



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2438-F

Appeal MA07-253

Town of Erin



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NATURE OF THE APPEAL:

The Town of Erin (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...all files, financial expenses incurred, and records pertaining to [the requester] and the property located at [specified address and legal description] Erin from the Town (Township) of Erin and its agents. These are to include all costing incurred and moneys paid for:

- legal,
- [named insurance company] [named individual],
- [named engineering company][named individual],
- Land Surveyor [named individual],
- Staff hours,
- Litigation with Justice [name], Ontario Superior Court of Justice [date] (Court File [#]),
- [named insurance company],
- and any and all agents used by the Town of Erin.

The Town denied access to the responsive records pursuant to section 12 (solicitor-client privilege) of the *Act*.

The requester, now the appellant, appealed the Town's decision.

During mediation, the appellant advised the mediator that he was of the view that additional records existed in response to his request including, but not limited to, records dating back to 1988, additional invoices from various named insurance companies, records in relation to litigation and the land survey, reports to the Town from insurance providers and the costs of the Town's defense of their position in Ontario Court.

As mediation was not successful in resolving the issues in this appeal, the file was transferred to me to conduct an inquiry. During adjudication, the Town provided the appellant with additional disclosure and also maintained that the appellant had clarified his request to include records that consisted only of invoices.

The appellant disputed the Town's claim that he clarified his request to include only invoices and he also disagreed with the Town's claim that he has been provided with all responsive records. As a result, I sent a Notice of Inquiry to the Town seeking its representations on the scope of the appellant's request, the reasonableness of the Town's search for records and the applicability of section 12 to any responsive records. I received representations from the Town, a complete copy of which, with the attachments (less the unsevered records), were sent to the appellant, along with a Notice of Inquiry. I received representations in response from the appellant. I then issued Order MO-2346-I, where I upheld the Town's decision to deny access to the severed information in ten legal invoices. I also ordered the Town to:

- disclose to the appellant the undisclosed information in the cheque that is part of Document number 13
- conduct another search for the files and records concerning the appellant or his address, except for the invoices concerning the appellant or his address, up until the date of the appellant's request.

I ordered the Town to provide me with an affidavit sworn by the individual(s) who conducted the search, confirming the nature and extent of the search conducted for the responsive records within 30 days of the interim order. At a minimum, the affidavit was to include information relating to the following:

- a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
- b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
- c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,
- d) the results of the search.

If, as a result of this further search for records, the Town identified any additional records responsive to the request, I ordered the Town to provide a decision letter to the appellant, with a copy to me, regarding access to these records in accordance with the provisions of the *Act*.

In response to Order MO-2346-I, the Town disclosed the severed information in Document number 13 to the appellant and conducted another search for responsive records. In its decision letter to the appellant, the Town identified 128 additional records and provided me with four statutory declarations from the employees who conducted the searches for these records. Of these 128 records, the Town disclosed to the appellant 57 records in full, as well as parts of 11 records, claiming the applicability of sections 38(a) (right of access to ones own personal information), 7(1) (advice to government), 11 (economic and other interests) and 12 (solicitor client privilege) to the withheld records or parts of records.

The appellant sought disclosure of the records or parts of records withheld by the Town. The appellant also continued to maintain that additional responsive records existed; therefore, the reasonableness of the Town's search for records in response to Order MO-2346-I is at issue. I sent a Notice of Inquiry to the Town, setting out the facts and the remaining issues since Order MO-2346-I, seeking its representations. I received representations from the Town, a complete copy of which was sent to the appellant, along with a Notice of Inquiry, seeking the appellant's representations. At the same time, the Town disclosed further records or parts of records to the

appellant. I received representations from the appellant in response. I sent a copy of the appellant's representations to the Town and sought reply representations. I received reply representations from the Town in response. Neither party provided direct representations on any of the issues outlined in the Notice of Inquiry.

RECORDS:

The records or parts of records at issue consist of letters, faxes notes and emails and are listed in the Town's Index of Records at Appendix A of this order.

DISCUSSION:

PERSONAL INFORMATION

I will first determine whether the records contain "personal information" as defined in section 2(1) and, if so, to whom it relates. That term 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 where 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;

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 [Order 11].

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

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 [Orders P-1409, R-980015, PO-2225].

Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

As stated above, neither party provided direct representations on this, or any of the other issues, outlined in the Notice of Inquiry.

