

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4551

Appeal MA22-00626

Township of Centre Wellington

July 29, 2024

Summary: The appellant asked the township for records about a specific property. The township found records that were relevant and provided all but one of these to the appellant. The township stated that it was denying access to the record because, as provided for in the *Act*, it is protected by solicitor client privilege (section 12). The appellant continued to seek access to the record and also claimed that additional records should exist. He asked the IPC to hear the appeal.

The adjudicator partially agrees with the township's decision. He finds that the township is permitted under the *Act* to withhold the record because it is protected by solicitor-client privilege, and he finds that the township's search for records was reasonable. However, he also finds that certain records identified during the appeal are relevant to the request and that the township must issue an access decision about those records.

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

OVERVIEW:

[1] The Township of Centre Wellington (the township) received an access request for a building file for a specified address. The request asked for information on "re-zoning, variances, building plan, site plan, deeds." The township located records responsive to the request and issued a decision granting partial access to the records. The township denied access to withheld information under section 14(1) (personal privacy) of the *Act*.

[2] The requester (now the appellant) appealed the township's decision to the Information and Privacy Commissioner of Ontario (IPC).

[3] During mediation, the appellant stated that he believed that additional records should exist, providing a description of these records to the township. In response, the township searched for additional records, with the scope of the request expanded to include communications about the property for a specified time period. Additional records were located and partially disclosed to him in three supplemental decisions. Information was withheld on the basis of sections 14(1), 12 and on the basis that that portions were not responsive. At the conclusion of mediation, the only remaining issues were access to a record withheld under section 12 and the appellant's position that additional records exist.

[4] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeals process. I conducted an inquiry where I sought and received representations from the township and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[5] For the reasons that follow, I partially uphold the township's decision. I find that the record at issue is exempt from disclosure under section 12 of the *Act* and I uphold its search as reasonable, but I order the township to issue an access decision for a record that it identified during its search as outside the scope of the request. As explained below, I find that this record is within the scope of the request.

RECORDS:

[6] The sole record remaining at issue is identified as record 5 in the index of records provided to the appellant.¹ The township did not provide this record to the IPC but did provide an affidavit regarding the contents of the record.

ISSUES:

- A. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the record?
- B. Did the township conduct a reasonable search for records?

¹ In the first supplemental decision letter provided during mediation.

DISCUSSION:

Issue A: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the record?

[7] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It 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.

[8] Section 12 contains two different exemptions, referred to in previous IPC decisions as “branches.” The first branch (“subject to solicitor-client privilege”) is based on common law. The second branch (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege created by the *Act*. The township has claimed that the first branch, specifically solicitor-client communication privilege, applies to the record.

[9] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.² This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.³ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.⁴

[10] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁵

Representations, analysis and finding

[11] The township submits that the record contains instructions and directions given to township staff from township lawyers regarding the specified property, as well as legal advice related to another property that is not responsive to the appellant’s request.

[12] The appellant provided limited representations on whether the section 12 exemption applied to the record. Generally, he submits that the record should be

² Orders PO-2441, MO-2166 and MO-1925.

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

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

disclosed if it was used to advise the township on various by-law issues underlying the request.

[13] I have considered the representations of the township and appellant, and the township's affidavit on the contents of the record, and I find that the section 12 exemption applies to the record. I also find that, based on the representations of the township and the affidavit describing the record, that the township intended these communications to be confidential.

[14] The record, as described by the township, is a series of emails between the township and its legal counsel regarding various issues related to a property. On its face, the record constitutes communications between a lawyer and their client for the purposes of obtaining legal advice, and it is therefore exempt under section 12.

[15] While I understand the appellant's desire to obtain all information that is responsive to his request, this does not mean that the section 12 exemption should not apply.

Exercise of discretion

[16] Section 12 is a discretionary exemption, meaning that the township could decide to disclose information even if it qualifies as exempt. I have, therefore, also reviewed the township's exercise of discretion to withhold the record under section 12.

[17] The township acknowledges that the exemption is discretionary, stating that it properly exercised its discretion to allow free communication between a client and their solicitor. The appellant did not provide specific representations on the exercise of discretion.

[18] Considering the township's overall representations, the nature of the record, and the amount of information that the township did disclose, I agree that it properly exercised its discretion to withhold the record at issue. Although the township withheld this particular record, it provided a large number of responsive records to the appellant, demonstrating that it considered the purposes of the *Act* and sought to balance the appellant's general right of access to information with the limited exemptions to access in the *Act*.

[19] I find that the township did not exercise its discretion to withhold the record for any improper purpose or in bad faith, and that there is no evidence that it failed to take relevant factors into account or that it considered irrelevant factors. Accordingly, I uphold the township's exercise of discretion in denying access to the record.

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

[20] The appellant claims that additional records responsive to his request should exist. If a requester claims that additional records exist beyond those found by the institution,

the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.⁶ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[21] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.⁷

[22] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;⁸ that is, records that are "reasonably related" to the request.⁹

[23] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.¹⁰ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹¹

Representations

[24] The township provided an affidavit outlining its search efforts, along with a general overview of the history of its correspondence with the appellant regarding the search for records. It submits that at the time of the initial request, a building clerk did a complete search of building records for the specified property, and the search was reviewed by the chief building official. It submits that both of these employees are familiar with records in the building department and that both electronic and physical locations were searched.

