

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3412

Appeal MA16-142

Township of Uxbridge

February 14, 2017

**Summary:** The township received a two-part request under the *Act* for information about an identified property. The township located records responsive to part 1 of the request, granting partial access to them, withholding portions pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. With respect to part 2 of the request, the township advised that no responsive records were located. The requester appealed the township's decision on the basis that additional records responsive to both parts 1 and 2 of his request should exist. The application of section 14(1) to portions of the responsive records is not on appeal. In this order, the adjudicator upholds the township's search for responsive records as reasonable.

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

### OVERVIEW:

[1] The Township of Uxbridge (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about an identified property, specifically:

1. all records (including correspondence, notes, emails, meeting minutes and agendas, and phone records) in the possession of the Township of Uxbridge (including staff, Township agents or consultants, and the Mayor and Council) in relation to an application for variance from zoning by-law Number 81-19,

approval or variance from zoning by-law Number 81-19, and approval of building permit, From May 1, 2014 to May 1, 2015; and,

2. in addition to [the township's email address for named councillor], this request includes records relating to item 1 above from [the named councillor's personal email accounts as follows: [two specified personal email addresses]].

[2] The requester advised that the councillor uses his personal email accounts to communicate with residents.

[3] The township issued an access decision granting partial access to records responsive to part 1 of the request. Portions of the records were severed pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. The township advised that it would provide access to portions of the records not subject to the exemption following receipt of a fee.

[4] With respect to records responsive to part 2 of the request, the township advised:

[A]ll records responsive to [part 2 of] this request, should they exist, would have been generated by the councillor in their personal capacity as an elected official and not as an officer or employee of the Township of Uxbridge. Accordingly, access cannot be granted as the records are not within the custody and control of the township.

[5] The requester, now the appellant, appealed the township's decision.

[6] During mediation, the appellant confirmed that he is not pursuing access to the information that has been severed from the records responsive to part 1 of the request under section 14(1) of the *Act*, nor is he appealing the fee. The appellant advised that he believes that additional records should exist with respect to both parts 1 and 2 of his request. With respect to part 1, the appellant advised that he believes that internal communications between township staff and councillors should exist. With respect to part 2, the appellant advised that he believes that emails from the named councillor's personal email accounts should exist and that such emails are in the custody and control of the township.

[7] The township advised that it had canvassed appropriate staff for records responsive to both parts of the appellant's request and that no additional records were located. The appellant was not satisfied with the township's response.

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. During the course of my inquiry into this appeal, representations were sought and received from both parties. The township's representations were shared with the appellant pursuant to the confidentiality criteria set out in this office's *Practice Direction 7*. I decided that it was not necessary to share the appellant's representations with the

township for a reply.

[9] In its representations, the township advised that it no longer takes the position that any records that might be responsive to part 2 of the request (emails from the councillor's personal email address) do not fall under its custody or under its control. It also advised that it continues to take the position that no records responsive to that portion of the request exist. Accordingly, the issue of custody or control is no longer at issue in this appeal. However, the reasonableness of the township's search for records responsive to both parts 1 and 2 of the request remains at issue and is the sole issue to be determined in this appeal.

[10] In this order, I uphold the township's search for responsive records. My reasons follow.

## **DISCUSSION:**

### **Did the township conduct a reasonable search for responsive records?**

[11] The township asserts that it conducted a reasonable search for and has located all records responsive to the request. The appellant takes the position that additional responsive records should exist. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.<sup>1</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[12] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>2</sup> To be responsive, a record must be "reasonably related" to the request.<sup>3</sup>

[13] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>4</sup> To be responsive, a record must be "reasonably related" to the request.<sup>5</sup>

[14] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>6</sup>

---

<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

<sup>2</sup> Orders P-624 and PO-2559.

<sup>3</sup> Order PO-2554.

<sup>4</sup> Orders P-624 and PO-2559.

<sup>5</sup> Order PO-2554.

<sup>6</sup> Order MO-2246.

## ***Representations***

[15] In support of its position that it conducted a reasonable search for records responsive to the request, the township provided an affidavit sworn by its Deputy Clerk.

[16] The Deputy Clerk advised that upon receipt of the request, he sent an email to the councillor requesting that he search for records responsive to the request. In response, the councillor provided two email chains with the owners of the property at a specific address, neither of which had "anything to do with the records being sought in the request." The Deputy Clerk also states that based on information received from the councillor it is clear that the councillor searched his personal emails for records pertaining to the request. The Deputy Clerk attached a copy of an email addressed to him from the councillor to his affidavit and from my review, it is clear that the councillor searched all three of his email addresses as listed in the request.

[17] The Deputy Clerk advised that searches for responsive records were also carried out by township staff, when the requests were received, and that the records that were located were provided to him. He submits that search requests were sent to the township's Chief Building Official and to a Planning Technician who, he submits, are the only two staff members who would reasonably have records relating to this request. The Deputy Clerk provided a copy of the email requesting those staff members to conduct a search for responsive records.

