image attached to the email. The email no longer exists in the system and thus it is not possible to print out the attachment. The CBO reviewed the email and confirmed that the attachment was a drawing of an attached garage as referenced in the text of the email thread. This drawing was released with the contents of the property file from the Building Department. ...

2) The Appellant believes [a particular Building Permit] must be in the property/building file as there is a Township of Tecumseth Building Permit Application in the file. The Township of Tecumseth Building Permit Application has [an identified number] written in the space for Permit No. This Application is the permit. The Records Co-ordinator spoke to the CBO and it is believed that in 1985, the procedure at the Township of Tecumseth was to use the Application form as the permit. A permit was issued once the Application had been completed and approved. Issuing a permit number on the Application was issuance of the permit and proof that the Application had been approved. The Town no longer employs anyone in the Building Department that worked for the Township of Tecumseth in 1985, and thus cannot verify with certainty that this is the case. However, the title of the Form as "Application" and the inclusion of a Permit Number suggest that the Application served as both the Application and the Permit if approved. There is no separate Building Permit on file.

3) Same as above. [a numbered building permit application] is believed to be both the Application and the Permit.

4) It is unclear which documents are being referenced in the Appellant's Representation. There are no pages 11, 12 and 13 in the November 7, 2011 release of records. ... The builder's name and architect's name are blank on the original record.

5) The Town does not have in its custody or control the NVCA inspection reports. It has the NVCA Permits, which have been released.

6) All records that exist have been released. Building permits are not issued for buildings under 10' x 10' because no permit is required by the Building Code.

7) All records that exist have been released. The Town did not receive documentation about a large tank being delivered in 2010. There are no records on file about an increase in bedrooms.

8) It is unclear what the Appellant is seeking to obtain. However, the request appears to relate to NVCA documents/records and is not a record held by the Town. The Town does not require the NVCA to provide records supporting the NVCA's process and reasons for an amendment to an NVCA permit. This information, if it exists, would be with the NVCA.

9) ... The Town's obligation is to search its own records and produce records responsive to the FOI Request. The Town does not have records as described in the Appellant's Representation.

[79] In summary, the town states:

The Town takes the position that it has responded to the ... requests and conducted reasonable searches. The request has expanded considerably from the initial [request]. The Town has expanded its searches accordingly and produced all records found in the search that are responsive to the Request. The Town represents that it has conducted a reasonable search of its records and has agreed to search records for this property every six months for a two year period as part of the continuing access request

[80] The appellant responds to the town's representations with lengthy reply representations. She begins by reviewing the specific background information. She acknowledges that some of the information provided by the town is helpful, and takes issue with the town's characterization of some of its actions.

[81] With respect to her representations that are specific to appeals MA11-264 and MA12-132, the appellant responds on a paragraph-by-paragraph basis to much of the information contained in the specific numbered paragraphs of the town's representations. Aside from her more general concerns and comments about the nature of the searches conducted by the town, the portions of the appellant's representations which are specific to whether additional records exist (and therefore whether the search was reasonable) can be summarized as follows:

- regarding question 1 above, the appellant is concerned that the image attached to the identified email no longer exists. She also notes her concerns about the missing permit for an original building;

- with respect to question 6, the appellant asks that the town either state that there were no applications for this property, or that there may have been applications but no records exist; and
- furthermore, the appellant states that if there was no permit, the town should investigate this matter.

[82] The appellant also reviews the affidavit on a paragraph-by-paragraph basis. Most of her representations either identify the appellant's concerns about the earlier actions taken in response to her request, or note her disagreement with the positions taken by the town regarding their actions in this file. She also states that this affidavit evidence supports her position that the search conducted by the town for responsive records was not reasonable.

Findings

[83] The issue of the reasonableness of the searches for responsive records relates to whether additional responsive records exist. In response to the requests for records relating to property A, and following various searches for records, many responsive records were identified and provided to the appellant.

[84] Notwithstanding this, one of the issues the appellant continues to focus on is her dissatisfaction with the initial searches conducted by the town, which appear to colour her overall suspicion that the town has failed to comply with its obligations under the *Act* to conduct a reasonable search for records responsive to her request.

[85] In my view, it is not a useful exercise to focus on the town's initial search. Rather, the issue before me is whether the town has ultimately conducted a reasonable search. In this case, it is the accumulated actions taken by the town during the request, mediation and adjudication stages that will determine the issue.

