Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2790

Appeal MA11-328

Nottawasaga Valley Conservation Authority

September 19, 2012

Summary: The appellant made a request to the Nottawasaga Valley Conservation Authority for records relating to a permit issued regarding a specified property. The conservation authority located responsive records and granted access to a number of records, but denied access to others, claiming the application of the mandatory exemptions in sections 10(1) (third party information) and 14(1) (personal privacy). During the mediation of the appeal, the conservation authority withdrew the section 10(1) claim, and the appellant raised the issue of reasonable search. During the inquiry stage of the appeal, the conservation authority claimed for the first time the application of the discretionary exemption in section 12 (solicitor client privilege) and that the records were outside the scope of the request. The adjudicator did not allow the late raising of section 12 or the claim that the records were outside the scope of the request. The adjudicator also upheld the conservation authority's decision, in part and found that its search was reasonable.

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

Orders Considered: MO-2226, P-270, P-658, P-883 and PO-2225.

OVERVIEW:

[1] This order disposes of the issues remaining as a result of an access decision made by the Nottawasaga Valley Conservation Authority (the conservation authority) in

response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a particular property as follows:

> Ongoing disclosure regarding NVCA permit issued re: [a specified address] from and after [a specified date] (any and all documentation, email records, plans, drawings, approvals, orders and any other documentation not listed but to which I am legally entitled).

[2] During the processing of the request, the requester contacted the conservation authority and clarified that her request was for records from and subsequent to another specified date.

[3] The conservation authority located responsive records and issued a decision letter granting access to some of the records, in whole or in part. The conservation authority claimed the application of the exemption in section 14(1) (personal privacy) in denying access to portions of some of the records and sections 10(1) (third party information) and 14(1) to deny access to other records, in their entirety.

[4] The requester, now the appellant, filed an appeal of the conservation authority's decision to this office.

[5] During the mediation of the appeal, the appellant indicated that she continued to seek access to the records which were withheld in their entirety. The appellant also informed the mediator that she believed that more records should exist. She provided the mediator with details of specific emails that she believes should have been included as part of the conservation authority's records. As a result, the conservation authority conducted another search for responsive records, located further records, and issued a second decision letter, granting partial access. The records found as a result of the second search are not at issue in this appeal.

[6] The appellant subsequently advised the mediator that she still believes more records should exist. Therefore, the reasonableness of the conservation authority's search was added as an issue in this appeal.

[7] The conservation authority subsequently issued a third decision letter to the appellant, withdrawing its reliance on section 10(1), but continuing to deny access to the records on the basis of the exemption in section 14(1), in conjunction with the factors weighing against disclosure in sections 14(2)(h) and 14(2)(i) of the *Act*.

[8] The matter then moved to the adjudication stage of the process where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the parties, which were shared in accordance with this office's *Practice Direction 7*. In its representations, the conservation authority raised, for the first time, the application of the discretionary exemption in section 12 (solicitor client privilege) in

relation to one of the records. The conservation authority also raised, for the first time, that it considered all of the records at issue to be outside the scope of the request. Therefore, I have added the issue of whether the conservation authority can claim a discretionary exemption, at the inquiry stage of the process, and also whether it is entitled to claim that the records are outside the scope of the request.

[9] For the reasons that follow, I do not allow the conservation authority to raise the discretionary exemption in section 12. I find that the records are within the scope of the request. I uphold the conservation authority's decision, in part, and order it to disclose the information not exempt under section 14(1) to the appellant. I also uphold the conservation authority's search as being reasonable.

RECORDS:

[10] The records consist of seven pages of emails.

ISSUES:

A: Can the conservation authority claim a new discretionary exemption and claim that the records are outside the scope of the request during the inquiry?

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

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

D: Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: Can the conservation authority claim a new discretionary exemption and claim that the records are outside the scope of the request during the inquiry?

[11] In its initial representations, the conservation authority raised, for the first time, the application of the discretionary exemption in section 12 to one of the emails at issue.

[12] The conservation authority submits that one of the records is subject to section 12 of the *Act*. The appellant submits that the conservation authority has had "plenty of time" to consider the records and objects to the late raising of this exemption.

