Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3330

Appeal MA14-487

Town of the Blue Mountains

June 30, 2016

Summary: A request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) was submitted to the Town of the Blue Mountains (the town) for copies of records pertaining to a specific project in the town for a period of three months in 2014. The town denied access, citing the discretionary exemption in section 12 (solicitor-client privilege). The adjudicator partially upholds the application of the exemption to the records and also upholds the town's search for records as reasonable.

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

OVERVIEW:

[1] A request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) was submitted to the Town of the Blue Mountains (the town) for copies of records pertaining to a specific project in the town. Specifically, the requester indicated the following:

> This information would include, but not be limited to, all correspondence, contracts, records, permits, notes, applications, documents, drawings, electronic records (e.g. e-mails), sound recordings (e.g. voicemails), etc. on [a named] subdivision.

[2] The town issued an interim fee estimate and time extension decision and sought

an additional 365 days to respond to the request and estimated the cost to produce the records to be $112,100. The town indicated that records prior to 2014 were archived and estimated a fee of $88,000 in order to produce these records. The town estimated it would take 770 hours to prepare the records and estimated that the fee to photocopy the records would be $1,000.

[3] In response, the appellant wrote to the town indicating that as the 2014 emails were not archived, they request the town provide a fee for the emails for January 1, 2014 to present. The appellant requested that the town obtain a third party quote for the fees to produce the archived records. With respect to the photocopy fees, the appellant provided the town with the 50% deposit.

[4] The town then issued a revised fee estimate and access decision granting partial access to the requested records, citing the application of the discretionary solicitor-client privilege exemption in section 12 and the discretionary closed meeting exemption in section 6(1)(b) of the *Act* to deny access to portions of the responsive records.

[5] The requester (now the appellant) appealed the decision of the town to this office.

[6] During mediation, the appellant questioned the sufficiency of the town's search for records. The appellant noted that many of the email records did not include referenced attachments. The town advised the mediator that they did not initially consider the attachments to be responsive to the request. The town agreed to search for and make a decision on access to the attachments.

[7] The town subsequently provided the appellant and the mediator with a revised Index of Records setting out the records at issue. These records were severed pursuant to the mandatory third party information exemption in section 10(1) and section 12 of the *Act.* In addition, some information was severed on the basis that it was not responsive to the request.

[8] The town subsequently sent another decision to the appellant and granted access to the attachments to Records 108, 109, and 114 to 118. The town advised that Records 112 and 113 do not have attachments. The town denied access to the attachments to Record 107 (Record 122f) and Record 111 (Record 124a and 124b) pursuant to section 12 of the *Act.* The attachment to Record 110 (Record 129) was denied pursuant to section 6(1)(b) of the *Act*.

[9] The town issued a further revised decision and agreed to disclose in full Records 9, 10, 11, 14 and 15a.

[10] The appellant advised the mediator that he believes that additional records exist. As a result, the issue of whether the town conducted a reasonable search has been

added as an issue in this appeal.

[11] Following further discussions, the appellant advised the mediator that he is not appealing the severances of non-responsive information and, in addition, is not appealing the application of section 10(1) of the *Act.* As a result, Records 4, 5, 15d, 27, 33 (in part), 60, 101, 102, 120 and 121 are no longer at issue in this appeal.

[12] No further mediation was possible and the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Representations were exchanged between the parties in accordance with section 7 of the Information and Privacy Commissioner of Ontario's (the "IPC's") *Code of Procedure* and *Practice Direction 7*.

[13] The town then decided to disclose Record 130 and to claim only section 12 for Record 129. Accordingly, Record 130 and the application of the section 6(1)(b) exemption are no longer at issue.

[14] In this order, I partially uphold the application of the section 12 exemption and I also uphold the town's search for responsive records.

RECORDS:

[15] The records remaining at issue are approximately 110 email chains. The town has applied section 12 to exempt the information. As noted above, Records 4, 5, 9, 10, 11, 14, 15a, 15d, 27, 33 (in part), 60, 101, 102, 120, 121 and 130 are no longer at issue. As well, the appellant has copies of Records 6 and 8, therefore, these records are also not at issue.

ISSUES:

A. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?

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

C. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Does the discretionary solicitor-client privilege exemption at section 12 apply to the records?

[16] 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.

[17] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[18] The town relies on both branches of section 12. In particular, the town relies on the common law solicitor-client communication privilege and the statutory solicitor-client communication privilege. It also states that the Ontario Municipal Board (OMB) has had an open file with respect to the subdivision and that clearly there is ongoing and contemplated litigation involving the subject matter of the request.

