ORDER MO-1714

Appeal MA-020290-1

Municipality of the Township of Tiny

NATURE OF THE APPEAL:

The Municipality of the Township of Tiny (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a representative of an association of property owners (the Association) for access to the following:

> Any and all documentation, information, memoranda, correspondence, reports, etc., pertaining to [a named beach (the Property)] and the [Association], and in particular, but not restricted to, any such information or documentation received from or sent to [a named lawyer], [a named law firm], [a named individual], [a second named law firm], and any other documents, reports, memoranda, correspondence, information, etc., pertaining to [the named beach].

The Township located a number of responsive records and denied access to them, stating:

> Since the Township is part of a potential litigation with [the Association] regarding one-third ownership of [the Property], Section 12 [the solicitor-client privilege exemption] of the *Act* applies.

The Association (now the appellant) appealed the Township's decision.

During the mediation stage of the appeal, the Township advised this office that it had identified two categories of responsive records, and described them as follows:

> Package 1 Information received from and/or sent to [the appellant] dating back to 1991.
>
> Package 2 Information denied under Section 12 of the *Act*. The ownership of [the Property] is presently under review by our legal advisors (3 firms) . . . and being surveyed by our Township Surveyor … All discussions regarding the above have been in closed session with the Council of the Township . . .

The appellant confirmed that it was not interested in pursuing access to the records described as "Package 1".

Also during mediation, the Township provided the appellant and this office with an amended index of 15 "Package 2" records, which generally describe the records at issue. In the amended index, the Township indicated that, in addition to section 12, it was relying on the exemptions at section 6(1)(b) (closed meeting) and section 7 (advice or recommendations) to withhold certain records. Furthermore, during mediation the appellant provided this office with extensive submissions setting out its position on the issues in the appeal.

In addition, the appellant indicated that it was not satisfied that the Township has conducted a reasonable search for all records responsive to the request. The appellant also took issue with the Township's position that one of the identified records was not responsive to the request.

Mediation did not resolve the issues in this appeal, and it was transferred to the adjudication stage of the process. A Notice of Inquiry was sent to the Township, initially, inviting representations on the facts and issues in this appeal. Along with the Notice of Inquiry, the Township received a copy of the appellant's material, in which the appellant raised the possible application of the section 16 "public interest override", as well as the exceptions to the section 7 exemption at paragraphs (a) and (k) of section 7(2), and the exception to the section 6 exemption at section 6(2)(c). These issues were included in the Notice of Inquiry, and the Township was invited to respond to the issues.

The Township provided representations to this office, and I sent the Notice of Inquiry, along with a copy of the Township's representations (with the exception of Appendix 5) to the appellant. The appellant also provided representations which were, in turn, shared with the Township, who provided reply representations.

RECORDS:

There are 16 records remaining at issue in this appeal, as identified in the Township's index of records. They include various correspondence, memoranda, notes, reports and a sketch.

DISCUSSION:

RESPONSIVENESS

During mediation, the Township confirmed its position that a record that had originally been included with the records package was in fact not responsive to the request. The record (Record 16) is a 5-page memo dated February 25, 2001 to the Township's Deputy Mayor from a named surveyor. The Township advised that this record does not relate to the Property and had been misfiled. The mediator conveyed this to the appellant's representative, who indicated that he wished to pursue access to that record. Accordingly, the issue of whether Record 16 is responsive to the request is an issue in this appeal.

The Township provided representations in support of its position that Record 16 is not responsive to the request, and states that the record does not pertain to the identified property, and was inadvertently included in the index. The Township specifically identifies that Record 16 was misfiled.

The appellant does not address this issue in its representations.

The issue of the responsiveness of records was addressed by former Inquiry Officer Anita Fineberg in Order P-880. That order dealt with a re-determination of the issue of responsiveness following the decision of the Divisional Court in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197.

In that case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In Order P-880, Inquiry Officer Fineberg noted the court's guidance and commented as follows:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is **reasonably related to the request** [emphasis added].

