

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3413

Appeal MA16-143

Township of Uxbridge

February 14, 2017

Summary: The township received a three-part request under the *Act* for information about an identified property. The township located one record responsive to part 1 of the request and granted partial access to it, withholding portions pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. The township also located records responsive to part 2 of the request, denying access to them in their entirety pursuant to the discretionary law enforcement exemption at section 8(1)(a) of the *Act*. With respect to part 3 of the request, the township advised that no responsive records were located. The requester appealed the township's decision to deny access to the records responsive to part 2 of the request pursuant to section 8(1)(a) and also on the basis that additional records responsive to parts 1 and 3 of his request should exist. The application of section 14(1) to portions of the record responsive to part 1 of the request is not on appeal. In this order, the adjudicator finds that section 8(1)(a) does not apply and orders that the records be disclosed. She upholds the township's search for responsive records as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 8(1)(a) and 17.

OVERVIEW:

[1] The Township of Uxbridge (the township) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information about an identified property. Specifically, the requester sought access to:

1. All records (including correspondence, notes, emails, meeting minutes and agendas, and phone records) in the possession of the Township of Uxbridge

(including staff, Township agent or consultants, and the Mayor and Council) in relation to an application for and approval of a permit to construct a detached garage like structure, from September 1, 2014 to December 31, 2015;

2. All records (including correspondence, notes, emails, meeting minutes and agendas, and phone records) in the possession of the Township of Uxbridge (including staff, Township agents or consultants, and the Mayor and Council) in relation to my personal Bylaw complaints (numbers 484 and 485) relating to the above property; and
3. In addition to [named councillor's] email address [identified email address], this request includes records relating to item 1 above from [named councillor's] personal email accounts as follows: [two identified email accounts].

[2] The requester advised that the councillor uses his personal email accounts to communicate with residents.

[3] The township issued a decision granting partial access to records responsive to part 1 of the request. Portions of the records were severed pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. The township advised that it would provide access to the portions of the records not subject to the exemption following receipt of a fee.

[4] With respect to parts 2 and 3 of the request, the township advised:

Access to [part 2] of your request is being denied under section 8(1)(a) of the *Act*, as it relates to an ongoing investigation which could be interfered with should these records be released.

With regards to [part 3] of your request, all records responsive to this request, should they exist, would have been generated by the councillor in their personal capacity as an elected official and not as an officer or employee of the Township of Uxbridge. Accordingly, access cannot be granted as the records are not within the custody and control of the Township.

[5] The requester, now the appellant, appealed the township's decision.

[6] During mediation, the appellant confirmed that he is not pursuing access to the information that has been severed from the responsive records pursuant to section 14(1) of the *Act*, nor is he appealing the fee. The appellant advised the mediator that he continues to seek access to the records responsive to part 2 of his request that were withheld under the discretionary law enforcement exemption at section 8(1)(a) of the *Act*. The appellant confirmed that he does not require copies of the complaints that he himself filed.

[7] The appellant also advised the mediator that he believes that additional records

responsive to both part 1 and 3 of the request should exist. With respect to part 1, the appellant believes that internal communications between and among township staff and councillors should exist. With respect to part 3, the appellant believes that emails from the named councillor's personal accounts should exist and that such emails are in the custody and control of the township.

[8] The township advised that it had canvassed appropriate staff for records responsive to all parts of the appellant's request and no additional records were located. The township also advised that it continues to rely of 8(1)(a) of the *Act* to deny access to the records responsive to part 2 of the request.

[9] The appellant continues to believe that additional records exist and that such records are in the custody or control of the township. He also continues to seek access to the records denied pursuant to section 8(1)(a) of the *Act*.

[10] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. During the course of my inquiry into this appeal, representations were sought and received from both parties. The township's representations were shared with the appellant pursuant to the confidentiality criteria set out in this office's *Practice Direction 7*. I decided that it was not necessary to share the appellant's representations with the township for a reply.

[11] In its representations, the township advised that it no longer takes the position that any records that might be responsive to part 3 of the request (emails from the councillor's personal email address) do not fall under its custody or under its control. It also advised that it continues to take the position that no records responsive to that portion of the request exist. Accordingly, the issue of custody or control is no longer at issue in this appeal. However, the reasonableness of the township's search for records responsive to both parts 1 and 3 of the request remains at issue.

[12] In this order, I uphold the township's search for responsive records but I do not uphold the township's decision to deny access to the records responsive to part 2 of the request pursuant to section 8(1)(a) of the *Act*.

RECORDS:

[13] Records 5, 6, 7, and 8 have been identified as responsive to part 2 of the request and are at issue in this appeal. Record 5 consists of emails and attachments exchanged between the appellant and the township's Manager of Municipal Bylaw. Record 6 is an email from the township's Chief Building Official to its Manager of Municipal Bylaw. Record 7 is made up of 4 pages of phone records of the township's Manager of Municipal Bylaw. Record 8 consists of emails between township staff and the appellant regarding the property identified in the request. These records have been withheld in their entirety under section 8(1)(a) of the *Act*.

