Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2946

Appeal MA11-352

Town of Penetanguishene

September 13, 2013

Summary: The appellant made a three item request for access to information. The town took the position that the three items constituted three separate access requests and proceeded to only address the first item. The appellant took issue with the town's characterization of the three item request and the reasonableness of the town's search for records responsive to the first item. This order upholds the town's decision that the three items properly constitute three separate access requests and upholds the reasonableness of the town's search for records responsive to the first item.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17 and section 5.2 of Regulation 823.

Orders Considered: MO-2459, MO-2612 and P-1267.

OVERVIEW:

[1] The Town of Penetanguishene (the town) received a three item request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the following information:

> 1. The written retainer agreement(s) that have been approved by the town with [a specified law firm], for the services, (legal or otherwise), of

> Town Solicitor [named solicitor]. Including, but not limited to, how he is paid, what he is paid, and the written process for discerning when, how, and who will authorize these services.
>
> 2. The documented approval, including the rational for the [named solicitor's] services to draft zoning legislation, in particular zoning amendments 16 to 25 inclusive, that were included in the passing of By-law 2011-28.
>
> 3. And finally, in late 2007, early 2008, [the named solicitor] was hired to deal with [a matter]. I have also, since, raised … questions regarding this [matter] and the [specified] property in question. I therefore, would like to receive the documented tally and costs of all the legal services related to the [named solicitor/at the specified law firm's] involvement on this file [with this particular property], including but not limited to, legal advice, legal consultation, assistance with staff response, or any and all documented involvement, paid or unpaid, related to service/involvement on this file, including [the named solicitor's] involvement, if any, with this Freedom of Information request.

[2] In its decision letter the town took the position that the request:

> … constitutes three (3) separate requests (outlined in your request under paragraphs 1, 2 and 3). As such, only paragraph 1 has been processed …
>
> In reference to your remaining items, please resubmit a request for each item as a separate Freedom of Information request, along with the applicable fee per request.

[3] Addressing item 1 of the request, the town's decision letter went on to state that no written retainer agreement existed. The town referred to a letter from the specified law firm to the town[1] stating that:

> Our firm provides legal services to [the town]. These services are not provided under an existing Retainer Agreement, nor have we ever provided services to the town under such an Agreement. We are retained on a file by file basis.

[1] At mediation the appellant advised that although the town's decision letter indicated it was enclosed, a copy of the specified law firm's letter did not accompany the town's decision letter. The town then forwarded a copy of the letter to the appellant.

[4] With respect to the request for information pertaining to the method of payment, the town explained in its decision letter that:

> The town pays for services rendered by cheque upon receipt of an invoice provided by [the specified law firm] with respect to their services provided to the town.

[5] With respect to the request for information pertaining to the amount of payment, the decision letter stated:

> Invoices include expenses pertaining to time spent on correspondence with/for the town including but not limited to emails, telephone conversations, letters, advice, drafting of by-laws, etc. In addition, expenses also pertain to disbursements, including but not limited to long distance phone calls, faxes, corporate searches, etc.
>
> Please contact [the specified law firm] for their standard applicable charges for service.

[6] With respect to the request for information pertaining to the written process for discerning when, how and who will authorize these services, the town advised:

> In reference to the above-noted request, … please be advised that there is no such record.
>
> Town staff may call upon the services of the Town Solicitor if and when deemed required in the course of their duties.

[7] The requester (now the appellant) appealed the town's response to item 1 of his request, as well as the town's decision not to process items 2 and 3 of the request.

[8] In the course of mediation, the town provided a further letter to the appellant reiterating its position that because the services of the specified law firm to the town "are not under a retainer agreement", no responsive record exists with respect to the request for "the written process for discerning when, how, and who will authorize these services". The town also stated that "town staff may call upon the services of the Town Solicitor if and when deemed required in the course of their duties."

[9] Also during mediation, the appellant reiterated his position that the information sought at items 1, 2 and 3 of the request is related. In addition, the appellant maintained his position that there are records which are responsive to item 1 of his request. In a letter to the mediator, he set out his position on this issue in the following way:

> In the early stages of this request, while in a related conversation with the town's Information Co-ordinator, … she revealed to me that our City's Town Solicitor [the named solicitor] was retained on what she referred to as, an as needed basis by all employees of [the town]. It is also well documented not only who the acclaimed Town Solicitor is, but which law firm he works for. This prearranged policy, or directive to all of its employees, would therefore require a written agreement, or contract to ensure accountability when this retained position/contract worker's services are procured.

