Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3099

Appeal MA13-235

Town of Tillsonburg

September 24, 2014

Summary: The appellant made an access request to the Town of Tillsonburg (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all correspondence and contracts between the town and a named company, and all invoices and reports from that company during a specified time period. The town denied access to some of the information either in whole or in part, claiming the application of the discretionary exemptions in sections 8 (law enforcement) and 12 (solicitor-client privilege), and the mandatory exemption in section 14(1) (personal privacy) of the *Act*.

During the mediation of the appeal, the town issued a revised decision, still claiming the discretionary exemption in section 12, and now claiming the application of the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*. In addition, the town withdrew its reliance on sections 8 and 14(1). The appellant raised the issue of the reasonableness of the town's search. In this order, the adjudicator upholds the town's decision, in part. She upholds the application of the discretionary exemption in section 12 to some of the records, as well as the town's exercise of discretion. She also finds that section 6(1)(b) does not apply to exempt the remaining records, and orders the town to disclose them to the appellant. Lastly, she does not find the town's search for records to be reasonable and orders it to conduct a further search for records responsive to the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 12 and 17.

Orders and Investigation Reports Considered: Orders MO-2468-F and MO-2683-I.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access decision made in response to a request to the Town of Tillsonburg (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all correspondence and contracts between the town and a named company. The request also sought access to all invoices and reports from that company during a specified time period.

[2] The town located 17 responsive records and issued a decision in which it granted partial access to them. The town denied access to some of the information either in whole or in part, claiming the application of the discretionary exemptions in sections 8 (law enforcement) and 12 (solicitor-client privilege) and the mandatory exemption in section 14(1) (personal privacy) of the *Act*.

[3] The requester (now the appellant) appealed the town's decision to this office. During the mediation of the appeal, the town issued a revised decision in which it granted access in full to records 1-8, 10, 12, 13 and 15. The town confirmed that it was still denying access to records 9, 11, 14, 16 and 17, claiming the discretionary exemption in section 12, and now claiming the application of the discretionary exemption in section 6(1)(b) (closed meeting) of the *Act*. In addition, the town withdrew its reliance on sections 8 and 14(1) to deny access.

[4] Also during mediation, the appellant expressed his belief that responsive information is missing from records 1 and 2, thus raising the reasonableness of the town's search as an issue in this appeal.

[5] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the file sought and received representations from the town and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*. The appeal was then transferred to me for final disposition.

[6] For the reasons that follow, I uphold the town's decision, in part. I uphold the application of the discretionary exemption in section 12 to records 9, 11 and 14, as well as the town's exercise of discretion. I also find that section 6(1)(b) does not apply to exempt records 16 and 17. Therefore, I order the town to disclose these records to the appellant. In addition, I do not find the town's search for records to be reasonable, and I order it to conduct a further search for records relating to the engagement of the company by the town.

RECORDS:

[7] The records remaining at issue consist of records 9, 11, 14, 16 and 17, which have been withheld in their entirety. These records consist of a report, a supplementary report, a revised supplementary report, and two email chains of correspondence. In addition, the appellant believes that records 1 and 2, which consist of e-mail chains, are incomplete and that additional e-mails should exist within these chains.

ISSUES:

A: Did the town conduct a reasonable search for records?

B: Does the discretionary exemption at section 12 apply to the records?

C: Does the discretionary exemption at section 6(1)(b) apply to the records?

D: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Did the town conduct a reasonable search for records?

[8] The appellant believes that the e-mail chains in records 1 and 2 should contain additional e-mails.

[9] 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.[1] 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.

[10] 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.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[11] 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

[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.

are reasonably related to the request.[4] 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.[5]

[12] 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.[6]

[13] The Town Clerk provided affidavit evidence with respect to this issue, and submits that she is the Head for purposes of the *Act*, and that she is an experienced employee knowledgeable in the subject matter of the request. She goes on to submit that the town completed a thorough search and made reasonable efforts to identify and locate responsive records by:

- Searching the town's hard copy and electronic files, including emails for records reasonably related to the request; and
- Having all members of the town's senior management search their records for any correspondence or contracts between the town and the company named in the request, including any invoices or reports. These searches were conducted with respect to hard copy and electronic files, including emails.

[14] The Town Clerk also submits that no other records related to the request exist and that no records were destroyed, to the best of her knowledge and belief.

[15] The appellant submits that the town has failed to identify and disclose email and other records between town staff and Councillors. He also argues that the Town Clerk does not have system administrator rights or sufficient systems' access to conduct a thorough search of electronic files and emails. The appellant states that the Town Clerk did not enlist the assistance of County of Oxford Information Systems staff to search for electronic records that she would otherwise not have access to.