In the Index of Records, the Town claimed that all of the records contain personal information. It also claimed that certain records contained personal information that falls within section 2(1)(g).

Upon my review of the records, I find that all of the records or portions of records at issue contain only the personal information of the appellant. This personal information consists of the appellant's name, which appears with other personal information relating to him, namely, that he was involved in a potential lawsuit in his personal capacity, as well as views or opinions of another individual about the appellant. I find that this qualifies as the appellant's personal

information under paragraphs (g) and (h) of the definition of that term in section 2(1). As a result of my finding, section 38(a) applies in the circumstances of this appeal.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

I will now determine whether the discretionary exemption at section 38(a) in conjunction with the sections 7, 11 and 12 exemptions apply to the information at issue.

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, **11, 12**, 13 or 15 would apply to the disclosure of that information.

SOLICITOR-CLIENT PRIVILEGE

The Town has claimed that the discretionary exemption at section 12 applies to all of the records, except for Records 32, 44, 49, 54, 57, 58, 67, 70, 90, 98, 108, 110 and 115.

Section 12 states as follows:

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 as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

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.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

Loss of privilege

Termination of litigation

Common law litigation privilege may be lost through termination of litigation or the absence of reasonably contemplated litigation.

Note, however, that termination of litigation does not affect the application of statutory litigation privilege under branch 2 (see below). [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.)]

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and

- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.”

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and
- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

Neither party provided direct representations on this issue, but the Town did indicate in its reply representations that it:

...continues to rely on Section 12 to refuse the disclosure of records that are subject to solicitor-client privilege to protect the direct communications between

the solicitor and the Town including agents or employees for the purpose of obtaining or giving professional legal advice.

Based upon my review of the records, I find that Records 1 to 5, 7, 9, 10, 16, 18, 20, 22 to 27, 29 to 31, 33, 35, 41, 45, 48 and 50, which are emails and other correspondence between the Town's solicitor and the Town and/or its insurer, are subject to solicitor client communication privilege under branch 1. These records are part of a continuum of communication between the Town's solicitor and the Town as the client.

The Town's insurance company's lawyer acted on behalf of the Town's insurer in the lawsuit filed by the appellant against the Town. Records 60, 61, 62, 63, 66, 69, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81 and 82 contain communications between this lawyer and the Town and or its insurer. I also find that these records are subject to solicitor client communication privilege under branch 1. I am satisfied that these records form part of the continuum of communication between the Town as the client and the solicitor from the insurance company acting on behalf of the Town as its solicitor.

I find that Records 99, 104 and 105 are not subject to solicitor client privilege. There is no evidence that these records were sent to a Town solicitor for review and advice. These records do not involve solicitor client communication. Nor were these records 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.

Therefore, I find that all of the records for which section 12 has been claimed, except for Records 99, 104 and 105, are subject to solicitor client privilege as they are direct communications between a solicitor (a named lawyer) and the client (the Town) made for the purpose of obtaining or giving legal advice. These records are privileged under the "continuum of communications" between the solicitor and client and are, therefore, subject to the solicitor client communication aspect of branch 1 of section 12 on that basis. This privilege has not been lost. As no other exemptions have been claimed for Record 99, I will order this record disclosed.

Furthermore, as I have found that Records 1 to 5, 7, 9, 10, 16, 18, 20, 22 to 27, 29 to 31, 33, 35, 41, 45, 48, 50, 60, 61, 62, 63, 66, 69, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81 and 82 are subject to section 12 of the *Act*, there is no need for me to consider the possible application of sections 7(1) and or 11(e) to them. I will discuss below whether the Town properly exercised its discretion to deny the appellant access to these records.

ADVICE TO GOVERNMENT

The Town has claimed that the discretionary exemption at section 7(1) applies to all of the records, except for Records 41, 69 and 99. I will now consider whether section 7(1) applies to the records for which this exemption has been claimed and that I have not already found subject to section 12, namely, Records 32, 37, 40, 43, 44, 49, 54, 57, 58, 67, 70, 90, 98, 108, 110 and

115. I also will consider whether section 7(1) applies to Records 104 and 105, as I did not find that section 12 applies to these two records.

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(1) 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-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on Judicial Review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

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 PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information

- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; 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.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)]

Neither of the parties addressed directly whether the records at issue contain advice or recommendations.