[19] Concerning branch 1, the common law privilege, the town states that records are from or to legal counsel for the town, both its internal and external solicitors, and include those records prepared in the course of requesting and/or receiving advice from legal counsel. It states that the only records which are not direct communication to or from legal counsel are Records 17, 19 (a portion), 118 and 119 (a portion). With regard to these records, the town submits they fall under branch 2.

[20] Concerning branch 2, the statutory exemption, the town submits that the majority of the records were prepared and/or received by legal counsel employed or retained by the institution and were used in the context of giving and receiving legal advice about a matter the town was dealing with. In addition, it states that all of the records were prepared within the context of the ongoing OMB litigation involving the subject matter of the request.

[21] The town states that Records 17, 19 (a portion), 118 and 119 (a portion) were prepared in contemplation of litigation and their contents were ultimately for the consideration of and use by counsel employed by or retained by the town. It states that these records are part of a continuum of communication with respect to the matters at issue.

[22] The appellant states that it is inappropriate for the town to claim litigation

privilege over communications with respect to an active OMB file, as the fact that there is an open OMB file is not indicative of contemplated litigation. It states that the reason there remains an open OMB file is because the OMB continues to be the ultimate approval authority for the registration of the plan of subdivision under the *Planning Act*, which means that the OMB was required to approve any plans related to the appellant's subdivision that it was seeking to have approved. It states:

> All of these representations continued to be made to, and reviewed by, the Town as part of the development approvals process. The mere existence of an approval authority external to the town does not indicate there is existing or contemplated litigation…
>
> The town was acting in its role as part of the development application approval process. As a result, the documents in question were not created for the dominant purpose of litigation, but rather for the dominant purpose of coming to a reasoned conclusion on the merits of a development application and as part of the review and the decision making process that attends the planning process. There are no documents or discussions prepared in contemplation of litigation since no litigation can be contemplated until the town actually provides an answer to the development application request…
>
> Further, it is unreasonable for the town to claim a blanket privilege over any communications connected to a development application on the off-chance that its decision might at some stage be appealed. This is too wide a blanket claim for privilege and is not necessary to ensure the protection of the Town's litigation interests since this literally covers every document that is filed with the municipality in the context of any development application.

[23] The appellant submits that the town's blanket claim of solicitor-client privilege over records that are to, from, or carbon copied to legal counsel for the town is unreasonable and demonstrably incorrect. It also submits that the town's solicitor has had a role in these communications beyond that of a lawyer, often only included for informational purposes and not simply to obtain legal advice. Therefore, it submits that communications involving him do not necessarily disclose legal advice nor are they automatically subject to a claim of privilege. The appellant also refers to Records 6 and 8, which it obtained through another access request, but which the town has refused to produce. It states that the town's claim that the emails are subject to privilege is, on the face of these records, not correct on a simple review of these records.

[24] In reply, the town states that it has had an open file with respect to the subdivision since 1983 when the OMB granted approval to a draft plan of subdivision on the subject property, but withheld its order subject to certain conditions. It states that,

as these conditions were never satisfied, the OMB's file has remained open through a series of extensions.

[25] The town states that it corresponded with its external counsel on February 6, 2014 regarding the appellant, which is evidence that at least by then it was taking concrete steps in reasonable contemplation of the litigation that had, in fact, commenced. Additionally, it provided copies of letters sent from the appellant to the town which it states "gave reality" to the prospect of litigation from at least March 6, 2014.

[26] The town relies on Order M-864, where the parties had been embroiled in a dispute before the OMB for 13 years, the adjudicator found that the records were prepared for the dominant purpose of litigation because of the nature and the history of the dispute between the city and that appellant.

[27] The town also relies on Order M-86, where the adjudicator found that records created "in order to ensure accurate documentary evidence that could be utilized in the course of the conduct of the grievance of the appellant..." and records created by individuals at the request of counsel in order to "record their recollections of the event" in contemplation of probable litigation were exempt from disclosure under section 12.

[28] The town submits that the records were prepared, in large part, to address matters related to the current OMB litigation.

[29] In sur-reply, the appellant states litigation privilege does not attach retroactively only to existing or contemplated litigation.[1] It also states that the town has relied on the existence of OMB proceedings to suggest a blanket of privilege covers all town correspondence related to the subdivision, despite the unequivocal submissions by the appellant that there was no reasonable contemplation of litigation until mid-2014.