[16] With respect to records 1 and 2, which are email chains, the appellant argues that portions of these chains are missing because: the subject lines were changed; they have inconsistent date and time stamps; and are not in sequence. In addition, he submits that the earliest correspondence between the town and the company that is the subject matter of the request discusses when it will be "back on site" (at the town). The appellant is of the view that there should be earlier correspondence reflecting the engagement of the company by the town, the scope of the engagement and a contract between them.

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[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2246.
[6] Order MO-2185.

[17] As previously stated, the appellant's request was for all correspondence and contracts between the town and a named company, and all invoices and reports provided by that company during a specified time period.

[18] Based on the town's representations and my review of both the request and the records that were disclosed to the appellant, I am satisfied that the town conducted a reasonable search for all invoices and reports provided by the company, as well as most email communications between the town and the company. While the appellant argues that the Town Clerk would not have sufficient systems' access to conduct a thorough search of electronic files, it is clear from the affidavit evidence that the Town Clerk and all members of the town's senior management conducted searches for records responsive to the request.

[19] However, I find that the appellant has provided a reasonable basis for concluding that additional records exist. In particular, I find the appellant's argument regarding the existence of records relating to the engagement of the company by the town to be persuasive. In my view, it is reasonable to conclude that there would have been communication between the town and the company prior to its first site visit. Consequently, I order the town to conduct a further search for records relating to the engagement of the company by the town, and to provide the appellant with a decision once that search is completed.

Issue B: Does the discretionary exemption at section 12 apply to the records?

[20] 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.

[21] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[22] Branch 2 is a statutory privilege that applies where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons.

[23] This privilege applies to records prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." It does not apply to

records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[7]

[24] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[8] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[9] The litigation must be ongoing or reasonably contemplated.[10]

[25] Only the head of an institution may waive the statutory privilege in section 12. Disclosure by Crown counsel to defence counsel during a criminal proceeding, for example, does not result in waiver of the statutory privilege.[11]

[26] The town submits that the records at issue are exempt under section 12, as they are either subject to solicitor-client privilege or were prepared by or for counsel employed or retained by the town for use in giving legal advice or in contemplation of, or for use in, litigation. The town states that records 9 and 11 are reports that were prepared by the company named in the request, and sent to the town's outside legal counsel. Record 14, which is a revised supplementary report, was prepared by the company and sent to the town, who forwarded it to its legal counsel. With respect to records 16 and 17, the town argues that these records are "supplementary" and directly relate to records 9, 11 and 14. The town also notes that records 16 and 17, which are email chains, have disclaimers stating that the emails contain legally privileged information intended only for the individual or entity named in the message. In all instances, the town submits that all of the records were provided to it in confidence and the town has not waived solicitor-client privilege.

[27] The appellant submits that there is no solicitor-client privilege between the company and the town's outside legal counsel, as the company was retained by the town and not the law firm. The appellant also states that given that the town has not provided any records concerning retaining the company, the work done by this company cannot now be shielded from disclosure on the basis of solicitor-client privilege.

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[7] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[8] *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).
[9] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[10] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[11] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

[28] Based on my review of the parties' representations and the records themselves, I am satisfied that records 9, 11 and 14 are exempt under branch 2 (the statutory privilege) of section 12 of the *Act*. These records consist of a report (record 9), a supplementary report (record 11) and a revised supplementary report (record 14). These records were prepared by the company named in the request, and then subsequently sent to the town's legal counsel either directly or through town staff. I find that, on the face of the records themselves, it is clear that they were prepared by the company for the town's legal counsel to assist it in contemplation of litigation. Consequently, these records are privileged. I also note that given the fact that only the head of an institution may waive the statutory privilege in section 12, waiver does not apply in this instance. Therefore, subject to my findings in regard to the town's exercise of discretion, records 9, 11 and 14 are exempt from disclosure under section 12 of the *Act*.

[29] Conversely, I find that records 16 and 17,[12] which are email chains, are not exempt under section 12. These emails are communications between the town's Chief Administrative Officer and a partner in the company named in the request. On the face of the records, the emails were not sent to the town's legal counsel. In addition, in my view, the records do not contain information relating to the giving of, or the receiving of, legal advice. Similarly, I find that based on their content, the emails were not prepared by or for legal counsel in contemplation of litigation. Consequently, I find that they are not subject to solicitor-client privilege under branches 1 or 2, and they do not qualify for exemption under section 12 of the *Act*. The town has also claimed the application of the discretionary exemption in section 6(1)(b) to these records, which I will consider below.

Issue C: Does the discretionary exemption at section 6(1)(b) apply to the records?