[86] It is clear from the representations of both parties that they have spent considerable time and effort addressing the issue of whether the searches conducted by the town for records responsive to the appellant's requests were reasonable. I have set out above in some detail the nature of the searches conducted by the town, and the nature of the evidence provided to me in support of the town's position that it conducted a reasonable search for responsive records. Although I have not set out the appellant's lengthy representations in the same way, I have considered her representations on the issue of the reasonableness of the town's search.

[87] In these appeals, the town has conducted extensive searches for records responsive to the appellant's requests. It has also specifically responded to many of the points made by the appellant in her representations, and addressed each of those points in some detail. The town has also provided affidavit evidence from the Records

Co-ordinator who was involved in the search, which identifies the other individuals who conducted searches.

[88] The appellant's representations are extensive and detailed, and are summarized above. Aside from the appellant's concerns about the earlier actions taken in response to her request, and her disagreement with the town's view of how it processed this file, the appellant's specific representations refer to her concerns about a deleted image and a missing permit, and her request that the town provide statements about their actions or further investigate this matter. I note that the appellant continues to raise specific concerns about the image and the permit after the town provided information about the nature of the searches conducted, as well as an explanation about why records were not located.

[89] Based on the significant information provided by the town, evidencing the nature of the searches conducted by it for responsive records, including the extensive searches conducted by it and the detailed affidavit evidence provided, I am satisfied that the searches conducted by the town were performed by knowledgeable individuals in locations where responsive records could reasonably be expected to be found. Accordingly, I find that the town's search for records responsive to the requests relating to Appeals MA11-264 and MA12-132 was reasonable in the circumstances.

Appeal MA12-122 (property B)

[90] The request resulting in this appeal was for:

[A second specified address – Property B] all records from following departments, all septic (all Bldg. Dept.) By-law Enforcement, Public Works, Engineering & Planning Dept., Administration Dept., including e-records.

[91] The sole remaining issue in this appeal is whether the searches conducted for responsive records were reasonable.

Representations

[92] The appellant initially provided lengthy representations relating specifically to the searches conducted for records responsive to this request. Her representations refer to certain work that was done on a property, and her belief that certain correspondence should exist. She also attaches notes of telephone conversations she had about the searches conducted, and identifies 13 areas of concern.

[93] In response, the town refers to the above-noted affidavit sworn by the Records Co-ordinator, which describes the areas searched, and the records located, and states:

During the mediation process, the Appellant ... submitted a list of 13 questions requesting either further information on the documents received or additional documents she believed to exist. The Records Coordinator circulated the questions to the relevant departments and the answer to each question was emailed to the mediator. As requested by the Appellant, the Town provided her with a copy of the Tecumseth Township Road Dedication Bylaw ..., a document that was not a part of or responsive to [the initial request]. Further, the Town arranged for the Appellant to view two original documents, which was done on [a specified date].

The Town located additional records during the mediation. These records were the log books maintained by the Chief Building Official. The CBO was not aware at the time of [the request] that log books were corporate records and understood they were personal notes. This issue was immediately corrected and the CBO reviewed the log books to determine if any notes were made that were responsive to [the request]. The CBO conducted a thorough review and did not find anything in his log books related to [property B] or anything responsive to [this request].

[94] The town also refers to the questions raised in the appellant's initial representations and confirms that it conducted further searches in response to them.

[95] With respect to specific questions raised by the appellant, the town provides the following responses:

- with respect to question 1, the town confirmed that there are no submissions made to the NVCA regarding failing of septic system;
- with respect to question 4, the town states that this is the first request for a copy of a particular by-law, and attaches a copy of the by-law to its representations;
- with respect to question 6, the town states that it does not have a By-law regarding the retention of emails, but does have a Records Management Policy to guide employees on retention of documents. It reviews the relevant portions of this by-law, and attaches a copy to its representations;
- with respect to question 8, the town states that there is no new building permit in the property file for the most recent referenced shed constructed;

- with respect to question 9, the town states that the Records Co-ordinator reviewed the property file and could not locate a date on the property survey and there is no record of who submitted the survey;
- with respect to question 10(b), the town confirmed that property elevations are taken in the field for reference at the time the work is done, and that the town conducted a further search of the Public Works Department file and located the Requests for Service Report Form that was completed manually on site, which includes recorded elevations. It states that the electronic copy of this report disclosed to the appellant did not include the elevations. The town provides a copy of the manual report as an attachment to its representations;
- with respect to questions 10(c) and 11, the town confirmed that the named worker in the field did not retain his own records;
- with respect to question 12, the town states that the referenced document is not a site plan but a property survey, and explains that it presumably goes with page 36, but that the pages are no longer stapled together. It also states that the file was thoroughly searched;
- with respect to question 13, the town states that there are no measurements on file regarding the new well and septic system.