[30] The appellant submits that the mere fact that the town has maintained an open file with respect to the subdivision before the OMB since 1983 does not demonstrate litigation privilege exists. It states that all that the OMB was doing was serving a sporadic administrative function of what is known as an approval authority, the result of which required submissions to be made but not with the expectation there would be litigation.[2] It submits that extending litigation privilege to the full scope of the development approval process would be an extension of the section 12 exemption beyond what was contemplated by the legislature. It states that the earliest possible point in which litigation was a mere possibility was February 10, 2014.

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[1] The appellant relies on Order M-69.

[2] The appellant refers to its initial representations where it stated that the reason there remained an open OMB file was because the OMB continued to be the ultimate approval authority for the registration of the plan of subdivision under section 51 (56) and (58) of the *Planning Act*.

Analysis/Findings

[31] The town states that all of the records, except Records 17, 19 (a portion), 118 and 119 (a portion), are subject to solicitor-client branch 1 common law communication privilege, and in some cases also under the branch 2 statutory privilege.

[32] 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.[3] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[4] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[5]

[33] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[6]

[34] 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.[7] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[8]

[35] I note that the town did not provide representations as to the application of section 12 to the specific information in each record.

[36] The records are all email chains. The appellant has been provided with an Index of Records by the town which includes the subject line of the records and the names and titles of the emails' senders and recipients.

[37] I find that disclosure of some of the records would not reveal legal advice, but are merely brief emails that indicate that there is information attached or being forwarded to the recipients. In other records, even though counsel, either external or internal are listed as one of many recipients of these emails, I agree with the appellant that from my reading of these emails they were only included for informational purposes and not simply to obtain legal advice. Therefore, I find that the information at issue in the following records is not subject to section 12:

- Records 12, 29, 30, 31, 39, 58, 62a, 81, 84, 90, 94, 109, 115, 129, and 132.

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[3] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[4] Orders PO-2441, MO-2166 and MO-1925.
[5] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[6] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[7] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[8] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

[38] In addition, in some of the emails the substantive portions have already been disclosed to the appellant by the town. The town did not provide an explanation as to why the remainder of the information in these emails is being withheld under section 12. Nor is it apparent from my review of these records as to why this information is being withheld. These emails for which I have found section 12 does not apply are:

- Records 21, 45, 46, 47, 82, 83, 91 and 92.

[39] Records 65 and 112 are identical and contain information about legal billing. In the Notice of Inquiry, the town was advised of the following and asked to respond to the questions listed therein:

> Legal billing information is presumptively privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.[9] In your representations, please address the question of whether the legal billing information is privileged in this case, with reference to the following questions:
>
> > is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?
> >
> > could an "assiduous inquirer", aware of background information, use the information requested to deduce or otherwise acquire privileged communications?[10]

[40] The town did not provide specific representations on Records 65 and 112. Based on my review of Records 65 and 112, I find, because of the nature of the information at issue, the presumption has been rebutted and that disclosure would not reveal privileged communications and I will order these records disclosed.

[41] I find that the information at issue in the following records do contain solicitor-client communication privileged information. Disclosure of these emails would reveal confidential information about the seeking or giving of legal advice from counsel:

> Records 7, 13, 16, 18, 20, 22, 23, 24, 25, 26, 28, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 61, 62b, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 85, 86,

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[9] *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

[10] See Order PO-2484, cited above; see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

87, 88, 89, 93, 95, 96, 97, 98, 99, 100, 103, 104, 105, 106, 107, 108, 110, 111, 113, 114, 116, 117, 122, 123, 124, 125, 126, 127, 128, and 131.

[42] The town relies on litigation privilege for Records 17, 19 (a portion), 118 and 119 (a portion).

[43] 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.[11] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[12] 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.[13] The litigation must be ongoing or reasonably contemplated.[14]

[44] Records 17 and 118 are identical and are dated April 17, 2014, past the date that the appellant states that litigation was contemplated. These two records were prepared in contemplation of litigation and I find that section 12 litigation privilege applies to Records 17 and 118.

[45] As well, Record 119 is dated April 17, 2014. Based on my review of this record which consists of three emails, I agree with the town that the emails either contain solicitor-client communication privileged information or litigation privileged information under section 12.

[46] Record 19 consists of two emails, the content of the earlier email is duplicated in other records (Records 69, 71, 74), and I have found that this earlier email contains solicitor-client communication privileged information. The later email contains a question from one town employee asking about the privileged information in the earlier email. I find that the later email is part of the continuum of communications and is also privileged. Therefore, Record 19 in its entirety is subject to solicitor-client communication privilege, not litigation privilege, under section 12.