Based upon my review of the records at issue, I find that the remaining records at issue for which section 7(1) has been claimed, i.e. Records 32, 37, 40, 43, 44, 49, 54, 57, 58, 67, 70, 90, 98, 104, 105, 108, 110 and 115, do not contain advice or recommendations within the meaning of section 7(1). Although Record 37 contains advice or recommendations, this information is from an insurance company and not from an officer or employee of an institution or a consultant retained by an institution.

The information in the records at issue for which section 7(1) has been claimed does not suggest a course of action that will ultimately be accepted or rejected by the person being advised. Nor could disclosure permit one to accurately infer advice or recommendations. Therefore, section 7(1) does not apply to Records 32, 37, 40, 43, 44, 49, 54, 57, 58, 67, 70, 90, 98, 104, 105, 108, 110 and 115. As the Town has claimed that section 11(e) applies to these records, I will now consider the application of that exemption to these records.

ECONOMIC AND OTHER INTERESTS

The Town has claimed that the discretionary exemption at section 11(e) applies to all of the records, except for Records 2, 3, 30, 31, 33, 35, 41, 69 and 99. I have found that section 12 applies to Records 1 to 5, 7, 9, 10, 16, 18, 20, 22 to 27, 29 to 31, 33, 35, 41, 45, 48, 50, 60, 61, 62, 63, 66, 69, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81 and 82. As stated above, I will now consider whether section 11(e) applies to Records 32, 37, 40, 43, 44, 49, 54, 57, 58, 67, 70, 90, 98, 104, 105, 108, 110 and 115.

Section 11(e) states:

A head may refuse to disclose a record that contains,

- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution.
[Order PO-2064]

Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

Neither party provided direct representations on this issue; however, the Town did provide the following relevant background information concerning the records' creation:

Please be advised that the appellant and his spouse have been in litigation or anticipated litigation with the Town over issues relating to grading and drainage of their property for many years. Since at least 1994, the Town's insurance adjuster and the Town's engineering consultant have been involved with

investigating the appellant's complaints regarding this matter. Litigation was commenced by the appellant and his spouse against the Town in 1998 and a trial was held in 2001, with a judgment by the Superior Court of Justice on (Court File [#]). All of the invoices provided to the appellant either relate directly to that litigation, preparation leading up to that litigation or matters arising out of the judicial decision in that litigation.

In 2005, the appellant's spouse wrote to the Town seeking clearances relating to the grading and drainage of their property, again threatening litigation if the issue was not resolved "as soon as possible". Over the past two years or more, the Town's insurance adjuster, the Town's engineering consultant and the Town's lawyer have again been actively involved in investigating the applicant's complaints and attempting to settle this pending litigation. The appellant hired legal counsel who represented him from 2005 until July 6, 2007 in settlement discussions, which culminated in a settlement that both the appellant's legal counsel and the Town's legal counsel recommended to their respective clients. The appellant's June 5, 2007 request for information was submitted to the Town after the settlement was recommended to the appellant, but before it had been finalized.

The Town received a letter from the appellant's legal counsel advising that he was no longer retained by the appellant and that the appellant was refusing to finalize the settlement that had been negotiated and specifically refusing to provide a full and final release of his claim against the Town.

Records 57, 58, 67, 70, 90, 98, 104, 105, 108, 110 and 115 are dated 2001 or earlier. As stated above, the litigation that the Town and the appellant were involved in was finalized in 2001 with the delivery of a court judgment. Records 37, 40, 43, 44, 49 and 54 are dated 2005. Record 32 is dated May 2006.

Based upon my review of the records at issue, I find that section 11(e) does not apply to any of these records. The four part test outlined above has not been met. The records do not contain positions, plans, procedures, criteria or instructions intended to be applied to negotiations. Based upon my review of the records at issue, I find that they contain general information about the appellant's claim against the Town and do not refer to pre-determined courses of action or ways of proceeding [Order PO-2034]. Furthermore, the Town is not carrying on now or will be carrying on negotiations. It has not carried on negotiations with the appellant since July 2007.

Therefore, I find that section 11(e) does not apply to Records 32, 37, 40, 43, 44, 49, 54, 57, 58, 67, 70, 90, 98, 104, 105, 108, 110 and 115, and as there are no other exemptions that apply to these records, I will order them disclosed.

EXERCISE OF DISCRETION

I will now determine whether the Town exercised its discretion in a proper manner under section 38(a) concerning the records that I have found subject to section 12.