[96] The town reiterates that there are no further records responsive to this request, and confirms that it has produced all relevant documents.

[97] In the affidavit sworn by the town's Records Co-ordinator, she provides information about the searches conducted for records responsive to this request. She states that, in response to the request, she sent an email to seven named individuals in six departments asking that searches be conducted. She indicates that, as a result of these searches, the town located and released 66 records responsive to the request. She also confirms that after this appeal was commenced, and in response to the appellant's questions, she compiled answers on a number of occasions. She also identifies further searches that were conducted, and the results of those searches. As well, the Records Co-ordinator prepared a Record of Searches chart which summarizes the areas searched, the records found and the 11 staff who conducted the searches, and attaches this to her affidavit.

[98] The appellant responds to the town's representations with lengthy reply representations. Her specific representations on appeal MA12-122 are contained in her paragraph-by-paragraph response to paragraphs 11 to 15 of the town's representations, her response to the thirteen points set out above, and her response to relevant numbered paragraphs of the affidavit sworn by the Record Co-ordinator.

[99] Again, aside from her more general concerns and comments about the nature of the searches conducted by the town, the portions of the appellant's representations which are specific to whether additional records exist (and therefore whether the search was reasonable) are set out in her response to certain parts of the thirteen points identified by the town. The relevant ones are:

- with respect to point 4, the appellant argues that the town's response refers to a particular Records Retention By-Law, which she suspects "would not apply in this instance as the records requested are previous in time thereto." The appellant states that the town has not responded to her request for the Records Retention By-Law previous to the one referenced, nor has it responded as to whether any new bylaw passed is retroactive. She asks that her questions be answered "in their entirety."
- with respect to point 8, the appellant asks if there is an old building permit for this most recent shed constructed. She states that if the Retention Period for building permits is 5 years, and there is no "new building permit in the property file", does this mean no building permit was applied for? She also states that, if that is not the correct inference, then the town ought to "at least release a copy of the Application for Building Permit, which, judging by the survey submitted, should be extant."
- with respect to point 9, the appellant asks why the Records Co-ordinator, and not the CBO, reviewed the property file, as he would be the "experienced employee knowledgeable in the subject matter of the request."
- with respect to point 13, the appellant acknowledges the response, but also states that the "release of Building Code Regulation 350/06 would be appreciated and any other applicable legislation at the time in question."

[100] The appellant also asks for clarifications on why attachments 4 and 5 are identical, but relate to different people, and how page 36 relates to page 37 (notwithstanding the reference in the affidavit to this issue, and the statement that the "order of pages in the file suggests that ... page 37 goes together with ... page 36."

[101] In response to the affidavit of the town's Records Co-ordinator, the appellant raises a number of issues. The ones that relate directly to the searches are the following:

- the chart of the record of searches does not include the dates the searches were conducted, which, the appellant argues, renders the chart unhelpful and "well-nigh meaningless."

- the administrative department ought to have been canvassed.

Findings

[102] Similar to the previous two appeals, the issue of the reasonableness of the search for responsive records relates to whether additional responsive records exist. In response to the request for records relating to property B, and following various searches for records, many responsive records were identified and provided to the appellant.

[103] It is again clear from the representations of both parties that they have spent considerable time and effort addressing the issue of whether the searches conducted by the town for records responsive to the appellant's requests were reasonable. I have detailed above the nature of the searches conducted by the town, and the evidence provided to me in support of the town's position that it conducted a reasonable search for responsive records. I have also set out portions of the appellant's lengthy representations, and have reviewed her representations on the issue of the reasonableness of the town's search.

[104] In this appeal, the town has conducted extensive searches for records responsive to the appellant's request. It has also specifically responded to many of the points made by the appellant in her representations, and addressed each of those points in some detail. The town has also provided affidavit evidence from the Records Coordinator who was involved in the search, which identifies the other individuals who conducted searches.

[105] As I noted above, the appellant's representations, summarized above, are extensive and detailed. Aside from her concerns about the earlier actions taken in response to her request, and her disagreement with the town's view of how it processed this file, the appellant's specific representations relate to her concerns about the following:

- she requests a particular records retention by-law, and regulation;
- she asks that her questions be answered "in their entirety;"
- she asks for further explanations or clarifications about certain records, and asks whether certain inferences she makes are correct;
- she believes certain individuals or other departments ought to have conducted certain searches; and
- she argues that the chart of the record of searches is unhelpful because it does not include the dates of the searches.