I agree with Inquiry Officer Fineberg's approach and adopt it for the purpose of this appeal.

The original request is set out above. It is quite broadly worded, and includes "Any and all documentation, information, memoranda, correspondence, reports, etc., pertaining to [the Property] and the [Association] … and any other documents, reports, memoranda, correspondence, information, etc., pertaining to [the Property]". Using the wording from Order P-880 set out above, Record 16 is responsive to the request if it is 'reasonably related to the request".

I have carefully reviewed the record to determine if it, or any portion of it, is "reasonably related to the request". In this appeal, if Record 16 or any portion of it pertains to the Property or the Association, it would be reasonably related to the request.

Record 16 deals with a number of items that the author of the record is bringing to the attention of the Township. My review of it confirms that this record deals primarily with specific details concerning a number of matters that the surveyor and Township are involved in. In my view, this record does not "pertain to the property or the Association", and is not reasonably related to the request. Although the property is mentioned in the record, it is only mentioned incidentally on one occasion. In my view, the fact that the property happens to be referred to incidentally in the record does not bring the record within the scope of the request for records "pertaining to" the property.

Accordingly, I find that Record 16 is not responsive to the request.

ADVICE TO GOVERNMENT

The Township applied section 7 to Record 1, which is a memorandum from the Township CAO/Clerk to staff, dated June 25, 2002.

The Township takes the position that this record is exempt under section 7 because it reveals the advice of an officer, the CAO/Clerk of the Township. The Township states that the purpose of the internal memorandum was a staff direction pertaining to the property.

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028]

In Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), Assistant Commissioner Mitchinson had to determine whether a direction given from a supervisor to an investigator constituted "advice or recommendations" for the purpose of section 13 of the provincial *Freedom of Information and Protection of Privacy Act* (similar to section 7 at issue in this appeal). He stated:

> Record 5 consists of a July 18, 1980 memo from the investigating human rights officer to her supervisor, together with the supervisor's reply, dated August 14, 1980. The July 18, 1980 memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the August 14, 1980 response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or

> recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing legislation. In my view, the August 14, 1980 response also does not qualify for exemption under section 13(1).

I accept the approach taken by Assistant Commissioner Mitchinson, and adopt it for the purpose of this appeal.

I find that Record 1 does not qualify for exemption under section 7 of the *Act*. As identified by the Township, this record is a direction given to staff regarding a particular action. Similar to the situation in Order P-363, the record in this appeal does not set out a suggested course of action which may be either accepted or rejected in the deliberative process, rather, it directs staff to take a particular action. This does not constitute "advice or recommendations" for the purpose of section 7 of the *Act*.

Accordingly, Record 1 does not qualify for exemption under section 7 of the *Act*, and I will order it to be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 12 of the *Act* reads:

> 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.

Section 12 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege
- litigation privilege.

Branch 2 contains two analogous statutory privileges that apply in the context of institution counsel giving legal advice or conducting litigation.

Solicitor-client communication privilege under Branch 1

General principles

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

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

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 part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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

Representations of the Parties

In this case, the Township's decision letter identifies that it relied on section 12 as the exemption that applied to the records. The Township's representations relate specifically to Records 2, 3, 5, 7, 8, 11 and 13. All of these records are identified by the Township as correspondence from counsel. The Township states:

> These records fall under solicitor-client privilege as they are legal opinions, advice and recommendations provided to the Township by our legal advisors pertaining to the [identified property].

The appellant does not contest the position that these records qualify for solicitor-client privilege.

Analysis

In this appeal, I find that the client is the Township and the solicitors are outside counsel retained by the Township to assist with matters related to the relevant property.

It is evident from the jurisprudence that not every communication between a solicitor and client is privileged. Privilege attaches only to that communication made for the purpose of giving or seeking legal advice. Clearly, the nature of the relationship and the surrounding circumstances will determine whether or not a particular communication is made for the purpose of giving or seeking legal advice.