The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Town did not provide representations specifically addressing its exercise of discretion. However, its submissions in support of the application of sections 7(1), 11(e) and 12 reflect the manner in which discretion was exercised. Having regard to the Town's representations, I am satisfied that the Town has properly taken into account only relevant factors, in exercising its discretion to withhold the records I found exempt under section 12. I am also satisfied that the Town did not exercise its discretion in bad faith, for an improper purpose or took into account irrelevant factors.

In making my decision, I took into account that the Town attempted to apply the section 12 exemption it claimed to the responsive records in a limited and specific manner. As a result, a significant amount of information was provided to the appellant, both initially and during adjudication. During adjudication, the Town's solicitor and its Freedom of Information Coordinator conducted a further review of the records and disclosed Records 34, 88, 101, 106, 107, 119, 120, 122 and 127 pursuant to section 38 (a).

With respect to the information that was not disclosed to the appellant, I am satisfied that the Town properly exercised its discretion to withhold this information having regard that the purpose of the section 12 exemption is to protect confidential communications between government employees or government employees and their legal counsel.

Having regard to the above, I find that the Town properly exercised its discretion in deciding to withhold the information I found exempt under section 12.

SEARCH FOR RESPONSIVE RECORDS

I will now determine whether the Town conducted a reasonable search for records in response to the provisions of Order MO-2346-I, which required it to conduct another search for records concerning the appellant or his address, except for the invoices concerning the appellant or his address, up until the date of the appellant's request.

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 [Orders P-85, P-221, PO-1954-I]. 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.

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 [Order P-624].

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.

The Town was asked to provide a written summary of all steps taken in response to the Order. In particular, the Town was asked to respond to the following, preferably in affidavit form:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

In response to Order MO-2346-I, the Town located 128 additional records and provided affidavits from:

- an administrative assistant who conducted a search of the Town's available computer database
- the Town Clerk who reviewed the Town Manager's and Building Department files
- the Town's Director of Finance/Treasurer who reviewed the insurance files and audit reports

all of whom searched for any responsive records related to the appellant's address. The Town also provided an affidavit from the Town Manager who stated that she reviewed and forwarded to the FOIC all responsive records in her possession.

In response, the appellant submits that:

The Town has not produced records to explain a document from General Accident for [amount] for Professional/Malpractice Property Damage Miscellaneous Adjustment Expense Erin Township. I am unclear if the Town's records indicate that this cheque was provided to me and/or cashed? I still do not see these records in the Index of Records provided on January 15, 2009. How many of other cheques exist associated with my name and property over the last decade or more that have not been produced? Why this one?

If so, where are these records produced by the Town containing our names and property? The Insurer on behalf of the Town paid General Damages of [amount] as ruled by Justice [name], Ontario Superior Court of Justice on [date] 2001 (Court File [#]). Where are these records? I am not clear as to why all the other existing Town of Erin insurance records similar to this photocopy cannot be provided to disclose all monies paid.

My position remains that additional records exist and that I am entitled to them. This consistent request to the Town of Erin, has not been met. They have not provided the costs incurred and reported to the municipality from the trial. They have established that this is due to client solicitor privilege. It is my position that I am entitled to this information. I feel strongly also that the disclosure of total costs in dollars for the defense of the Town Of Erin's position is not subject to solicitor client privilege. If the costs are tied to our name and property through a case file or claim with the insurer then I am entitled to this disclosure as it does not name any persons at all. It is a total dollar amount of any and all costs associated with our name and property that should and must be disclosed completely.

The Town of Erin has not produced any documents regarding the payout for their error and omissions from the trial. I believe that these records exist and have been shared with the Town and its lawyers. If shared, there would be notes and copies of documents discussed. They should be produced. Council records and meeting minutes have not been produced. I am sure many elected councils have discussed the issue repeatedly over a decade both in public and in camera sessions. All of the notes taken would contain our names and information. These have not been disclosed.

This insurance and claim information is reported to the Council on a quarterly or annual basis therefore further records do exist. This insurance data and claims profiles, including mine over almost a decade, are used to justify and set subsequent insurance rates that the Municipality must pay. This is the justification for these insurance increases to the Municipality and to the Taxpayers. Therefore it seems very reasonable that these additional records exist and have not been provided to me...