[13] The *Code* sets out basic procedural guidelines for parties involved in an appeal. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims after an appeal has been filed. Section 11.01 of the *Code* is relevant to this issue and reads:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[14] These guidelines for the late raising of discretionary exemptions were found to be reasonable by the Divisional Court in the judicial review of Order P-883.[1]

[15] In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

[16] The objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

---

[1] *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

[17] In Order MO-2226, Senior Adjudicator John Higgins further considered the late raising of a discretionary exemption. He stated:

> An institution's right to claim a discretionary exemption is governed by the *Act* and this office's *Code of Procedure* (the *Code*). The head of an institution is required to give notice under section 19 of the *Act* to the requester within thirty days as to whether or not access to a record or a part of it will be given (section 19). As mentioned above, the notice of refusal to give access to a record or part of a record (i.e. the decision letter) shall, among other things, state the specific provision of the *Act* under which access is refused and the reason the provision applies to the record (section 22).
>
> There have been circumstances when the institution decides to raise discretionary exemptions after the decision letter referred to in section 19 has been issued. Section 11 of the *Code* permits an institution to claim a new discretionary exemption within 35 days after it has been notified of the appeal. In an appeal before this office, the adjudicator may *decide not to consider a new discretionary exemption* where the claim is made after the 35 day period [emphasis in original].
>
> Section 11 of the *Code* and the provisions of the *Act* that set out the procedures an institution must follow in the event that it wishes to claim the application of discretionary exemptions have been considered by a number of previous orders. The principles established by these orders were recently reviewed in Order PO-2500. In that order, I stated:
>
> > The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). **The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*** (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.) [emphasis added] …

> Order PO-2500 and the other decisions it cites underline the point that the procedures established by this office in relation to the late raising of discretionary exemptions are designed to protect the integrity of the process and the rights of the appellant. …

[18] Section 12 is a discretionary exemption and, subject to the guidelines in section 11.01 of the *Code*, must be raised within 35 days of the issuance of the notice of mediation by this office. The notice of mediation was sent to the conservation authority on August 11, 2011 and states:

> **Please be advised that, if your institution wishes to claim discretionary exemptions in addition to those set out in your decision letter, you are permitted to do so by September 16, 2011. Should your institution wish to claim these exemptions, you will be required to issue a new decision letter to the appellant with a copy to the Mediator in the form prescribed by the IPC Practices, Number 1.**

[19] This exemption was not raised during the mediation of the appeal and the conservation authority's representations were received several months after the deadline of September 16, 2011. The conservation authority has not provided any reasons why it has raised the application of section 12 at the representations stage of the inquiry and not during mediation. In addition, the conservation authority did not issue a new decision letter to the appellant, advising her that it was now claiming the application of section 12.

[20] In my view, the conservation authority had ample time to review the record, and to confirm which discretionary exemptions it wished to rely on as the appeal proceeded through the mediation stage of the process. This is particularly so given that there are only seven pages of records at issue in the appeal and the claim is being made with respect to only one record. While I accept that there may be unique circumstances involving numerous records where the 35-day policy may not apply, this is not one of those cases where it is appropriate to do so.

[21] Although the appellant was provided access to the conservation authority's representations in which it made the section 12 exemption claim, and was given the opportunity to reply, the introduction of a new exemption at a late stage only gives the appellant the time allowed for providing representations to consider it. Earlier identification of an exemption claim permits an appellant the time to consider and reflect on its application, consult with counsel on the issue if desired, and to address the exemption claim in mediation. In my view, it is inherently unfair to an appellant to discover the basis for an institution's denial of access through a Notice of Inquiry issued long after the request and appeal processes have been initiated.

[22] In the specific circumstances of this appeal, I find that the integrity of the process would be compromised and the interests of the appellant prejudiced if I were to allow the conservation authority to rely on section 12 with respect to the record at issue. Accordingly, I will not permit the conservation authority to claim this exemption. Given this finding, I will not consider the application of section 12 to the record for which it was claimed.

[23] The conservation authority has also raised in its representations, for the first time, its contention that the responsive records fall outside the scope of the request. In particular, the conservation authority submits that although the records at issue were in "the file" they do not relate to the appellant's request. The records, the conservation authority argues, relate to a request for a deputation from the appellant and would not provide the appellant with any further information regarding the permit that is the subject matter of the request. The conservation authority also states that the records were in "the file" because the Senior Environmental Officer was copied on the emails.

[24] The appellant submits that she was provided access to other records by the conservation authority without the "supposed pre-condition" that the records provide further details regarding the permit in question. The appellant states:

> I did not think it the purview of the Authority to pre-judge the relatedness of the information without clarifying the scope of the request directly with the requester, which was never done in this particular case.