Records 2, 5, 7, 8, 9, 11 and 13 are correspondence sent to the Township from outside counsel retained by the Township. Record 3 is described in the index as a "Report from [outside counsel] to the Township re: property ownership/information". Record 10 is correspondence sent to the outside counsel from the Township surveyor, and Record 12 is correspondence sent to the Township from the Township surveyor, but copied to the outside counsel. The last 4 pages of Record 14 consist of a draft document which appears to have been sent to the outside counsel from the Township surveyor. These records all relate to the property, and the Township has identified that counsel was retained by the Township to assist with the litigation related to the property. Based on my review of the records and the representations, I find that these records form part of the "continuum of communications" between the Township and its solicitors as described in *Balabel*, above. Accordingly, these records meet the test for solicitor-client communication privilege.

Records 4, and 6 are correspondence to the Township from the Township's surveyor. The first 30 pages of Record 14 consist of a Registered Plan Investigation Report prepared by the surveyor, and Record 15 is a sketch, also prepared by the surveyor. Although these records relate to the property, on their face they are not confidential communications between a lawyer and client made for the purpose of giving or receiving legal advice, nor have I been provided with sufficient evidence to establish that they form part of the "continuum of communications" between the Township and its solicitors. As well, I have not been provided with sufficient evidence to support the position that they qualify under any other branch of the section 12 exemption. In my view these records do not qualify for exemption under section 12 of the *Act*.

However, in my view two paragraphs which form part of Record 6 (the last paragraph on page one and the first paragraph on page two), and one line from Record 14 (the line entitled NOTE on page 4) contain information the disclosure of which would reveal solicitor-client privileged information. Accordingly, I find that this information should not be disclosed.

To summarize, Records 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, two paragraphs from Record 6, and one line from page 4 and the last 4 pages of Record 14 qualify for solicitor-client communication privilege under Branch 1. Records 4, 15, and the remaining portions of Records 6 and 14 do not qualify for exemption under section 12.

Waiver

The appellant takes the position that the solicitor-client privilege in these records was waived by the Township. He states:

> The central issue involving this appeal is the "waiver" of the solicitor-client privilege by way of two motions passed by Council.

The appellant then refers to earlier material he provided to this office, which was also shared with the Township. In that earlier material the appellant stated as follows with respect to Records 2 and 3:

> Based on the facts contained within [two identified motions] wherein the [Township] Council has named the solicitors in order to provide a factor of credibility to the motions and provided the details of the opinion to substantiate the anticipated actions of Council. When the Council placed the Motions of the Agendas of the Council Meetings, named the solicitors and expressed the solicitor's opinion by passing the motions in Council, the cumulative actions of Council produced and substantiated the evidence for waiver of the solicitor-client privilege.

The appellant proceeds to identify the specific quotations from the legal opinions which were contained in the motions, and states:

> It is clearly evident from the wording of the motions that the Council waived its solicitor-client privilege by way of publicly enacted motions.

The appellant has provided me with copies of the motions he refers to. With respect to the other documents for which the privilege has been claimed, the appellant states:

> Documents 5, 7, 8, 11 and 13 dealing with the same matter are related information and therefore would in fact be treated as waived even though the solicitors may be different.

The Township does not address the issue of the possible waiver of solicitor-client privilege.

The appellant takes the position that the disclosure of portions of the legal opinions received from counsel can be viewed as a waiver of the solicitor-client privilege in these documents. Previous orders have addressed the issue of whether partial disclosure of a legal opinion can be regarded as the waiver of privilege. In Order MO-1172, Adjudicator Laurel Cropley examined this issue in some detail. After reviewing a number of authorities regarding the issue of waiver of solicitor-client privilege, and establishing the general principles governing waiver of the privilege by a client, Adjudicator Cropley found that the institution in that appeal (the City of Vaughan) did not intend to waive privilege with respect to a record by making the relatively minimal disclosure of a small portion of the "bottom line" of the legal advice contained in the record. The relevant portion of that order states:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege (*S.&K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd*., [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) At 148 - 149 (C.P.C.)).
>
> …
>
> I have reviewed page 3 of Report No. 18 of the Committee of the Whole. I find that it contains a small portion of the "bottom line" of the advice provided to