In reply, the Town submits that:

Additional Records

The appellant has already been provided copies of all of the invoices located in his file relating to his request. This file is not the Town's official accounts payable file; however, these are all of the responsive records that the municipality currently has in its files. In accordance with the retention schedule by-law # 06-92 of the former Township of Erin accounts payable information is retained for a period of seven years. As previously stated, due to the age of the documents being requested, if there were ever other records relating to [the appellant] in the municipality's files they were likely destroyed in the normal course. The appellant has all of the available records relating to the matter in question, and also has a copy of the Superior Court of Justice Court File No. [#] which outlined costs.

General Accident Cheque \$658.51

In accordance with the Interim Order, the appellant was provided a copy of the undisclosed information in the cheque. This cheque was part of Document number 13 [as referred to in Order MO-2346-I]. The balance of Document number 13 of the original index of records provides the details relating to the cheque and explains that it was a reimbursement of expenses incurred by the Town. Therefore the cheque was payable to the Town and not the appellant...

Insurance Company and Costs Incurred for Defense

[T]he appellant ...was advised that once he submitted his lawsuit against the former Township of Erin, [name] Insurance Company assumed control of the file and from that point forward defense costs incurred were the responsibility of the insurer. The Town does not have copies of the insurer's expense records. To the

best of my knowledge and the subsequent searches conducted by staff, there was no documentation that the Town of Erin was ever provided a costing associated with the defense relating to the appellant and therefore I have not used solicitor-client privilege to withhold said information.

The appellant continues to state that the Town has not provided him the costs incurred and reported to the municipality from the trial. I have previously provided a copy of the Claims Audit report provided by [name] Company Limited in 1997 which did not identify the subject property and the Claims Audit report provided by [name] Company Limited covering the period 1994 to 2001 which had no value identified for the subject property and therefore would not have been included in the documents requested...

The appellant has been provided copies of the invoices paid by the Municipality which included the total amounts paid by the municipality relating to the first "index of records".

Council Records

To the best of my review I was not able to find anything in the former Township Minutes regarding this issue. Normally litigation items would not be discussed in the open session and that such items would have been discussed in closed sessions. I assume that Council from time to time would have discussed this issue but there was nothing in the file that confirms that they did. During this time period the practice of the municipality was not to record what Council discussed in closed session.

Analysis/Findings

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 [Orders M-909, PO-2469, PO-2592].

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 [Order MO-2185].

Based upon my review of the parties' representations and the records located following the issue of Order MO-2346-I, I am satisfied that the Town has conducted a reasonable search for responsive records. In particular, the Town has located the records concerning "all files, financial expenses incurred, and records pertaining to the appellant and his property" as set out in the request.

In my view, the appellant has not provided a reasonable basis for concluding that additional records exist [Order MO-2246].

The Town has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. The Town has provided a comprehensive description of the steps it undertook to locate records responsive to the appellant's request. I am also satisfied that the Town's search was completed by individuals with knowledge about the records and the circumstances of the appeal. Accordingly, I find that the Town has performed a reasonable search for responsive records.

ORDER:

1. I order Records 32, 37, 40, 43, 44, 49, 54, 57, 58, 67, 70, 90, 98, 99, 104, 105, 108, 110 and 115 to be disclosed to the appellant **by August 17, 2009**.
2. I uphold the Town's decision to withhold access to the remaining information at issue in the records.
3. In order to verify compliance with this order, I reserve the right to require the Town to provide me with a copy of the records disclosed to the appellant pursuant to provision 1, upon my request.
4. I uphold the Town's search for records.