[10] In response, the town pointed to the letter from the specified law firm stating that it does not have a written retainer agreement with the town, and that accordingly, no such record exists.

[11] As mediation did not resolve the appeal it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to conduct the adjudication commenced her inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the town, which provided representations in response. A Notice of Inquiry accompanied by the town's non-confidential representations was then sent to the appellant.

[12] Instead of providing representations in response to the Notice of Inquiry, the appellant forwarded correspondence to this office expressing his concerns about the manner in which the town conducted itself in this appeal, as well as its interactions with him. The appellant also expressed concerns about the appeal process, and sought on a number of occasions to adjourn the inquiry or to place it on hold, all of which, except for the last occasion, were granted.

[13] In correspondence to the appellant, the adjudicator assigned to the appeal addressed certain of his concerns[2], advised him that he may raise additional factors that he may feel are relevant to the appeal in any representations he provides[3], and refused to further delay the inquiry[4]. The appellant did not provide any representations that addressed the matters at issue in this appeal.

[14] The file was subsequently transferred to me to complete the adjudication.

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[2] In a letter to the appellant dated July 31, 2012.
[3] In a letter to the appellant dated September 4, 2012.
[4] In a letter to the appellant dated September 13, 2012.

DISCUSSION:

FORM OF THE REQUEST

[15] Section 17 of the *Act* and section 5.2 of Regulation 823, imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. Section 17 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;
>
> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.
>
> …
>
> (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).

[16] Section 5.2 of Regulation 823 sets out that the fee to be charged for an access request is $5.00. Section 5.2 states:

> The fee that shall be charged for the purposes of clause 17(1)(c) or 37(1)(c) of the *Act* shall be $5.

[17] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[5]

[18] The town's representations address the information requested in item 1 of the request and confirm its position that items 2 and 3 should have been made the subject of separate requests. In that regard, the town states that because it considered items 2 and 3 to be separate requests it did not conduct a search for responsive records pertaining to those items.

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[5] Orders P-134 and P-880.

[19] With respect to the information sought in item 1, the town relies on the letter provided to the appellant during mediation and submits that it "does not and has not had a written retainer agreement for legal services with the [specified law firm]". The town further states that:

> As there is no retainer agreement, the balance of the inquiry, under paragraph 1 "… including but not limited to, how he is paid, what he is paid, and the written process for discerning when, how, and who will authorize these services" is not able to be answered directly in relation to the terms of a non-existent agreement. As an alternative, in the notice of decision … , the town provided an overview of the method of payment and amount paid, with the instructions for the requester to contact the law firm directly for their standard applicable charges for service.

[20] With respect to the information sought in item 2 of the request, the town submits:

> In reviewing the request, the town Clerk determined that paragraph 2 did not relate to or pertain to the records requested under paragraph 1. As such, the Clerk deemed paragraph 2 to form a separate request and advised the requester accordingly in the notice of decision.

[21] The town further submits that any correspondence between the named law firm and the town pertaining to the matter would qualify as a privileged solicitor-client communication and "would be subject to further restrictions under the *MFIPPA* and the *Municipal Act*[6]."

[22] With respect to the information sought in item 3, the town submits:

> In reviewing the request, the town Clerk determined that paragraph 3 did not relate to or pertain to the records requested under paragraph 1 or paragraph 2. As such, the Clerk deemed paragraph 3 to form a separate request and advised the requester accordingly in the notice of decision.

[23] The town submits that the Clerk also took into consideration the following factors in relation to item 3:

- the requester is not the subject property owner.
- the files and legal transactions pertaining to the subject property date back to 2007. Under the town's record retention By-law, Accounts Payable records are retained for 7 years in total, with records for 6 of

[6] *Municipal Act*, 2001, S.O. 2001, c.25.

the years at issue being in "in-active storage". The town submits that considerable staff time would be required in order to locate any responsive records.