Council from the City's solicitor. It very briefly outlines the City Solicitor's view of what the City is entitled to do and what is required in order for it to do so. The bulk of the legal opinion deals with other aspect of this issue. In my view, it is often necessary or desirable for a public body to refer to the crux of the advice its solicitors provide to it in order to carry out its mandate and responsibilities. In many cases, the public body will intend to retain the privilege, while at the same time provide a minimal degree of public disclosure to ensure the proper discharge of its functions. In the usual case, this should not of itself constitute express waiver of the privilege attaching to the underlying solicitor-client communication (Order P-1559).

This issue was recently addressed by the Federal Court of Appeal in *Stevens v. Canada (Prime Minister)* (1998), 161 D.L.R. (4th) 85 at pp.108 -109. In this case, pursuant to an access request under the federal *Access to Information Act*, a federal institution provided partial access to legal accounts, severing out the narrative portion of the accounts while providing access to the dollar amount of the accounts. In dealing with the issue of waiver in the freedom of information context, Linden J.A. stated on behalf of the Court:

> In *Lowry v. Can. Mountain Holidays Ltd.* [(1984, 59 B.C.L.R. 137 (S.C.), at p. 143] Finch J. emphasized that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance.
>
> ...
>
> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. **As I mentioned earlier, a government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients**. [Adjudicator Cropley's emphasis]

> Although the matter in *Stevens* arose in the context of disclosure under the federal *Act*, in my view, the Court's rationale may be similarly applied to the disclosure, generally, made by government institutions of information in their custody or control. This is not to say that an institution can never be found to have waived solicitor-client privilege by partial disclosure of a privileged document. Rather, in determining this issue, a decision-maker must be cognizant of the environment in which institutions operate and their responsibilities with respect to the public interest, which may include maintaining a "policy of transparency" regarding information which is used in the decision-making process.
>
> In the circumstances of the current appeal, I am satisfied that in making the relatively minimal disclosure of a small portion of the "bottom line" of the advice, the City did not intend to waive privilege with respect to the record. Accordingly, I find that the City has not expressly waived privilege.

In my view, the circumstances in this appeal are similar to those in Order MO-1172 for the purpose of the waiver analysis, and I agree with Adjudicator Cropley's application of the common law principles discussed in *Stevens*. I find that in this appeal the relatively minimal disclosure of the "bottom line" of the advice given to the Township, contained in the motions referred to by the appellant, did not constitute an express waiver of the solicitor-client communication privilege, nor do I find that fairness or consistency would require a finding that the privilege ceased. Therefore, I conclude that the Township did not waive privilege.

Because I have found that there has not been waiver of solicitor-client privilege, I find that the records are exempt under section 12 of the *Act*.

Conclusion

I find that Records 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, two paragraphs from Record 6, and one line from page 4 and the last 4 pages of Record 14 qualify for exemption under section 12 of the *Act*. Because I have found that these records qualify for exemption under section 12, it is not necessary to determine whether they qualify for exemption under any other section of the *Act*.

I find that Records 4, 15, and the remaining portions of Records 6 and 14 are not exempt under section 12.

CLOSED MEETING

The Township takes the position that Records 4, 15 and the remaining portions of Records 6 and 14 are exempt from disclosure under section 6(1)(b) of the *Act*. That section states:

A head may refuse to disclose a record,

> that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

The Notice of Inquiry sent to the Township stated:

> In order to qualify for exemption under section 6(1)(b), the institution must establish that:
>
> 1. a meeting of a council, board, commission or other body or a committee of one of them took place; and
>
> 2. that a statute authorizes the holding of this meeting in the absence of the public; and
>
> 3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.
>
> [Orders M-64, M-98, M-102, M-219 and MO-1248]
>
> The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held and that it was held in camera. [Order M-102]
>
> In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on the term "deliberations":
>
> > In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.
>
> The former Assistant Commissioner expanded on his analysis of the interpretation of section 6(1)(b) in Order M-196 as follows:

> The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.