Diane Smith
Adjudicator

July 17, 2009

APPENDIX A

Index of Records

Record No.	Date	General Description of Record	Page/Para No.	Release Yes/No	Section(s) Applied
1	Aug 2/07	copy of emails between Town Solicitor and [named insurance company] dated Aug. 2 and June 26/07	2	no	7(1); 11(e); 12 ; 38(a)
3	July 25/07	copy of emails between the Town's Solicitor and Town Staff dated July 25/07	2	no	7(1); 12; 38(a)
4	July 20/07	copy of email between the Town's Solicitor and Town Staff dated July 20/07 and email between Town's Solicitor and appellant's Lawyer	1	portion	7(1); 12; 38(a)
5	July 19/07	copy of email between staff dated July 19/07; the Town's Solicitor and Town Staff dated July 19/07 and email between Town's Solicitor's staff dated July 19/07	2	no	7(1); 11(e); 12; 38(a)
7	July 9/07	copy of email from Town's Solicitor to Town Staff	1	no	7(1); 11(e); 12; 38(a)
9	July 5/07	copy of emails between the Town's Solicitor and Town staff dated July 05/07; and internal staff emails dated July 4 and 5/07	2	no	7(1); 11(e); 12; 38(a)
10	June 26/07	copy of email between [named insurance company] and Town solicitor	2	no	7(1); 11(e); 12; 38(a)
16	Nov 17/06	copy of emails between Town staff and the Town's Solicitor dated Nov 17/06 and Nov 16/06; and between the Town's Solicitor and appellant's lawyer dated Nov 16/06	2	portion	7(1); 11(e); 12; 38(a)
18	Nov 7/06	copy of internal email between staff	2	no	7(1); 11(e); 38(a)
20	Nov 7/06	copy of emails between the Town's Solicitor and [named insurance company] dated Oct 30, 31, and Nov 7/06	3	no	7(1); 11(e); 12; 38(a)
22	Oct 31/06	copy of emails between the Town's Solicitor and [named insurance company] dated Oct 30 and 31st /06	2	no	7(1); 11(e); 12; 38(a)

23	Oct 30/06	copy of emails between the Town's solicitor and Town staff dated Oct 30/06; and the Town's solicitor and [named insurance company].	2	no	7(1); 11(e); 12; 38(a)
24	Oct 16/06	copy of email between the Town's solicitor and [named insurance company] dated Oct 16/06; emails between the Town's solicitor and appellant's lawyer dated Sept 20/06; Aug 11/06; July 27/06; July 18/06 and May 26/06	6	portion	7(1); 11(e); 12; 38(a)
25	Oct 16/06	copy of email between the Town's solicitor and [named insurance company] dated Oct 16/06; and emails between the Town's solicitor and appellant's lawyer dated July 18/06 and May 26/06	3	portion	7(1); 11(e); 12; 38(a)
26	Oct 16/06	copy of email the Town's solicitor and [named insurance company] dated Oct 16/06; and copy of emails between the Town's solicitor and appellant's lawyer dated May 25.06, May 16/06, Apr 27/06; and Apr 27/06	4	portion	7(1); 11(e); 12; 38(a)
27	Oct 11/06	copy of email between the Town's solicitor to [named insurance company] dated Oct 11/06	1	no	7(1); 11(e); 12; 38(a)
29	July 27/06	copy of email between town staff dated July 27/06; and copy of email between the Town's solicitor and Town staff dated July 18/06; and copy of email between the Town's solicitor and appellant's lawyer dated July 18/06, and May 26/06	3	portion	7(1); 11(e); 12; 38(a)
30	July 27/06	copy of email sent by Town staff to the Town's solicitor dated July 27/06; and draft letter dated July 19/06	2	no	7(1); 12; 38(a)
31	July 18/06	copy of emails between the Town's solicitor and Town staff dated July 18/06 and copy of emails between the Town's solicitor and appellant's lawyer dated July 18/06; and May 26/06	4	portion	7(1); 12; 38(a)

32	May 26/06	copy of internal email between staff	1	no	7(1); 11(e); 38(a)
33	May 25/06	copy of email sent between the Town's solicitor and Town staff dated May 25/06 and copy of emails between the Town's solicitor and appellant's lawyer dated May 25/06; May 16/06, April 27/06.	4	portion	7(1); 12; 38(a)
35	Aug 30/05	copy of email between the Town's solicitor and Town staff dated Aug. 30/06	1	no	7(1); 12; 38(a)
37	July 12/05	copy of [named insurance company's] fax dated July 12/05 regarding appellant's claim	1	no	7(1); 11(e); 12; 38(a)
40	May 31/05	fax cover sheet to [named insurance company]	1	no	7(1); 11(e); 38(a)
41	May 31/05	fax cover sheet to the Town's solicitor	1	no	12; 38(a)
43	May 12/05	copy of email by Town Staff to insurance company	1	no	7(1); 11(e); 38(a)
44	May 10/05	copy of memo sent by Town Staff to [named insurance company]	1	no	7(1); 11(e); 38(a)
45	Apr 29/05	copy of email between the Town's solicitor and Town staff	1	no	7(1); 11(e); 12; 38(a)
48	Apr 18/05	copy of email between Town staff and Town Solicitor dated Apr. 28/05 and Apr. 18/05	3	no	7(1); 11(e); 12; 38(a)
49	Apr 18/05	draft letter dated Apr 18/05 including [engineering company] letter sent to [name] dated June 12/97	3	no	7(1); 11(e); 38(a)
50	Apr 11/05	copy of email between Town staff and the Town's Solicitor	1	no	7(1); 11(e); 12; 38(a)
54	Mar 15/05	handwritten history of file	1	no	7(1); 11(e); 38(a)