[25] As previously stated, the appellant's request was for:

> Ongoing disclosure regarding NVCA permit issued re: [a specified address] from and after [a specified date] (any and all documentation, email records, plans, drawings, approvals, orders and any other documentation not listed but to which I am legally entitled).

[26] In response to the request, the conservation authority issued three decision letters. The two most recent letters were issued during the mediation of the appeal. The conservation authority did not raise any concerns about the scope of the request in the decision letters, or with the mediator during mediation. In its third decision letter, the conservation authority advised the appellant that it was no longer claiming the application of the exemption in section 10(1), but that it was claiming the exemption in section 14(1), in conjunction with two factors in section 14(2) that weigh against disclosure. The mediator then confirmed with the conservation authority that its position set out in the letter related to the records at issue in this appeal.

[27] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[28] The conservation authority did not raise concerns about the scope of the request at the time of the request or during the mediation of the appeal and, in fact, issued a revised decision letter during mediation, setting out the exemptions on which it was relying in denying access to the records at issue. At all times, the conservation authority treated the records as being responsive to the request.

[29] I have reviewed the records at issue and I find that they are responsive to the appellant's request. Therefore, I do not accept the conservation authority's position that the records are not responsive to the request.

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

[30] In order to determine if section 14(1) of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. The conservation authority submits that the records contain personal email addresses, correspondence sent to an institution in confidence, and the views or opinions of another individual about the individual. The relevant portions of the term are defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (d) the address, telephone number, fingerprints or blood type of the 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;

[31] Section (2.1) also relates to the definition of personal information and states:

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

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

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

[34] The conservation authority submits that the information in the emails was shared with all of their recipients in confidence and is of a private and confidential nature, falling within the ambit of paragraph (f) of the definition of personal information in section 2(1) of the *Act*. In addition, the conservation authority states that some of the contact information in the emails consists of personal email addresses. The conservation authority further submits that the records contain the views or opinions of an individual about another individual, which falls within the ambit of paragraph (g) of the definition.

[35] The appellant states that the emails were sent in the individuals' professional, and not personal capacity, and that any personal email addresses could be severed prior to disclosure.

---

[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.

[36] In reply, the conservation authority states that it has disclosed all information to the appellant with the exception of personal information, including "the property owner and individuals' names, and confidential emails."

[37] As the appellant has advised that she is not seeking the personal email addresses of any individuals contained in the records, any order I may make in regard to these records will not include the disclosure of personal email addresses, as they have been removed from the scope of the appeal by the appellant.

[38] I have carefully reviewed the records at issue. I find that they contain an identifiable individual's property address,[4] which constitutes personal information as it falls within the ambit of paragraph (d) of the definition of personal information in section 2(1) of the *Act*. I will consider the application of the mandatory exemption in section 14(1) to this information, below.

[39] In addition, I find that portions of the records contain the appellant's personal information. She is identified by name in the records, which appears with other personal information relating to her, falling within the ambit of paragraph (h) of the definition of personal information in section 2(1) of the *Act*.

[40] With respect to the other individuals named in the records, in order to determine whether information in a record contains personal information, I must consider whether the information relates to the named individuals in a professional, rather than their personal capacity. Only information about individuals in a personal capacity can qualify as personal information for the purposes of the *Act*. I find that all of the emails at issue consist of communications between named individuals in their professional, rather than personal, capacity.

[41] The current approach of this office in determining whether information relates to an individual in a personal or professional capacity was set out by former Assistant Commissioner Tom Mitchinson in Order PO-2225. This approach has been followed in numerous decisions and essentially involves the consideration of the following two questions:

> …the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ….

[4] Located on pages 78 and 81 of the records.

> The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?*" Even if the information appears in a business context, would its disclosure reveal something inherently personal in nature?[5]

[42] I adopt this approach for the purposes of this appeal. I find that the email exchanges among the participants took place in the context of their professional, and not their personal capacities. I also find that there is nothing in the records that would reveal something of a personal nature about the individuals named in the records.

[43] In addition, I do not accept the conservation authority's argument that simply because the emails were sent "in confidence" amongst the participants, the information contained in them falls within the ambit of paragraph (f) of the definition of personal information in section 2(1) of the *Act*.

[44] Further, in Order P-270, former Commissioner Tom Wright found that opinions given by a person in their professional capacity are not "personal information". After carefully reviewing the records at issue, I find that the opinions expressed by the participants were done in the context of their employment and professional responsibilities. Throughout the records, the individuals are providing their professional opinions with regard to the issues discussed, and at no point do they provide their personal views or opinions.