Conclusion

[47] I have found that Records 12, 21, 29, 30, 31, 39, 45 to 47, 58, 62a, 65, 81 to

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[11] *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).
[12] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[13] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[14] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

83, 84, 90 to 92, 94, 109, 112, 115, 129, and 132 are not subject to section 12. As no other discretionary exemptions have been claimed and no mandatory exemptions apply, I will order these records disclosed.

[48] I have found that the remaining records, Records 7, 13, 16 to 20, 22, 23, 24, 25, 26, 28, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 61, 62b, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 85, 86, 87, 88, 89, 93, 95, 96, 97, 98, 99, 100, 103, 104, 105, 106, 107, 108, 110, 111, 113, 114, 116, 117 to 119, 122, 123, 124, 125, 126, 127, 128, and 131 are subject to section 12. I find that the privilege in these records has not been waived or lost. Therefore, subject to my review of the town's exercise of discretion, these records are exempt under section 12.

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

[49] 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.

[50] 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.

[51] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[15] This office may not, however, substitute its own discretion for that of the institution.[16]

[52] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[17]

- the purposes of the *Act*, including the principles that
    - information should be available to the public

[15] Order MO-1573.
[16] Section 43(2).
[17] Orders P-344 and MO-1573.

    - 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.

[53] The town states that it has clearly exercised its discretion as evidenced through the release of many records and partial records. In particular, the town states that it recognizes the purposes of *MFIPPA*, and also considered the wording of the exemption and the interest it seeks to protect. The town also states that it considered the context of the request and the requester, in particular, the ongoing litigation at the OMB involving the subject matter of the request. This, according to the town, necessarily included a consideration of the nature of the information and the extent to which it is significant and/or sensitive to the town, as well as its position in its dealings with the subject matter and the ongoing litigation. It states:

> An example of the exercise of discretion is [that the] town has provided information about the date of each record, who it is from and to, and the general subject matter of the record, rather than simply refusing the records and any information about them altogether.

[54] The appellant states that the town may have improperly exercised its discretion with respect to the emails in the records that only involved internal counsel and did not involve external counsel. It states that there are a significant number of emails included

in the Index of Records that are addressed to, or copied to, the internal counsel and that the fact that the internal counsel is sender or a recipient does not lead to an automatic claim of solicitor-client privilege. For instance, it states that the internal counsel was regularly sending agreements out and not providing legal advice as part of administrative functions.

[55] In reply, the town states that the nature of the communications involving its internal solicitor involve communication between solicitor and client which entails the seeking of and giving of legal advice, necessarily intended to be confidential. It states that a simple assertion by the appellant that not everything done by the town's internal counsel attracts solicitor-client privilege may be a generally true statement but it is not relevant or accurate in the context of the records.

[56] In sur-reply, the appellant states that the information provided relating to the records, namely to the parties' "to", "from", "date sent" and the "re:" line, is not sufficient to meet the town's burden of proof and does not explain why these communications should be privileged.

Analysis/Findings

[57] Based on my review of the records at issue, I agree with the town that it has exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[58] To address the appellant's specific concerns, the email chains that comprise the records that I have found subject to solicitor-client communication privilege either concern the town's internal counsel in the seeking or receiving of legal advice from him or the internal counsel is included in email chains with external counsel who is in communication with the town staff for the purpose of providing legal advice.

[59] Accordingly, I am upholding the town's exercise of discretion and find that the following records are exempt by reason of section 12:

- Records 7, 13, 16 to 20, 22, 23, 24, 25, 26, 28, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 61, 62b, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 85, 86, 87, 88, 89, 93, 95, 96, 97, 98, 99, 100, 103, 104, 105, 106, 107, 108, 110, 111, 113, 114, 116, 117 to 119, 122, 123, 124, 125, 126, 127, 128, and 131.

C. Did the institution conduct a reasonable search for records?

[60] 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.[18] 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.

[61] 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.[19] To be responsive, a record must be "reasonably related" to the request.[20]

[62] 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.[21]

[63] 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.[22]

[64] 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.[23]

[65] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[24]

[66] The institution was required to provide a written summary of all steps taken in response to the request. In particular, it was asked:

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?

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[18] Orders P-85, P-221 and PO-1954-I.
[19] Orders P-624 and PO-2559.
[20] Order PO-2554.
[21] Orders M-909, PO-2469 and PO-2592.
[22] Order MO-2185.
[23] Order MO-2246.
[24] Order MO-2213.

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.

5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

[67] The town states that the town staff responsible for the administration of *MFIPPA* (the Clerk) coordinated an extensive search to identify potentially responsive records. As part of the search, it states that the town Clerk sent an email to staff in the Chief Administrative Officer's office, and the Clerk, Engineering, Planning and Legal departments. The town also provided details of the timing and contents of its disclosure of records.