57	July 26/01	copy of internal email between Town staff dated July 26/01	1	no	7(1); 11(e); 38(a)
58	July 25/01	copy of internal email between Town staff dated July 25/01	1	no	7(1); 11(e); 38(a)
60	Feb 22/01	copy of insurance company's legal internal defense summary letter dated Feb. 22/01	5	no	7(1); 11(e); 12; 38(a)
61	May 2/01	copy of insurance company's legal defense summary letter dated May 2/01	3	no	7(1); 11(e); 12 ; 38(a)
62	Jan 30/01	copy of insurance company's legal defense summary letter dated Jan. 30/01	2	no	7(1); 11(e); 12; 38(a)
63	Jan 10/01	copy of insurance company's legal defense summary letter dated Jan 10/01	3	no	7(1); 11(e); 12; 38(a)
66	Dec 7/00	copy of insurance company's legal defense summary letter dated Dec. 7/00	3	no	7(1); 11(e); 12; 38(a)
67	Nov 14/00	copy of letter sent to the Town from the insurance company's lawyer dated Nov. 14/00	3	no	7(1); 11(e); 38(a)
69	Dec 1/99	email sent to Town staff from the insurance company	3	no	12; 38(a)
70	Dec 1/99	copy of internal Town staff email	1	no	7(1); 11(e); 8(a)
71	Nov 29/99	emailed letter received from insurance company's lawyer dated Nov 29/99 including letter dated Nov 29/99 appellant's lawyer	8	portion	7(1); 11(e); 12; 38(a)
72	Oct 20/99	copy of insurance company's legal defense summary letter dated Oct. 20/99	2	no	7(1); 11(e); 12; 38(a)
74	Oct 4/99	copy of insurance company's legal defense summary letter dated Oct. 4/99	2	no	7(1); 11(e); 12; 38(a)
75	Aug 10/99	letter sent to the Town from the insurance company's legal counsel dated August 10/99 including copy of letter they sent to appellant's lawyer dated Aug 10/99	12	no	7(1); 11(e); 12; 38(a)

76	Aug 4/99	letter sent to the Town from the insurance company's legal counsel dated Aug 4/99	3	no	7(1); 11(e); 12; 38(a)
77	July 20/99	letter sent to the insurance company's legal counsel dated July 20th/99	1	no	7(1); 11(e); 12; 38(a)
78	June 7/99	letter sent to the Town from the insurance company's legal counsel dated June 7/99 and summary of undertakings by [name]	20	portion	7(1); 11(e); 12; 38(a)
79	June 2/99	copy of insurance company's legal defense summary letter dated June 2/99	13	no	7(1); 11(e); 12; 38(a)
80	Jan 26/99	letter sent to the Town from the insurance company's legal counsel dated Jan 26/99	1	no	7(1); 11(e); 12; 38(a)
81	Mar 15/99	letter sent by the Town to the insurance company's legal counsel dated Mar 15/99	1	no	7(1); 11(e); 12; 38(a)
82	July 9/98	copy of [engineering company's] letter sent to the insurance company's legal counsel dated July 9/98	1	no	7(1); 11(e); 12 ; 38(a)
90	May 26/97	letter sent to the Town by [named insurance company] dated May 26/97	1	no	7(1); 11(e); 38(a)
98	Sept 12/05	handwritten note to file	1	no	7(1); 11(e); 38(a)
99	July 20/95	copy of [named insurance company] letter to [name] dated July 20/95	3	no	12; 38(a)
104	Feb 22/95	fax cover sheet sent to [named insurance company]	1	no	7(1); 11(e); 12; 38(a)
105	Feb 21/95	letter sent to [named insurance company] dated Feb 21/95	1	no	7(1); 11(e); 12; 38(a)
108	Sept 29/94	telephone note to file	1	no	7(1); 11(e); 38(a)
110	July 29/04	handwritten notes to file	1	no	7(1); 11(e); 38(a)

115	July 6 & 7/93	notes to file	1	no	7(1); 11(e); 38(a)
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