[30] Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[31] For this exemption to apply, the institution must establish that:

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

[12] Record 16 is duplicated in its entirety in record 17.

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

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[13]

[32] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[14] and

- "substance" generally means more than just the subject of the meeting.[15]

[33] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[16]

[34] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[17]

[35] Section 6(2) of the *Act* sets out exceptions to section 6(1)(b). It reads, in part:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
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> (b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public;

[36] The town states that records 16 and 17 are email communications between the town's Chief Administrative Officer and a partner in the company named in the request.

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[13] Orders M-64, M-102 and MO-1248.
[14] Order M-184.
[15] Orders M-703 and MO-1344.
[16] Order M-102.
[17] Orders MO-1344, MO-2389 and MO-2499-I.

It goes on to argue that disclosure of these two records would reveal the substance of deliberations that were discussed at an *in camera* meeting of the town Council on February 19, 2013.

[37] With respect to the *in camera meeting*, the town submits that this meeting was held in the absence of the public in accordance with section 239 of the *Municipal Act, 2001*, and that all of the procedural requirements were met. The town provided a copy of its procedural by-law, as well as copies of the agendas for the open Council and *in camera* meetings. The agenda indicates that the town Council moved into a closed session to consider matters relating to "the security of the property of the municipality (IT Systems)."

[38] The appellant submits that the closed meeting agenda does not list records 16 and 17 as items to be discussed in the in camera meeting. In addition, the appellant argues that the subject matter of the engagement of the company by the town was discussed in a presentation to open Council following the closed session and, therefore, section 6(1)(b) no longer applies to exempt the records from disclosure. Lastly, the appellant states that he believes that the records contain false and untrue allegations, and that the town would not be prejudiced by their disclosure if the statements in the records were accurate.

[39] There seems to be no dispute among the parties that a closed session of Council took place on February 19, 2013. I conclude therefore, that the first part of the test in section 6(1)(b) has been met.

[40] The second part of the test in section 6(1)(b) is that a statute authorizes the holding of the meeting in the absence of the public. The town is relying on section 239 of the *Municipal Act*, 2001 which provides, in part:

> (1) Except as provided in this section, all meetings shall be open to the public.
>
> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (a) the security of the property of the municipality or local board;
>
> (b) personal matters about an identifiable individual, including municipal or local board employees;
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board;

> (d) labour relations or employee negotiations;
>
> (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
>
> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
>
> (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.
>
> (4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,
>
> (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or
>
> (b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject matter and that it be closed under that subsection.

[41] The town provided a copy of it procedural by-law 3511, which essentially replicates the content of some of the subsections of section 239 of the *Municipal Act, 2001*. Section 13.2 of the by-law also states that:

> Meetings closed to the public must be closed by a motion to "Proceed into Closed Session" with the said motion, duly seconded and passed, stating the general nature of the matter(s) to be considered at the Closed Session.

[42] Based on the evidence before me, I conclude that the town has met part two of the test in section 6(1)(b), which is that a statute authorizes the holding of the meeting in the absence of the public. As set out in both the *Municipal Act, 2001* and the town's own procedural by-law, the town is required, if going into a closed session, to close the meeting to the public by a motion, stating the general nature of the matter(s) to be considered in the closed session. The agenda provided by the town indicates that Council moved into an *in camera* session to discuss the security of the town's IT property.

[43] In Order MO-2468-F Adjudicator Laurel Cropley found that "security of the property of the municipality" concerns the "protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to this property." In examining this issue, she noted that other Ontario statutes "use the word 'security' in relation to individuals in the sense of keeping them safe from harm, and in relation to property in the sense of taking measures to prevent loss or damage to it."

[44] I agree with Adjudicator Cropley's findings in Order MO-2468-F that "security of the property" in section 239(2)(a) of the *Municipal Act* is limited to situations where the protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety is in relation to this property.

[45] In Order MO-2683-I, Adjudicator Frank DeVries reviewed and expanded upon Adjudicator Cropley's findings in Order MO-2468-F. In that order, the record at issue was a report related to an identified project. The *in camera* meeting discussed the particular risks involved in the development of this project and the methods to be taken to secure the municipality's property from potential adverse impacts arising from the various decisions required. The municipality, in that appeal, provided confidential representations in which it specifically identified the risks and impacts to its property discussed at the meeting.