[68] The appellant states that the town, in responding to this request, had its records censored not by the town clerk or staff who ultimately prepared the final response to this request, but by staff who did the searches of its record holdings who had no special training on how to exercise the authority of the head of the municipality for the purposes of the *Act*. It states that the town has refused to produce documents on the basis that they are not relevant, which the appellant submits are relevant (Records 120 and 121 on the Index of Records).

[69] The appellant submits that the town's initial exorbitant fee estimate of $112,100, for the production of records from January 1, 2000, demonstrates that it does not have proper filing or records retrieval systems in place.

[70] In reply, the town states that the appellant has confused the processes of searching and of reviewing records and the exercising of the authority of the head under the *Act*. It states that the Clerk provided instructions to staff on how to perform a search but it was the Clerk who reviewed the documents and performed redactions, in consultation with legal counsel where appropriate.

[71] Concerning the records that the appellant refers to specifically in its representations as having not been disclosed, the town states:

> This argument is, respectfully, irrelevant. On page 3 of the Mediator's Report in this matter dated May 28, 2015, the mediator notes that the appellant is not appealing the severances of non-responsive information and that [Records] 120 and 121 (among others) are no longer at issue. This is further confirmed in the Notice [of Inquiry], wherein on page 3 it states, "Following further discussions, the appellant advised the mediator that he is not appealing the severances of non-responsive information and, in addition, is not appealing the application of section 10 of the *Act*. As a result, Records 4, 5, 15d, 27, 33 (in part), 60, 101 102, 120 and 121 are no longer at issue in this appeal". Such a position has no logical or factual connection to an assertion that a number of records are missing and therefore the Town's search for records is unreasonable.

[72] Concerning the initial fee, the town states that the original request was much broader and for any and all information on the project at issue dating back to January 1, 2000, which is for a long period of time. It states that software systems have changed at the town and that there was no attempt by the town to pass on the capital costs of any file storage and retrieval system to the appellant.

[73] In sur-reply, the appellant states that the town in merely providing the Clerk's instructions to staff, has not provided sufficient evidence of any search, let alone that a reasonable effort to search was made. It states that these instructions do not provide evidence of all of the steps taken in response to the request to understand what was actually done to conduct the search. It also states that the town did not comply with the Notice of Inquiry and that it should have provided affidavit evidence about its search.

Analysis/Findings

[74] Based on my review of the parties' representations, I find that the search conducted by the town for records responsive to the appellant's request, as narrowed, for emails from January 1, 2014 to the date of the request (March 31, 2014), was reasonable.

[75] As set out above, 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 that are reasonably related to the request. I find that the town has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records within its custody or control. The town conducted a number of searches for records responsive to the request in a number of different town departments.

[76] Based on my review of the request as narrowed and the parties' representations, I find that the appellant has not provided a reasonable basis for concluding that additional responsive records exist.

[77] I also do not agree with the appellant that it is inappropriate for the town's staff to search their own record holdings for responsive records. The staff who conducted these searches would be knowledgeable of the subject matter of the records in their respective departments. They were provided with extremely detailed instructions as to how to search for responsive records by the town's Clerk.[25]

[78] As set out in the town's Index of Records provided to the appellant, the town located a large number of responsive emails for the three-month time period covering the request time span.

[79] I find that the appellant has not indicated what records it believes have not been located, but instead has focused its representations on unsubstantiated allegations of bad faith on the town's part.

[80] In conclusion, I am satisfied that the town has demonstrated that it has conducted a reasonable search under the *Act* and I uphold the town's search for records responsive to the appellant's request.

ORDER:

1. I order the town to disclose Records 12, 21, 29, 30, 31, 39, 45 to 47, 58, 62a, 65, 81 to 83, 84, 90 to 92, 94, 109, 112, 115, 129, and 132 to the appellant **by July 26, 2016**.

2. I uphold the town's decision to withhold access to Records 7, 13, 16 to 20, 22, 23, 24, 25, 26, 28, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 61, 62b, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 85, 86, 87, 88, 89, 93, 95, 96, 97, 98, 99, 100, 103, 104, 105, 106, 107, 108, 110, 111, 113, 114, 116, 117 to 119, 122, 123, 124, 125, 126, 127, 128, and 131.

3. I uphold the town's search for responsive records.

Original Signed by: June 30, 2016

Diane Smith
Adjudicator

[25] Appendix D to the town's reply representations sets out the Clerk's instructions to town staff. The Clerk is the town staff responsible for the administration of *MFIPPA*.