

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3436-I

Appeal MA16-408

Township of Uxbridge

May 9, 2017

Summary: The township received a three-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (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 parts 2 and 3 of the request, the township advised that no responsive records were located. The requester appealed the township's decision to withhold portions of the records responsive to part 1. He also appealed the township's decision on reasonable search with respect to parts 2 and 3. In this order, the adjudicator upholds the township's decision to withhold portions of the records responsive to part 1 pursuant to section 14(1). However, she finds that the township did not conduct a reasonable search for part 2, and orders it to conduct further searches in response to that part.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 14(1), and 17(1).

Orders and Investigation Reports Considered: Orders MO-3407, MO-3380, M-909, MO-2135-I, PO-2782-I, MO-3412, and MO-3413.

BACKGROUND:

[1] The Township of Uxbridge (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information for the

period from March 3, 2016 to May 19, 2016 relating to an identified property in Stouffville. The request encompassed:

1. All records relating to the township's decision to permit an accessory building to be attached to a dwelling, once attached to the dwelling, to be considered part of the dwelling, and once part of the dwelling to be legally able to accommodate a business.
2. All records relating to the planning process followed by the township which resulted in approval of the permit and initiation of construction on the property.
3. Specifically, all records of a named councillor in relation to the above two topics.

[2] The township issued a decision granting partial access to records responsive to part 1 of the request. Some information was withheld under the personal privacy exemption at section 14(1) of the *Act*. The township advised that there were no records responsive to parts 2 and 3 of the request.

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

[4] During the course of mediation, the appellant confirmed that he sought access to the information responsive to part 1 of his request, which was withheld under section 14(1) of the *Act*. He also believes that records responsive to parts 2 and 3 of his request should exist. The township took the position that it had conducted a reasonable search for records responsive to parts 2 and 3 of the request.

[5] As mediation was unable to resolve the outstanding issues, it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. Representations were sought and received from all the parties. In accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*, I provided a summary of the relevant details of the affected parties' representations and a copy of the township's entire representations to the appellant. I decided that it was not necessary to share the appellant's representations with the township and the affected parties for a reply.

[6] In this order, I find that records responsive to part 1 of the request qualify for exemption under section 14(1). I also find that the township did not conduct a reasonable search for records responsive to part 2, and order further searches in respect to part 2 of the request.

RECORDS:

[7] The records at issue consist of the information responsive to part 1 of the request, which is withheld under section 14(1) of the *Act*. The withheld information contains names, email addresses and phone numbers in 7 pages of emails.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 14(1) apply to the information at issue?
- C. Did the township conduct a reasonable search for records responsive to parts 2 and 3 of the request?

DISCUSSION:

A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[8] The township claims that certain information contained in the record responsive to part 1 of the request is exempt pursuant to the personal privacy exemption at section 14(1).

[9] In order to determine whether this section may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[10] "Personal information" is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[12] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[13] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[14] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[16] In its representations, the township submits that the records responsive to part 1 contain communications between it and the owners of the property. As such, it submits that the withheld information is about the owners of the property. Accordingly, it falls within the definition of "personal information" as defined in section 2(1) of the *Act*.

[17] Although the appellant and the affected parties provided representations, their representations did not directly address whether the withheld information is personal information.

[18] After reviewing the withheld information in the records responsive to part 1 of the request, I find that it contains the personal information of two individuals. Although one of the individuals used his work email address in his communications, I do not find that this information falls within section 2(2.1) (the business identity information) as he was communicating with the township in his personal capacity. Overall, the withheld information includes the two individuals' name, phone numbers and email addresses, which falls within the definition of "personal information" under the *Act*.

B: Does the mandatory exemption at section 14(1) apply to the information at issue?

[19] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[20] The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 14.

[21] Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. This section states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[22] Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1).

[23] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14(1). Once established, a presumed unjustified invasion of personal privacy under

section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies.⁵ Section 14(4) does not apply in the circumstances of this appeal and the appellant has not raised the application of section 16. Further, I do not have evidence that any of the presumptions in section 14(3) applies.

[24] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.⁶

[25] Section 14(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy.

