

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3766

Appeal MA17-148

Township of Puslinch

May 3, 2019

Summary: The appellant filed an access request under the *Act* with the township for records relating to an identified address. The township granted the appellant partial access to the responsive records. The township withheld certain information under the discretionary exemptions in sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*. The appellant appealed the township's decision and raised the issue of whether the township has an obligation to disclose the records under section 5(1) of the *Act*. The appellant also claimed that additional responsive records ought to exist, thereby raising the issue of reasonable search. In this order, the adjudicator finds that she does not have jurisdiction to make an order pursuant to section 5(1) of the *Act*. In addition, the adjudicator finds that the one record remaining at issue is exempt under section 12 and upholds the township's exercise of discretion. Finally, the adjudicator finds that the township conducted a reasonable search for responsive records and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended sections 5(1), 12 and 17.

OVERVIEW:

[1] The appellant filed an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Township of Puslinch (the township) for the following records relating to an identified address:

- Nitrate impact analysis
- GM blueplan sewage system review

- Further review of the drainage plan
- All documents and information relating to the redevelopment since my last request on or about September 6th, 2016

[2] After locating responsive records, the township notified individuals whose interests may be affected by the disclosure of the records (the affected parties) to seek their views on disclosure. The affected parties provided the township with their consent to disclose the information relating to them in the records.

[3] The township issued an access decision to the appellant and affected parties granting the appellant access to the records, in part. The township withheld Records 5, 6, 7, 18 and 23, either in whole or in part, under the discretionary exemptions in sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*.

[4] The appellant appealed the township's decision to this office.

[5] During mediation, the appellant confirmed his interest in the information withheld from disclosure. The appellant took the position that the township has an obligation to disclose the responsive records to him, in full, pursuant to section 5(1) of the *Act*. In addition, the appellant raised the possible application of the public interest override in section 16 of the *Act* to the records. Finally, the appellant claimed that additional responsive records should exist, thereby raising the reasonableness of the township's search for records as an issue in this appeal.

[6] The town conducted another search for records and located one additional record. The town disclosed the new record to the appellant, in full. Subsequently, the township confirmed that all the records identified and located as responsive to the request had been disclosed to the appellant, with the exception of the information that is subject to its exemption claim. The township stated that no further responsive records exist.

[7] The appellant confirmed his position that additional records should exist and that the records should be disclosed to him, in full.

[8] Mediation did not resolve the appeal. Accordingly, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[9] After the appeal was transferred to the adjudication stage, the township issued a revised access decision to the appellant disclosing Records 5, 6, 7, and 18 to him in full. The township confirmed its decision to withhold Record 23 from disclosure.

[10] I began my inquiry by inviting the township to submit representations in response to the issues raised in a Notice of Inquiry. The township submitted representations. I then sought and received representations from the appellant in

response to the Notice of Inquiry and the township's representations, which I shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*.

[11] In the discussion that follows, I find I do not have the jurisdiction to make an order pursuant to section 5(1) of the *Act*. I also find that Record 23 is exempt under section 12 of the *Act* and uphold the township's exercise of discretion. Lastly, I uphold the township's search for responsive records. I dismiss the appeal.

RECORDS:

[12] The sole record at issue is Record 23, which consists of an email chain.

ISSUES:

- A. Did the township have an obligation to disclose the records under section 5(1)?
- B. Does the discretionary exemption at section 12 apply to the record?
- C. Did the township exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?
- D. Did the township conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: Did the township have an obligation to disclose the records under section 5(1)?

[13] The appellant raised section 5(1) of the *Act* as an issue in his appeal letter. Section 5(1) states:

Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[14] The appellant did not address section 5(1) directly in his representations. However, the appellant raises a number of environmental, health and safety concerns resulting from a proposed sewage system at the property identified in his original request.

[15] The township states it does not have an obligation to disclose Record 23 under

section 5(1) of the *Act*. The township states that Public Staff Report PD-2017-001¹ establishes that there is no grave environmental, health or safety hazard to the public. The township states that the report contains comments from the township's Engineer and Hydrogeologist that note that the new sewage system is "a tertiary treatment system and is expected to be an improvement in terms of effluent quality and nitrate reduction over the previous system."

[16] Section 5(1) is a mandatory provision that requires the head to disclose records in certain circumstances. In Order 65, former Commissioner Sidney B. Linden found that the duties and responsibilities set out in section 11(1) of the provincial *Act* (the provincial equivalent to section 5(1)) belong to the head alone. Therefore, the appellant does not have the right to raise the application of this section on appeal to this office. I will not review the township's decision not to release the records under section 5(1) of the *Act*.

Issue B: Does the discretionary exemption at section 12 apply to the record?

[17] The township claims that the solicitor-client privilege exemption applies to Record 23. Section 12 of the *Act* states,

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.

[18] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law and encompasses two heads to privilege: (i) solicitor-client communication privilege and (ii) litigation privilege. Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. In this appeal, the township claims the application of the common law solicitor-client communication privilege.

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 The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal

¹ This is a report regarding the property at issue, dated February 15, 2017.

² *Descôteaux v. Mierzewski* (1982), 141 DLR (3d) 590 (SCC).

matter.³

[20] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁴ During this *continuum of communications* between the solicitor and a client, privilege will attach.⁵

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

[22] The township submits that Record 23 should be withheld because the communications in the email chain were for the "sole purpose of obtaining or giving professional legal advice." The township states that its employees must be able to freely communicate with their solicitor on legal matters.