I then asked the Township to address the following questions:

> For what reasons do you consider that the record reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them?
>
> How would disclosure of the record reveal the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them?
>
> When and where was the meeting held?
>
> What is the statute that authorizes the holding of the meeting in the absence of the public? Please provide a copy of the section(s) which contain(s) the authorization. Please also provide a copy of the resolution closing the meeting to the public, where applicable.

The Township's representations state:

> [The] Records … were discussed in closed session. According to the Municipal Act, RSO 1990, c. M.45, section 55(5), Council is permitted to discuss the following in closed session:
>
> > …
> > Litigation or potential litigation, including matters before administrative tribunals, affecting the Municipality.

The Township states that the records fit within that category of records, and provides a blank sample of a typical resolution used for closed sessions as an Appendix to its representations.

The Township's representations were shared with the appellant. The appellant's representations focus on the need for the Township to specifically identify the circumstances under which the meeting was held, and information about the date and time of the in-camera meeting. The appellant states:

> Holding an in camera meeting by any Municipal Council under a general heading as outlined in the *Municipal Act*, without stating the specific purpose of that meeting with precise language does not invoke section 6(1)(b). For example, a

> Council wants to hold a closed session. One Councillor moves and the other seconds the motion. The motion states the following: That Council meeting in Committee of the Whole meets in closed session to deal with the following subject matters.

The appellant also notes that the time of the in-camera session is to be referenced. The appellant then states:

> To validate the precision of [section] 6(1)(b) there must be specific recorded records dealing with a specific subject to meet the exemption under 6(1)(b). Technically, any document of deliberation, consultation must be specifically referenced and archived in official minutes of the closed in camera session. Without specific reference there is no means by which the Public interest can be protected or the intent of the *Municipal Act* carried out to provide open and accountable municipal government.
>
> The *Municipal Act* provides a mechanism for Councils to discuss matters without the presence of the public. Closed meetings are to be extraordinary events that must be accountable to the public. They are not to be events that conceal sensitive public events or matters that the public should be privy to.
>
> The intent of Freedom of Information Acts throughout Canada are to provide a public safeguard of accountability through their various commissioners. Therefore, the proof and the evidence of in camera sessions lies with the municipal government.

The appellant's representations were shared with the Township. In its reply representations, the Township states:

> The Council of the [municipality] may hold a meeting or part of a meeting closed to the public according to section 239(2) of the *Municipal Act, 2001*. Section 239(4) requires that the general nature of the matter be considered at the closed meeting be stated.

Analysis

In order to qualify for exemption under section 6(1)(b), the Township must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; and

2. that a statute authorizes the holding of this meeting in the absence of the public; and

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102, M-219 and MO-1248]

The first and second parts of the test for exemption under section 6(1)(b) require the Township to establish that a meeting was held and that it was held in-camera. [Order M-102]

Other than stating that the Township is authorized by the *Municipal Act* to hold in-camera meetings for "litigation or potential litigation", and stating that the records were discussed in closed session, the Township has not provided any additional information concerning the circumstances surrounding the in-camera sessions. The appellant's representations, which were shared with the municipality, also identify the onus placed on an institution claiming that records fall within an exemption. In response, the Township did not provide any additional information concerning the in-camera meetings.

In order MO-1215, Assistant Commissioner Tom Mitchinson reviewed the requirements of an in-camera meeting. He stated:

> As far as section 55(5)(b) [of the *Municipal Act*] is concerned, I accept the Reeve's sworn evidence that a meeting of some sort was held on April 25, 1998, but the Township has not provided me with sufficient evidence to establish that it was a properly constituted *in camera* meeting of Council or one of its committees. The appellants and the Township obviously have conflicting views on this issue. However, the burden of proof lies with the Township and, in my view, it has not provided sufficient evidence to establish that it was authorized to hold its April 25, 1998 meeting *in camera*, pursuant to section 55(5)(b) of the *Municipal Act*.
>
> Similarly, the Township has not provided sufficient details of the subject matter or substance of the deliberations which took place at the April 25, 1998 meeting to persuade me that disclosure of the record would reveal the actual substance of any such deliberations.
>
> Therefore, the … requirements of the section 6(1)(b) exemption claim have not been established, and I find that the record does not qualify for exemption under this section.