[26] In order to find that disclosure does not constitute an unjustified invasion of personal privacy under section 14(1), one or more factors and/or circumstances favouring disclosure in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.⁷

[27] In this appeal, none of the parties have provided any evidence with respect to the factors and/or circumstances favouring or not favouring disclosure. Moreover, there is no evidence that any of the factors favouring disclosure in section 14(2) apply. Accordingly, I find that the mandatory exemption in section 14(1) applies to exempt the personal information in part 1 of the request.

C: Did the township conduct a reasonable search for records responsive to parts 2 and 3 of the request?

[28] 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 17.⁸ 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.

[29] 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.⁹ To

⁵ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

⁶ Order P-239.

⁷ Orders PO-2267 and PO-2733.

⁸ Orders P-85, P-221 and PO-1954-I.

⁹ Orders P-624 and PO-2559.

be responsive, a record must be "reasonably related" to the request.¹⁰

[30] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.¹¹

[31] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹²

[32] 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.¹³

[33] Although the appellant provided representations, his representations did not directly address the issue of reasonable search.

[34] In its representations, the township asserts that it conducted a reasonable search for parts 2 and 3 of the request. In support of its representations, the township attached an affidavit sworn by the Deputy Town Clerk.

[35] The Deputy Town Clerk advised that upon receipt of the request, he sent an email to relevant township staff, the mayor and the named councillor about the request. In response, both the mayor and the named councillor responded by stating that they did not have any records relating to the request. The Deputy Town Clerk attached a copy of the email responses from the mayor and the named councillor to his affidavit. He also attached a copy of an email he sent to relevant township staff about the request.

[36] Having carefully reviewed the evidence before me, I am not satisfied that the search conducted by the township for records responsive to part 2 of the appellant's request was reasonable.

[37] In Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She states:

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

¹⁰ Order PO-2554.

¹¹ Orders M-909, PO-2469 and PO-2592.

¹² Order MO-2185.

¹³ Order MO-2246.

rely on the experience and judgment of the individual conducting the search.

[38] I adopt the approach taken in the above-noted order.

[39] Although the Deputy Town Clerk provided a copy of the email sent to relevant township staff, he does not state the position held by these five individuals. It appears that one of these five individuals is the Freedom of Information Coordinator, but I have not been provided with the position of the other four individuals. As such, I am unable to assess whether they are experienced employees or not.

[40] More importantly, with respect to part 2 of the request, the Deputy Town Clerk has not stated the efforts the township staff has made to identify and locate responsive records. For example, the Deputy Town Clerk has not stated where township staff has searched for records, or described the township's record holdings.

[41] With respect to part 3 of the request, I note that the email response from the named councillor to the Deputy Town Clerk stated that the named councillor did not have any records. I also note that, in his representations, the appellant did not provide a reasonable basis for concluding that such records exist. In the absence of evidence, I find that the township has conducted a reasonable search with respect to part 3 of the request.

[42] In sum, I find that the township has not conducted a reasonable search for records responsive to part 2 of the request. The Deputy Town Clerk's affidavit lacked details about the employee(s) who conducted the search and the area(s) they searched. However, I find that the township has conducted a reasonable search for records responsive to part 3.

ORDER:

1. I uphold the township's decision to withhold portions of part 1 of the request due to section 14(1) of the *Act*.
2. I order the township to conduct further searches for records responsive to part 2 of the request. I order the township to provide me with an affidavit sworn by the individual who conducts the search(es) within 21 days of the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:
 - a. information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
 - b. a statement describing the employee's knowledge and understanding of the subject matter of part 2 of the request;

- c. the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - d. information about the record holdings searched, the nature and location of the search, and the steps taken in conducting the search;
 - e. the results of the search;
 - f. if as a result of the further searches it appears that no responsive records exist, a reasonable explanation for why such records would not exist.
3. The affidavit referred to in the above provision should be forwarded to my attention, c/o Information and Privacy Commissioner of Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*.
4. I remain seized of this matter.

Original Signed by: _____

Lan An
Adjudicator

_____ May 9, 2017