[23] The appellant did not address the application of section 12 to Record 23 in his representations. The appellant only states that the township's exemption claims are "irresponsible and [have] not been substantiated."

[24] Based on my review, I find that Record 23 is exempt under the common law solicitor-client communication privilege. I am satisfied that the record would, if disclosed, reveal 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 and aimed at keeping both informed so that advice can be sought and given. Record 23 is an email chain containing correspondence between township staff and its solicitor in which legal advice was requested and provided. Based on my review, I find the record forms a part of the continuum of communications between a solicitor and client. Therefore, I am satisfied that Record 23 is protected by common law solicitor-client communication privilege.

[25] In addition, I am satisfied that no waiver of privilege has occurred with respect to Record 23. The appellant did not make any representations on the issue of loss of privilege. Accordingly, I find that Record 23 qualifies for exemption under section 12, subject to my finding on the township's exercise of discretion below.

[26] As a result of this finding, I do not need to consider whether Record 23 is also exempt under section 7(1) of the *Act*.

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

⁴ *Balabel v. Air India*, [1988] 2 WLR 1036 at 1046 (Eng. CA) (*Balabel*).

⁵ *Ibid.*

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

Issue C: Did the township exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[27] Where a record falls within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The solicitor-client privilege exemption in section 12 is discretionary, which means the township could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[28] In applying section 12 to Record 23, the township was required to exercise its discretion. On appeal, the Commissioner may determine whether the township failed to do so. In addition, the Commissioner may find that the township erred in exercising its discretion where it took into account irrelevant considerations or failed to take into account relevant considerations. In either case, I may send the matter back to the township for an exercise of discretion based on proper considerations.⁷ However, I may not substitute my own discretion for that of the township.⁸

[29] The township submits that it exercised its discretion in good faith. The township states it disclosed Records 5, 6, 7 and 18 to the appellant even though they are covered by solicitor-client privilege and that this disclosure is evidence of its good faith in applying section 12 to Record 23.

[30] The appellant did not address the township's exercise of discretion in his representations. However, he raised a number of concerns with the township issuing a permit for a sewage system at the location identified in his address. While the appellant does not discuss the township's exercise of discretion, it is clear the appellant believes the township has acted in bad faith.

[31] I have considered the circumstances of this appeal and the parties' representations. Based on this review, I find the township properly exercised its discretion under section 12 of the *Act*. I am satisfied the township did not exercise its discretion in bad faith or for an improper purpose as there is no evidence before me this is the case. While the appellant has raised a number of concerns regarding the township's behaviour in relation to the sewage system, I find that the appellant has not provided any evidence to demonstrate that the township acted in bad faith in its exercise of discretion in applying section 12 to withhold Record 23. Based on my review of the appeal, it is clear that the township disclosed the majority of the responsive records to the appellant. I also find the township properly considered the principles that information should be available to the public and that exemptions should be limited and specific. In addition, I am satisfied the township properly considered the purpose of

⁷ Order MO-1573.

⁸ Section 43(2).

section 12 in withholding Record 23. Accordingly, I find the township took relevant factors into account and did not take into account irrelevant factors. Therefore, I uphold the township's exercise of discretion to apply section 12 to Record 23.

Issue D: Did the township conduct a reasonable search for responsive records?

[32] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.⁹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the township's search. If I am not satisfied, I may order further searches.

[33] The *Act* does not require the institution prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it made a reasonable effort to identify and locate responsive records.¹⁰ To be responsive, a record must be *reasonably related* to the request.¹¹

[34] 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.¹²

[35] The township states it conducted "several thorough searches" of its paper files while processing the request. During the inquiry, the township conducted another search and located an additional four records because the township had not properly ensured that non-transitory email records were filed in the appropriate paper files within a reasonable period of time. To address this issue, the township held a training session for all staff on records retention and the use of its internal classification system, created a Corporate Procedure for Records Retention and Information Management, and met with consultants to develop and standardize a system for tracking comments.

[36] The appellant did not address the issue of search in his representations.

[37] Based on my review of the parties' representations, I am satisfied the township conducted a reasonable search for responsive records. While it appears the township had, due to a filing error, located additional records during the inquiry that it had not initially located, the township has now rectified the issue. Upon review of the township's representations, I am satisfied the township has implemented and followed proper record management practices and procedures to ensure that it conducts reasonable

⁹ Orders P-85, P-221 and PO-1954-I.

¹⁰ Orders P-624 and PO-2559.

¹¹ Order PO-2554.

¹² Order MO-2246.

searches for records in response to access requests. As set out above, the *Act* does not require the township to prove with absolute certainty that additional responsive records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate responsive records. In my view, the township demonstrated that it expended a reasonable effort to identify and locate records responsive to the appellant's request.

[38] As stated above, the appellant did not address the township's search or its representations on search, even though he had the opportunity to do so. In the absence of any representations on this issue, I find the appellant has not provided sufficient evidence to demonstrate there is a reasonable basis for his belief that additional responsive records should exist.

[39] In conclusion, I am satisfied the township conducted a reasonable search for records responsive to the appellant's request.

ORDER:

I uphold the township's decision and dismiss the appeal.

Original signed by _____
Justine Wai
Adjudicator

_____ May 3, 2019