[46] Adjudicator DeVries found that "property" includes both "corporeal" and "incorporeal" property. Accordingly, if the subject matter being considered in a meeting is the "security" (in the sense of taking measures to prevent loss or damage to it) of the property of the municipality or local board, section 239(2)(a) authorizes holding the meeting *in camera*. Further, Adjudicator DeVries applied the analysis in Order MO-2468-F and found that in order to establish that the requirements of section 239(2)(a) of the *Municipal Act*, *2001*, a municipality must establish that:

- it owns identified property (corporeal or incorporeal); and
- the subject matter being considered in the meeting is the security (in the sense of taking measures to prevent loss or damage to it) of that property.[18]

[47] I agree with this analysis of Adjudicator DeVries in Order MO-2683-I and apply it to the facts in this appeal. I accept that the town's IT system qualifies as town property for the purposes of section 6(1)(b) and I accept that the town moved into a closed session to discuss the security of the IT system. Therefore, in accordance with the findings in both Orders MO-2468-F and MO-2683-I, I find that the town Council

[18] Order MO-2683-I.

properly moved into an *in camera* session as authorized by section 239(2)(a) of the *Municipal Act, 2001*.

[48] The third part of the test for exemption under section 6(1)(b) requires that disclosure of the records would "reveal the actual substance of the deliberations of the meeting." I am not satisfied on the evidence before me, and in the absence of the minutes of the closed session, that the third part of the test has been established. The only evidence provided by the town as to the substance of the deliberations at the closed meeting is its statement that records 16 and 17 relate to and reveal the substance of deliberations, and that the two authors of the emails were present at the *in camera* meeting. The town was asked in the Notice of Inquiry to provide evidence demonstrating how disclosure of the records would reveal the substance of the deliberations in the *in camera* meeting. In my view, the town has not provided sufficient evidence to substantiate its claim.

[49] Further, records 16 and 17 were not before Council during the closed meeting. As previously stated, the two records consist of email exchanges between the town's Chief Administrative Officer and a partner in the company named in the request. These email exchanges took place before and after the closed session of Council. This office has held that the third requirement for exemption under section 6(1)(b) is not satisfied if the disclosure would merely reveal the *subject* of the deliberations and not their *substance*.[19] In my view, disclosure of records 16 and 17 would not reveal the substance of the deliberations of the town Council. Rather, disclosure of these emails would reveal only the *subject* or the outcome of the deliberations.

[50] Therefore, I conclude that the town has not provided sufficient evidence that records 16 and 17 are exempt under section 6(1)(b) of the *Act*. As no other exemptions have been claimed with respect to these records, I order the town to disclose them to the appellant.

Issue D: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[51] The section 12 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.

[52] 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;

[19] Order MO-1344.

- it takes into account irrelevant considerations; or

- it fails to take into account relevant considerations.

[53] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[20] This office may not, however, substitute its own discretion for that of the institution.[21]

[54] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[22]

- the purposes of the *Act*, including the principles that information should be available to the public, and that exemptions from the right of access should be limited and specific;

- the wording of the exemption and the interests it seeks to protect;

- whether the requester has a sympathetic or compelling need to receive the information;

- whether the requester is an individual or an organization;

- 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; and

- the historic practice of the institution with respect to similar information.

[55] The town submits that it exercised its discretion appropriately, and that it "carefully considered" the access request, but decided not to disclose the records because they are subject to solicitor-client privilege. In addition, the town argues that it did not exercise its discretion in bad faith or for an improper purpose, and that the appellant has not provided credible evidence to the contrary.

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[20] Order MO-1573.
[21] Section 43(2) of the *Act*.
[22] Orders P-344 and MO-1573.

[56] The appellant submits that the town exercised its discretion in bad faith and for an improper purpose. He cites as an example of bad faith the fact that the town initially refused to consent to disclose its representations in this inquiry to him. Lastly, the appellant states that he believes the records contain false and untrue statements and allegations about him which he should be able to refute.

[57] I have reviewed the circumstances surrounding this appeal and the town's representations on the manner in which it exercised its discretion. I am satisfied that that the town weighed the appellant's interest in obtaining access to the information against the protection of sensitive institutional information that is subject to solicitor-client privilege. Accordingly, I am satisfied that the town did not err in the exercise of its discretion in applying the exemption in section 12 to the records for which I upheld the town's decision.

ORDER:

1. I order the town to conduct a further search for records relating to the engagement of the company by the town.

2. If, as a result of this further search, the town identifies additional records responsive to the request, I order it to provide a decision letter to the appellant regarding access to these records in accordance with section 19 of the *Act*, treating the date of this order as the date of the request. I also order the town to provide me with a copy of any new decision letter that it issues to the appellant.

3. I order the town to disclose records 16 and 17 to the appellant by **October 30, 2014** but not before **October 24, 2014**.

4. I reserve the right to require the town to provide me with copies of the records it discloses to the appellant.

5. I uphold the town's decision with respect to records 9, 11 and 14.

Original signed by: September 24, 2014
Cathy Hamilton
Adjudicator