[45] Lastly, although the conservation authority refers to and relies on paragraph (g) of the definition of personal information in section 2(1), it does not explain which individual the personal opinions or views are about. If, in fact, the views and opinions are about the appellant, as they appear to be from my review of the records, then those views and opinions would qualify as the appellant's personal information and not that of the individuals expressing them.

[46] Consequently, I find that the records contain the personal information of a single identifiable individual and the appellant. The records do not contain the personal information of the participants in the email exchanges.

[47] I will consider the application of the mandatory exemption in section 14(1) to the personal information of the individual other than the appellant, below.

[48] I note that the conservation authority has not claimed the application of any other exemptions with respect to the records and no mandatory exemptions apply to them. Therefore, I order the conservation authority to disclose the records to the appellant, subject to my finding below.

---

[5] PO-2225, page 7-8.

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

[49] As previously stated, some of the records contain the address of an identifiable individual, which constitutes that individual's personal information. Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[50] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[51] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[6] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.[7]

[52] The conservation authority submits that sections 14(2)(h) and 14(2)(i) are relevant factors that weigh against disclosure of the personal information at issue. The conservation authority states:

> It is reasonable to conclude that the individuals named in the e-records would be identified by disclosing the information and furthermore, that this information could cause potential harm to their reputation.
>
> . . .
>
> The FOI Coordinator believes that section 14(2)(h) applies in that the records in question were supplied and received in confidence and would be treated confidentially and not disclosed. Our staff and members believe that any correspondence forwarded confidentially is being kept confidential. . .

[53] The appellant disputes the factors relied on by the conservation authority.

---

[6] Order P-239.
[7] Orders PO-2267 and PO-2733.

[54] As previously stated, the only personal information remaining at issue is the address of an identifiable individual. In my view, the factors relied upon by the conservation authority weighing against disclosure are not relevant to the information at issue. However, I also find that there are no factors favouring disclosure in section 14(2) that would weigh in favour of disclosure. Consequently, I find that disclosure of the personal information at issue would constitute an unjustified invasion of that individual's privacy under section 14(1)(f) and that this information is exempt from disclosure under the mandatory exemption in section 14(1).

[55] I have highlighted the portions of the records that are exempt under section 14(1) and will provide a copy to the conservation authority with this order.

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

[56] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[8] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[57] The conservation authority submits that a thorough search for the records was conducted, and that the staff who conducted the search are very familiar with the freedom of information process and what is required. The conservation authority provided three affidavits in support of its search. The affidavits state that:

- A search for electronic and hard copy files was conducted by the engineering and technical services department, but yielded no results;

- A search for electronic and hard copy files was conducted by the planning department on three occasions. Engineering records regarding the property would be within the planning department's files. Records were located by the Senior Environmental Officer and forwarded to the FOI Coordinator; and

- No records pertaining to the property at issue would have been purged from the conservation authority's files, as its retention schedule dictates a "permanent held" status for permits.

[58] The conservation authority also advises that, after being questioned by the appellant during the mediation of the appeal, it was noted that there were some email records missing from the files. As a result, the conservation authority states, the third

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

search was conducted and further email records were located. The conservation authority states:

> Although the emails revealed nothing new to the requester in her search for information on the named property, it has been duly noted by staff that a gap did occur in record keeping and a lesson has been learned in ensuring that all emails are placed in our hard copy files and electronic files accordingly.

[59] The appellant submits that, contrary to the conservation authority's position that the records located as a result of the search conducted during mediation "revealed nothing new" regarding the property, the emails have been a "most enlightening source of information" on the ongoing drainage issues around the property. The appellant takes issue with the conservation authority's filing system and handling of her request.

[60] In addition, the appellant is of the view that further records exist. In support of her position, the appellant provided copies of a number of emails in which the property at issue, amongst others, is the subject matter. The appellant submits that the conservation authority did not disclose these emails to her[9] and that it "apparently" has no knowledge of the emails, notwithstanding that a conservation authority staff member is either the recipient or sender of some of them.

[61] In further support of her position that more records should exist, the appellant submits that:

- There should be records relating to the septic system location and approvals or Certificate of Use, which are administered by the conservation authority on behalf of the town;

- One of the emails she received states that a planning assistant was speaking with the property owner. The appellant believes that there should be notes to the file regarding that conversation; and

- She had several telephone conversations with conservation authority staff regarding the permit at issue and there should be notes to file regarding same.