[106] Based on the information provided by the town regarding the nature of the searches conducted by it for responsive records, including the extensive searches conducted by it and the detailed affidavit evidence provided, I am satisfied that the town's search for records responsive to the requests was reasonable in the circumstances. Although the appellant raises a number of questions or concerns, I find that most of them relate to questions about the records themselves or the town's procedures, and only peripherally relate to the searches. As in the above appeals, I find that the searches conducted by the town were performed by knowledgeable individuals in locations where responsive records could reasonably be expected to be found.

Appeal MA12-131 – Property C

[107] In this appeal, the appellant requested:

[H]ouse plans, all records in By-Law Enforcement, Public Works, Bldg Dept files, Engineering, Planning Dept, Administration Dept. [for third specified address], including e-records.

[108] After providing a fee estimate decision, the town subsequently issued a decision granting the requester partial access to certain responsive records. The town denied access to the remainder of the records pursuant to the discretionary exemption at section 12 (solicitor-client privilege) and the mandatory personal privacy exemption at section 14 of the *Act*.

[109] During mediation, a number of issues were resolved; however, issues regarding access to the records denied on the basis of the exemption in section 12 were not resolved. I address those issues under Issue A, above.

[110] In addition, the appellant indicated her belief that more records should exist, which raised the issue of whether the searches conducted for responsive records were reasonable.

Representations

[111] The appellant initially provided lengthy representations relating specifically to the searches conducted for records responsive to this request, including concerns she had about the response received from the town.

[112] In response, the town provides representations relating to this request. It reviews the request and then states as follows regarding the searches conducted:

... the Records Co-ordinator circulated the Appellant's request to management in By-law Enforcement, Public Works, Building, Engineering,

and Planning Departments. A total of 14 staff members searched for records responsive to the ... request and 265 records were located in Building, Administration/Clerks, Engineering and Roads (a division of Public Works). ...

[113] The town refers to the affidavit of its Records Co-ordinator in support of its position. It then refers to the various steps that were undertaken in mediation. With respect to the reasonableness of the searches, the town reviews certain actions it took, and also confirms that, when it learned that the town's Chief Building Official (CBO) had log books that had not been produced, it located these records and provided the 21 pages related to this request to the appellant.

[114] The town also confirms that the numbering of supplemental sets of records provided to the appellant may have resulted in some confusion, and that it now sequentially numbers all pages.

[115] The town also addresses a number of other issues raised in this appeal, which can be summarized as follows:

- The CBO searched his files and records for rough notes made at an identified meeting, and cannot locate any such document. Further, the CBO deleted some emails after they had been produced under the FOI Request on the understanding the emails had been produced and did not need to be retained in his inbox. The Records Co-ordinator was able to locate the emails through other sources and thus disclosure is complete. However, it is important to note that the emails had been produced prior to deletion.
- The appellant raised a concern that she received a document that related to a different property that was not the subject of this request. The document in question is page 32, a handwritten excerpt from a By-law Enforcement Officer's notebook. The note refers to a phone call to the appellant and so the address in the notebook is [the same as] the subject property of this request. The search results match the requested information and thus the page was disclosed. The next notebook entry concerns a visit to the property to check for tree cutting and references [the identified address]. The Records Co-ordinator has since learned that the tree cutting complaint related to [a different address], however the officer's notes references [the identified address] As such, the officer's notes were released pursuant to this ... request as the search encompassed and collected documents referencing [the identified address].

- The appellant queries the location of notes made by [an identified individual] regarding a property visit in August 2010. [This individual] and the Records Co-ordinator together reviewed his notes for August 2010 and there is no reference to the Appellant or [the identified address].”
- The appellant requests Minimum Distance Setback calculations done for agricultural buildings. No such calculation was required as the agricultural building was constructed prior to the Appellant’s house and the agricultural use of the building for livestock was indicated from the start. There was no change to the intended use of agricultural building that would trigger a new MDS calculation.

[116] Referring to eight specifically named individuals whom the appellant believes ought to be asked to search for records, the town indicates that some of them were involved in the searches, others either no longer work for the town or never worked for the town, and one of them would not have records that fall within the request.

[117] With respect to the appellant’s request that specific departments be searched, the town states:

The Appellant’s ... request listed the departments from which she sought records and, in response to the ... request, searches were conducted of those departments. Many of the Town’s documents are electronic and thus many of the searches for documents responsive to ... requests are done electronically. As the Town cannot manually search every electronic record, it must rely on search terms to locate documents. Staff determines the best search terms to locate documents being requested There are situations where searches, regardless of how specific the search, will not pull all of the relevant documents. ...