In my view the Township in this appeal has not provided sufficient evidence to establish that section 6(1)(b) applies to the records. Although the Township has identified that it has the authority to hold in-camera meetings in relation to litigation or potential litigation affecting the Township under the appropriate sections of the *Municipal Act*, it has not provided the further information necessary to establish the application of the exemption to the records. Despite being asked to do so in the Notice of Inquiry, the Township has not provided information concerning when any in-camera meetings were held, or whether any such meetings were properly

constituted in-camera meetings, nor has it provided details of the subject matter or substance of the deliberations of any such meetings. As identified by Assistant Commissioner Mitchinson, the burden of proof that records qualify for exemption lies with the Township, and the Township has not provided sufficient evidence to establish that section 6(1)(b) applies to the records for which it makes the claim.

Accordingly, I find that the records do not qualify for exemption under section 6(1)(b).

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Township has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Township will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example: Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

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 to identify and locate records responsive to the request.

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.

Representations

During the mediation stage of this appeal, the appellant's representative took the position that it is not plausible that there could be only 15 records responsive to the request. In support of his position, the appellant's representative identified that the Township is required to establish and maintain a public register of the property it owns and that there must be records responsive to his request in the register. He says that the requirement to maintain a register is found in section 193(7) of the *Municipal Act* and notes that the Township hired a surveyor to deal with the register in or about December 2000. The appellant refers to By-law 00-118 passed by the Township.

Additionally, with respect to the appellant's contention that additional records exist, the appellant's representative says that as a result of a previous court decision, the appellant believes that the Township would have begun compiling materials in 1989 or 1990 and may have created a specific file relating to the Property. On this basis, he believes that additional records exist relating to the Property.

More particularly, the appellant believes that the following records must exist and that access should be granted:

- survey data provided to the Township and the information that would have been relied upon to determine the dimensions for the land
- documentation that would have been appended to the deed or received by the Township in relation to the deed, particularly,
    - the original Crown patent (dating back to the 1800s)
    - any partnership agreements between the three parties . . .
    - agreements or documents outlining the terms upon which [a named individual or his estate] conveyed his property interest to the Township

The appellant's representative also advised the mediator that he was also interested in certain identified types of records listed in the material he provided to this office.

With respect to the existence of additional records, the Township indicated to the mediator that many of these records are either public records (e.g. subdivision plans, land value assessments, deeds) or not in the Township's possession (e.g. partnership agreements). The Township also referred to section 15 of the *Act* with respect to the public records.

In its representations the Township reviewed the listed categories of records identified specifically by the appellant. The Township listed the "type of record" referred to by the appellant, and provided an "explanation" in the column beside the type of record. The

"explanation" provided by the Township ranged from " Not aware such a document exists" to references to documentation provided to the appellant during the course of mediation, to referring the appellant to information which is available to the public (ie: assessment role information which can be viewed at the Township offices). The Township also provided an affidavit which identified that a search of the Township's Records Management System was conducted for all records pertaining to the named Property.

The appellant's submissions identify in detail the appellant's position that the search conducted by the Township was not reasonable. The appellant states:

> The [affidavit] indicates that the [affiant] searched records under the search field [the named property]. Databases have electronic search engines with input and output design. While we are not familiar with the scope of the search engine design of the Township's Records Management system we are of the opinion that a more extensive search of related fields may yield more specific documentation than the sole word [the property name]. The name … is derived from the names of the original sub dividers and is used as a description for the general area, but this is simply a vernacular designation. There is no municipality of that name. It is probable that files are kept under different headings.