[25] It states that responsive records were reviewed by the deputy clerk and disclosed to the appellant. Following the initial decision, the appellant contacted the deputy clerk and there were discussions about missing records, culminating with a video conference during the mediation stage of the appeal between the appellant, deputy clerk of the township, and IPC mediator. The township states that it conducted an additional search following the discussion at mediation, with the scope of the request expanded to include communications about the property, and additional records were disclosed to the appellant. The appellant continued to discuss the existence of additional records with the township, resulting in the township conducting an additional search for a misfiled record,

⁶ Orders P-85, P-221 and PO-1954-I.

⁷ Order MO-2246.

⁸ Orders P-624 and PO-2559.

⁹ Order PO-2554.

¹⁰ Orders M-909, PO-2469 and PO-2592.

¹¹ Order MO-2185.

which was disclosed to the appellant.

[26] In response to the township's representations, the appellant provided a detailed overview of the background to the request and why the information was being sought, as well as why he believes that additional records exist. He submits that a review of the documents that he received shows that there are additional documents that should exist regarding the specified property. Generally, he raises concerns about how property inspections were conducted and how permits for the property were issued. He questions how the permitting process and other procedures conducted by the township would not have produced additional records that are responsive to his request.

[27] He specifically referenced an email chain that he received where township staff discussed the existence of a grading plan for the property in question. In his representations, the appellant submits that this grading plan should have been disclosed to him, and that further records related to the approval of permits for the property should exist. He also submits that the email chain supports other records responsive to his request existing.

[28] In response to the appellant's representations, the township reiterated its search efforts and submits that the records the appellant referenced in his representations are not part of his original or expanded request, and that he appears to be looking for records regarding the building and planning process that do not exist. It notes that multiple searches for records were conducted by staff knowledgeable of the subject area, and that the township has acted in good faith by agreeing to expand his original request and by providing information to the appellant about concerns outside the scope of his access request.

[29] The township's reply representations were provided to the appellant for sur-reply. The appellant again provided a detailed overview of the history of the events underlying the request and of his interactions with the township in requesting records. He reiterates his concerns that the actions of building officials in the events underlying the request should have yielded additional records and also submits that records related to the retaining of legal counsel related to the property should exist. He further asked various questions about the specific manner in which the township conducted its search, such as how the township's IT department was involved, whose emails were searched for responsive records, whether phone calls were recorded, and what processes exist for misplaced files.

Analysis and finding

[30] Based on my review of the parties' representations and evidence, I am satisfied that the township had experienced employees expend a reasonable effort to locate records responsive to the appellant's request, and that the search was reasonable. However, I also find that there is an additional record responsive to his request that was not disclosed to the appellant. In its representations, the township did not dispute that

this record exists, but instead stated that it is outside the scope of the appellant's request. As I discuss below, I do not agree with this characterization of the record, and as such I order the township to issue an access decision for the record.

[31] As the township noted in its representations, the appellant's initial request for records related to the specified property was later expanded to include communications about the property. In his initial representations, the appellant provided an email chain between township staff where a grading plan for the specified property is discussed and referenced as an attachment to one of the emails. The appellant submits that he did not receive this grading plan, questioning why this would not be included as a record responsive to his request. When asked about this, the township stated in its reply representations that the records the appellant was seeking would be outside of the scope of the original and expanded request.

[32] Based on the information that the township provided, I am not satisfied the grading plan the appellant identified as an email attachment is outside of the scope of the request. To be considered responsive to the request, records must "reasonably relate" to the request.¹² Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester's favour.¹³

[33] Here, in the case of the grading plan specifically, on its face an attachment to an email that the appellant received in response to his request would also be responsive to that same request, especially if it is about the same property the appellant is requesting information about. Considering this, I find that the township should have provided this record to the appellant as part of his original and expanded requests, subject to any relevant exemption claims. While this is not necessarily an issue with the township's search – the township does not dispute that this exists – I will order the township to issue a decision on the record.

[34] Leaving the grading plan aside, I accept the township's arguments in response to the appellant's reasonable search position. I agree that the appellant is seeking access to records that may not exist. In his representations and sur-reply representations, the appellant points to various gaps in communications between township staff. While, as I have found above, there may be specific records that were not disclosed when they should have been, it is not the case that all communications between township staff would be captured by email or other forms of written correspondence. For example, the gaps the appellant points to in his representations could be explained by verbal conversations between township staff. Additionally, I find that the appellant's concerns about the records he received are more appropriately characterized as concerns about the township's permit and approval processes, which are not the subject of this appeal.

¹² Orders P-880 and PO-2661.

¹³ Orders P-134 and P-880.

[35] In any case, a reasonable search, as required by the *Act*, does not mean that an institution has to answer every question that a requester has about a particular issue, in this case the township's conduct in dealing with the specified property. It also does not require that the township provide a comprehensive summary of its entire record-keeping practices, as the appellant asked for in his sur-reply representations. Rather, it requires that the institution have experienced employees make a reasonable effort to identify and locate records responsive to a request.

[36] Based on the evidence before me, I find that the township has met this obligation. After receiving the appellant's request, it took steps to clarify it and had employees with direct knowledge of the subject matter conduct a search to locate responsive records. The scope of the request was expanded during mediation, and the township conducted multiple additional searches for records, which were provided to the appellant. While I understand that the appellant is dissatisfied with what he received and believes that additional records should exist, I do not find that ordering another search is appropriate in the circumstances.

ORDER:

1. I uphold the township's decision to withhold the record at issue under section 12 of the *Act*.
2. I uphold the township's search for records as reasonable.
3. I order the township to issue an access decision for the grading plan for the property that is the subject of the request, as identified on page 7 and attachment 8 in the appellant's representations, treating the date of this order as the date of the request for procedural purposes.

Original signed by: _____
Chris Anzenberger
Adjudicator

July 29, 2024 _____