[118] The town summarizes its position by stating:

The Act requires the Town to produce records responsive to the FOI Request received. It does not have the statutory obligation or the resources to search every department, every database and every file for records. It must define the search to relevant search terms and departments that would produce records responsive to the request. The Town complied with this requirement.

[119] The town again refers to the affidavit sworn by the town’s Records Co-ordinator. In that affidavit, she states that, in response to the request, she sent an email to seven named individuals in six departments asking that searches be conducted. She indicates that, as a result of these searches, the town located and released 212 records responsive to the request. She also confirms that after this appeal was commenced,

and in response to the appellant's questions, she requested a further search be conducted by a named individual in another department, and that an additional 32 records were located. She also identifies further searches that were conducted, and the results of those searches and notes that she compiled answers to questions the appellant asked on a number of occasions. As well, the Records Co-ordinator prepared a Record of Searches chart which summarizes the areas searched, the records found and the 14 staff who conducted the searches, and attaches this to her affidavit.

[120] The appellant responds to the town's representations with lengthy reply representations. Her specific representations on appeal MA12-131 are contained in her paragraph-by-paragraph response to the relevant paragraphs of the town's representations and the affidavit.

[121] Again, the appellant identifies her general concerns and comments about the nature of the searches conducted by the town. She also identifies specific individuals whom she believes ought to have been contacted to conduct searches. She also believes the town's manner of responding to the requests (going to specific departments) resulted in the initial failure to identify all responsive records. In addition, she again indicates that the administrative department ought to have been canvassed, and that the chart of the record of searches attached to the affidavit does not include the dates of the searches. She states that "most of the searches were, in my opinion, too little, too late."

Findings

[122] As with the above three appeals, the issue of the reasonableness of the search for responsive records relates to whether additional responsive records exist. In response to the request for records relating to property C, and following various searches for records, many responsive records were identified and provided to the appellant.

[123] It is again clear from the representations of both parties that they have spent considerable time and effort addressing the issue of whether the searches conducted by the town for records responsive to the appellant's requests were reasonable. I have detailed above the nature of the searches conducted by the town, and the evidence provided to me in support of the town's position that it conducted a reasonable search for responsive records. I have also set out portions of the appellant's lengthy representations, and have reviewed her representations on the issue of the reasonableness of the town's search.

[124] In this appeal, the town has conducted extensive searches for records responsive to the appellant's request. It has also specifically responded to many of the points made by the appellant in her representations, and addressed each of those points in some detail. The town has also provided affidavit evidence from the Records Co-

ordinator who was involved in the search, which identifies the other individuals who conducted searches.

[125] The appellant's representations, summarized above, are extensive and detailed. In addition to her concerns about the earlier actions taken in response to her request, and her disagreement with the town's view of how it processed this file, the appellant's specific representations relate her concerns that specific, named individuals ought to have also conducted searches for records. She also believes the town's manner of responding to the requests (going to specific departments) resulted in the initial failure to identify all responsive records, and that the chart of the record of searches attached to the affidavit is inadequate because it does not contain a date.

[126] Based on the information provided by the town, evidencing the nature of the searches conducted by it for responsive records, including the extensive searches conducted by it and the detailed affidavit evidence provided, I am satisfied that the town's search for records responsive to the requests was reasonable in the circumstances.

[127] With respect to the concern that the chart did not contain the dates of the searches, although the dates may have been helpful, the information about who conducted the searches and the results of the searches, attached to the affidavit, are still sufficient evidence to satisfy me that a reasonable search was conducted.

[128] With respect to the appellant's concerns that specific, named individuals ought to have also conducted searches, I acknowledge that not every individual listed or mentioned in the appellants' detailed earlier representations was contacted in the course of the town's search for records. However, based on my review of the evidence regarding the town's searches, including the affidavit provided by the Records Coordinator, which sets out the number of individuals directly related to the request who were contacted and who searched for records, I find the searches conducted were reasonable. In particular, I find that the searches conducted by the town were performed by knowledgeable individuals in locations where responsive records could reasonably be expected to be found.

ORDER:

1. The town's decision regarding the application of section 12 is upheld.

2. The town's search for records responsive to Appeals MA11-264, MA12-122, MA12-131 and MA12-132 was reasonable and this part of the appeal is dismissed.

Original signed by: _____

Laurel Cropley
Adjudicator

_____ April 16, 2014