- not all legal services costs are borne by the town and depending on the nature of the legal services required, some legal costs are in turn billed to the property owner. In order to determine if any legal costs billed to the town were then billed to the subject property described in item 3, the town's Finance Department would be required to retrieve the records pertaining to Accounts Receivable, which are also subject to the same retention requirements set out above.

- any responsive legal invoices may have to be severed to remove any information pertaining to other unrelated legal services that might appear on the invoice.

- if this item were subject to a separate request, because of the volume of records, search time and record preparation, a deposit would be required, as the estimated fee to process the request would exceed $200.00.

[24] Finally, the town sets out its concerns with respect to the conduct of the appellant and the purpose of his request. This need not be addressed for the purposes of disposing of this appeal.

Analysis and finding

[25] In my view, the amount of search time that it will take to process the request,[7] the manner in which the records are stored[8] or the fact that responsive records may be subject to exemption under the *Act*, should not dictate the form in which requests for access to information are made.

[26] That said, however, I have reviewed each item of the request and I find that they relate to discrete categories of information and are not so inter-related as to be considered as part of the same request. Therefore, I find that in the circumstances of this appeal, the town was justified in treating each of these items as separate and distinct and processing them individually, requiring an application fee for each item of the request. Accordingly, I find that the appellant must file two separate requests, and pay the appropriate application fee for access, if he continues to seek the information set out at items 2 and 3, above.

[7] Orders MO-2459 and P-1267.
[8] Order MO-2459.

[27] I will now address the reasonableness of the town's search for records responsive to item 1.

REASONABLE SEARCH

[28] 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.[9] 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.

[29] 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.[10]

[30] 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.[11]

[31] To be responsive, a record must be "reasonably related" to the request.[12]

[32] The appellant did not file representations in response to the Notice of Inquiry. In the course of mediation, however, the appellant provided a letter to the mediator setting out the basis for his position that additional records exist. In its decision letters provided to the appellant and in its representations, the town explains that no written retainer exists with the specified law firm and that there are no other responsive records.

[33] In addition to the information provided in its decision letters, the town also sets out in its representations that a search for a retainer agreement with the named law firm was conducted during the course of an appeal commenced by a different appellant, which resulted in Order MO-2612. The town further submits:

> As such, a secondary search was conducted with attention to the time period from October 2010 to July 2011. No records were located. It should be further noted that from July 2011 to [the date of the town's representations], the town still does not have a retainer agreement and as such, the record still does not exist.

[9] Orders P-85, P-221 and PO-1954-I.
[10] Orders P-624 and PO-2559.
[11] Order MO-2246.
[12] Order PO-2554.

Analysis and finding

[34] The issue before me is whether the search carried out by the town for records responsive to item 1 was reasonable in the circumstances. As set out above, the *Act* does not require the town to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. In my view, based on the evidence before me, including the content of appellant's letter to the mediator further specifying the type of record sought under item 1, the town has conducted a reasonable search for records responsive to item 1 of the request, thereby satisfying its obligations under the *Act*.

[35] I interpret item 1 as having two components; the first component of item 1 is a request for access to the written retainer agreement(s) that has/have been approved by the town with a specified law firm for the services, legal or otherwise, of a named town solicitor, including written retainer agreement(s) that contain information about how he is paid and what he is paid.

[36] The second component of item 1 is a request for access to information regarding the written process for discerning when, how, and who will authorize these services. As set out in the appellant's letter to the mediator, this would be in the nature of "a written agreement, or contract to ensure accountability when this retained position/contract worker's services are procured."

[37] With respect to the first component of item 1 the town states, and based on the evidence before me, I accept, that no such written retainer agreement exists. That is a complete answer to the information sought in the first component of item 1, and I find that it has conducted a reasonable search for a record that would be responsive to that part of item 1.

[38] With respect to the second component of item 1, the town similarly advises that no responsive record exists, and that town staff may call upon the services of the town solicitor if and when deemed required in the course of their duties. I accept the town's evidence in that regard, and I find that it has conducted a reasonable search for such a record.

[39] Accordingly, I am satisfied that the town's search for records that are responsive to item 1, is in compliance with its obligations under the *Act*.

ORDER:

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

Original signed by: September 13, 2013
Steven Faughnan
Adjudicator