[9] The appellant submits that the emails were disclosed to her as a result of a freedom of information request to another institution under the *Act*.

[62] In its reply representations, the conservation authority submits that the email records that were located as a result of the search conducted during the mediation of the appeal were:

> [N]ot part of the record as the information contained therein was of no importance to the file in question and therefore not necessary for filing or becoming part of the record.
>
> The [conservation authority's] Planning Department files information pertaining to address; and only information pertaining to that address goes in the file. There are no other records relating to the address in question in the file that can be disclosed to the appellant. I am confident that a thorough search of all [conservation authority] records pertaining to the property named on the FOI request was conducted.

[63] In her sur-reply representations, the appellant submits that the conservation authority's confidence in its filing system is misplaced. To support her position, the appellant states that an access request was made to the conservation authority regarding a different property, and the conservation authority subsequently issued a decision letter indicating that there were no files on that property.[10] However, the appellant argues, some of the records that were disclosed as part of the request at issue in this appeal clearly relate to the second property for which the conservation authority advised there were no files.

[64] In addition, the appellant submits that, in her view, there should be further records such as:

- 100 year storm water calculations for the property;
- Geodetic benchmark data;
- Studies of hydrogeological impacts;
- Natural hazard assessments;
- Water flow rate assessments;
- Site inspection reports;
- Various drawings;
- Evidence of approvals from all other relevant government agencies;
- Plan for erosion controls; and
- Notes regarding the above types of records.

[10] The appellant provided a copy of the conservation authority's access decision regarding the second property.

[65] The conservation authority was provided with the opportunity to respond to the appellant's sur-reply representations, and advised that it had no further comment on the issue of search.

[66] 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.[11]

[67] 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.[12]

[68] 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.[13]

[69] 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.[14]

[70] The conservation authority has provided affidavit evidence that it conducted three searches for records relating to the property referred to in the request and that, as it stated, a lesson was learned about ensuring that electronic copies of records be included with the hard copy records. Consequently, in the circumstances of this appeal, I find that the conservation authority has made reasonable efforts to locate responsive records and it would not serve any purpose to order any further searches. Therefore, I uphold the conservation authority's searches as being reasonable.

[71] However, I am concerned about some of the statements made by the conservation authority in its representations. For example, regarding the records that were located as a result of the second search (and subsequently disclosed to the appellant), the conservation authority stated that those records "revealed nothing new to the requester." I remind the conservation authority that the *Act* provides a right of access to information under the control of institutions, subject to limited and specific exemptions. Whether or not records held by institutions reveal any "new" information to requesters is irrelevant to the purpose and spirit of the *Act*.

[72] In addition, as stated above, the conservation authority advised that there was a gap in record keeping and that a lesson had been learned in ensuring that all emails are placed in the hard copy file, as well as the electronic file. Surprisingly, the conservation

[11] Orders P-624 and PO-2559.
[12] Orders M-909, PO-2469, PO-2592.
[13] Order MO-2185.
[14] Order MO-2246.

authority then stated in its reply representations that the records referred to above were:

> [N]ot part of the record as the information contained therein was of no importance to the file in question and therefore not necessary for filing or becoming part of the record.

[73] In my view, the conservation authority is taking contradictory positions regarding the search for and retention of records that were disclosed as a result of the search conducted during mediation. I would encourage the conservation authority to comply with its record keeping and retention policies.

[74] In conclusion, I do not allow the conservation authority to raise the discretionary exemption in section 12. I find that the records at issue are within the scope of the request. I uphold the conservation authority's decision, in part and order it to disclose the information to the appellant that is not exempt under section 14(1). I also uphold the conservation authority's search as being reasonable.

ORDER:

1. I order the conservation authority to disclose records 75, 76, 77, 79 and 80 to the appellant by **October 24, 2012** but not before **October 19, 2012**. Personal email addresses may be severed from the records.

2. I order the conservation authority to disclose records 78 and 81 to the appellant by **October 24, 2012** but not before **October 19, 2012**, and sever the property address and any personal email addresses from the records. I have included copies of these records. The highlighted portions are not to be disclosed to the appellant.

3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require that the conservation authority provide me with a copy of the records sent to the appellant.

4. I uphold the conservation authority's search.

Original signed by: September 19, 2012
Cathy Hamilton
Adjudicator