The appellant then identifies different ways in which the search could have been conducted including the various plans within the boundaries of the area, the full names of the original sub dividers or other purchasers, and the legal description used by the Municipal Property Assessment Corporation. The appellant also questions whether the Township cross-indexed the database to reflect the property name with other associated files.

The appellant then refers to five specific documents, and refers to other general categories of documents, which he believes should have been included in the list of responsive records, but were not.

The Township responded to the representations of the appellant. The Township identifies that it implemented a new Records Management System in 1994 and that, following the implementation of that system, numerous files were purged in accordance with the Township's records retention by-law.

The Township then provides an example of how the record-keeping and records retention process works, and identifies that certain records which may have existed in the past would no longer be retrievable, as they would have been destroyed based on the records retention schedule.

The Township also addresses the appellant's concern that the Township may not have cross-indexed the database to reflect the property name with other associated files, and states that once the property name is entered in the database, all files in the system with the property name are located through a search for that keyword.

The Township then responds specifically to the examples given by the appellant of records which were not located. The Township identifies that one of the records does not exist, one was provided to the appellant, and three of the records were older, and likely purged since the new records management system was implemented.

Analysis

Other than the affidavit identifying that a search was conducted in the Records Management System for all records pertaining to the named property, the Township does not provide any information regarding the steps taken to search for responsive records, such as where the physical files and records are located, nor how they are maintained. As well, the Township does not provide any other background which would assist in disposing of this issue. In response to requests by the appellant for specific records, the Township in the course of this appeal has either subsequently provided the record, identified that it is not aware of the existence of the record, or advised the appellant that the record is publicly available and that section 15 applies to it. Although the Township refers to the exemption, it is unclear whether the Township takes the position that it is in possession of these records or not. They are in any event not listed in the index of records provided to the appellant.

In the circumstances, I am not satisfied that all reasonable efforts were made to locate responsive records. In my view, at a minimum, the Township ought to have consulted the individuals at the Township involved with the property, including the surveyor and legal counsel who dealt with the matters, to determine whether any additional records might exist. I will therefore order the Township to conduct further searches for the records responsive to the request, with particular attention to the additional records referred to by the appellant.

Furthermore, in the circumstances, I am not satisfied with the Township's response to the appellant's questions regarding the Township's search of its database. Although I accept that the Township's database search for records with the name of the property in it would produce responsive records with that name in it, the position taken by the appellant is that certain responsive records, which relate to the property, would likely not have the specific property name in it, and therefore would not be located in a search for that name. The appellant's representations specifically identify other searches which may produce records responsive to the request. I will therefore order the Township to conduct further searches of its database for records responsive to the request, with particular attention to the search categories referred to by the appellant.

Conclusions

I find that the Township has not adequately discharged its responsibilities under section 17 of the *Act* to conduct a reasonable search for all responsive records.

ORDER:

1. I order the Township to disclose to the appellant Records 1, 4, 15, and the non-exempt portions of Records 6 and 14, by **December 16, 2003.**

2. I uphold the Township's decision to withhold Records 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, the line entitled NOTE from page 4 and the last 4 pages of Record 14, and two paragraphs from Record 6 (being the last full paragraph on the first page, and the first full paragraph on the second page of Record 6).

3. I order the Township to conduct further searches for additional responsive records. These searches are to include consultations with the individuals at the Township involved with the property, including the surveyor and legal counsel who dealt with the matters.

4. I order the Township to conduct further searches of their database for records responsive to the request, with particular attention to the search categories referred to by the appellant.

5. I order the Township to communicate the results of the searches to the appellant by sending him a letter summarizing the search results on or before **January 5, 2004.**

6. If additional responsive records are located, I order the Township to issue an access decision concerning those records in accordance with the applicable sections of the *Act*.

7. I order the Township to provide me with copies of the correspondence referred to in Provisions 5 and 6, as applicable, by sending a copy to me when it sends this correspondence to the appellant.

8. In order to verify compliance with this order, I reserve the right to require the Township to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: November 25, 2003

Frank DeVries
Adjudicator