[18] The Deputy Clerk concluded his affidavit stating that it is the township's position that a reasonable search was conducted for the requested records at issue in this appeal.

[19] The appellant takes the position that additional records responsive to his request must exist. In his representations, the appellant explained in great detail the background to his request and provided numerous supporting documents to help illustrate his submissions. In brief, the appellant objects to a large addition (or accessory building) constructed on the property, which is across the street from his own property. The appellant believes that the property owners are conducting a commercial business out of this addition and that doing so is in contravention of a municipal bylaw.

[20] The appellant submits that by his access request, he hopes to ascertain whether or not there are records to show that permission was privately granted to the property owner at the outset of the application process to proceed with their business plan and the financial investment of facilities and equipment. The appellant submits that through documents disclosed in a separate freedom of information request, he subsequently learned that the property owners worked out an agreement with the township whereby they joined the two structures together (the property owner's dwelling and the newly constructed accessory building) so that it would be considered one dwelling. The appellant submits that as one dwelling, under the "Home Occupancy" bylaw, the business would be considered legal. He submits that this change occurred with "no signed approval documents, no mention of the use restriction agreement between the property owners and the [township], no mention of registration of use restrictions on

title.”

[21] The appellant suggests that additional records should exist that demonstrate that the plan for commercial and industrial use of the accessory building was known at the time of the variance application. The appellant also believes that “with a legal agreement restricting the use of the accessory building registered on titled...it is highly unlikely the property owner would proceed with large financial investment in facilities and machinery,” secure mortgage financing and launch and advertise the business “unless assurances from [the township] were given.”

[22] At the conclusion of his representations, the appellant submits that the two critical questions in the current appeal are:

1. Did the property owners receive assurances from anyone including [the mayor], [the deputy mayor and councillor identified in the request], other members of Council or Staff that they could go ahead with their investment in facilities and machinery in support of their business without concern for the law, and
2. Did [the mayor], [the deputy mayor and councillor identified in the request], other members of Council or Staff knowingly compromise the planning process by withholding knowledge of the intended illegal use of property in order to get the accessory building approved and building and [named company] up and running.

[23] The appellant “request[s] an aggressive search for records that will answer these questions....”

### ***Analysis and finding***

[24] Having carefully reviewed the evidence before me, I am satisfied that the search conducted by the township for records responsive to both parts of the appellant’s request was reasonable and is in compliance with its obligations under the *Act*.

[25] As previously explained, a reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends reasonable effort to locate records that are reasonably related to the request. In the circumstances of this appeal, I find that the township has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and to locate responsive records within its custody or under its control. I acknowledge that the searches were directed and conducted by experienced employees, knowledgeable in the subject matter and that consultations were made to confirm the accuracy of the findings. I accept that the effort that the councillor and the township staff members expended to locate responsive records was reasonable and in accordance with the township’s obligations under the *Act*.

[26] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a

reasonable basis for concluding such records exist. While I acknowledge that the appellant is of the view that additional records should exist to demonstrate that the property owner received assurances from the township that they could conduct a commercial business in their accessory building, I do not accept that I have been provided with a reasonable basis for reaching such conclusion.

[27] Although the appellant's position is carefully detailed, I find that it is speculative in nature. He has provided, with great specificity, the time line and details surrounding the approval, construction and use of the accessory building that was constructed across the street from his own property, including facts that he believes suggest that a commercial business is being operated out of the space. However, I have not been provided with a reasonable basis to conclude that records documenting the various allegations made by the appellant exist. Moreover, based on documentation that the appellant provided to me himself, despite several bylaw complaints by the appellant detailing his evidence to the contrary, it appears that following an investigation, the township is of the position that no commercial business is being conducted out of the property.

[28] Furthermore, even if additional records exist or existed at one point in time, I reiterate the principle outlined above that the *Act* does not require the township to prove with absolute certainty that further records do not exist. Rather, the township's obligation under the *Act* is to demonstrate that it has made a reasonable effort to identify and to locate responsive records. In the circumstances of this appeal I accept that it has done so.

[29] I acknowledge that the appellant believes that some form of approval process by the township might have occurred without regard to standard procedures or municipal bylaws. However, it should be noted that it is not within my jurisdiction to determine whether the approval process was conducted in an appropriate fashion, in accordance with township procedures or in accordance with municipal bylaws. My jurisdiction is to determine whether the township conducted a reasonable search for records responsive to the request and I accept that it has.

[30] In conclusion, I am of the view that in the circumstances of this appeal the township has discharged its onus and has provided sufficient evidence to support its position that it has made a reasonable effort to identify and to locate records responsive to the request. On that basis, I uphold its search and dismiss the appeal.

**ORDER:**

I uphold the township's search for responsive records.

Original Signed By: \_\_\_\_\_  
Catherine Corban  
Adjudicator

February 14, 2017 \_\_\_\_\_