ISSUES:

- A. Did the township conduct a reasonable search for records responsive to parts 1 and 3 of the request?
- B. Does the discretionary exemption at section 38(a), read in conjunction with section 8(1)(a) or does section 8(1)(a), on its own, apply to the records identified as responsive to part 2 of the request?

DISCUSSION:

Issue A: Did the township conduct a reasonable search for records responsive to parts 1 and 3 of the request?

[14] The township asserts that it conducted a reasonable search for and has located all records responsive to the request. The appellant takes the position that additional responsive records should exist. 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.

[15] 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

[16] 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.⁴ To be responsive, a record must be "reasonably related" to the request.⁵

[17] 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.⁶

Representations

[18] In support of its position that it conducted a reasonable search for records responsive to the request, the township provided an affidavit sworn by its Deputy Clerk.

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders P-624 and PO-2559.

⁵ Order PO-2554.

⁶ Order MO-2246.

[19] The Deputy Clerk advised that upon receipt of the request he sent an email to the councillor requesting that he search for records responsive to the request. In response, the councillor provided two email chains with the owners of the property at a specific address, neither of which had "anything to do with the records being sought in the request." The Deputy Clerk also states that based on information received from the councillor it is clear that the councillor searched his personal emails for records pertaining to the request. The Deputy Clerk attached a copy of an email addressed to him from the councillor to his affidavit and from my review, it is clear that the councillor searched all three of his email addresses as listed in the request.

[20] The Deputy Clerk advised that searches for responsive records were also carried out by township staff, when the requests were received, and that the records that were located were provided to him. He submits that search requests were sent to the township's Chief Building Official and to the Manager of Municipal By-Law who, he submits, are the only two staff members who would reasonably have records relating to this request. The Deputy Clerk provided a copy of the email requesting those staff members to conduct a search for responsive records.

[21] The Deputy Clerk concluded his affidavit stating that it is the township's position that a reasonable search was conducted for the records sought by the request at issue in this appeal.

[22] The appellant takes the position that additional records responsive to parts 1 and 3 of his request should exist. In his representations, the appellant explained some of the background to his request and provided numerous supporting documents to help illustrate his submissions. In brief, the appellant believes that the property owners are conducting a commercial business on their property and that doing so is in contravention of a municipal bylaw. The appellant submits that vehicles, landscaping materials and landscaping equipment that is being kept on the property, the establishment of what he describes as "as staff parking area" and the construction of what he describes as "a three bay garage with adjoining office space" demonstrate that a business is being operated out of this property. The appellant submits that the building application states the use of the new garage would remain the same, being storage, but that he believes that the township knew from the beginning that the intended use was not storage but for a commercial business and that as a result, the approval process has been compromised.

[23] The appellant explains that he seeks access to records that demonstrate that the township is aware that a commercial business is in operation on the property and that such business is in violation of municipal bylaws. He submits that the "critical question" is whether political influence is guiding the township bylaw and planning processes in order to permit an illegal business to operate and expand. He requests a search for records that will "answer this question."

Analysis and finding

[24] Having carefully reviewed the evidence before me, I am satisfied that the search

conducted by the township for records responsive to both parts of the appellant's request was reasonable and is in compliance with its obligations under the *Act*.

[25] As previously explained, a reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends reasonable effort to locate records that are reasonably related to the request. In the circumstances of this appeal, I find that the township has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and to locate responsive records within its custody or under its control. I acknowledge that the searches were directed and conducted by experienced employees, knowledgeable in the subject matter and that consultations were made to confirm the accuracy of the findings. I accept that the effort that the councillor and the township staff members expended to locate responsive records was reasonable and in accordance with the township's obligations under the *Act*.

[26] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding such records exist. While I acknowledge that the appellant is of the view that additional records that demonstrate that the township is aware that the property owner is conducting a commercial business on their property should exist, I do not accept that I have been provided with a reasonable basis for reaching such conclusion.

[27] Although the appellant's position is carefully detailed, I find that it is speculative in nature. He has provided many details to support his belief that a commercial business is being operated out of the property identified in the request. However, in my view I have not been provided with a reasonable basis to conclude that the township has or had knowledge of a commercial business being operated on the property or that additional records that might reveal this type of information should exist. Moreover, based on documentation that the appellant provided to me himself, it appears that following an investigation, the township is of the position that the property is in compliance with municipal bylaws.

[28] Furthermore, even if additional records exist or existed at one point in time, I reiterate the principle outlined above that the *Act* does not require the township to prove with absolute certainty that further records do not exist. Rather, the township's obligation under the *Act* is contained to being required to demonstrate that it has made a reasonable effort to identify and to locate responsive records. In the circumstances of this appeal I accept that it has done so.

[29] I acknowledge that the appellant believes that the approval process for construction of the garage on the property occurred without regard to standard procedures or municipal bylaws. However, it should be noted that it is not within my jurisdiction to determine whether the approval process was conducted in an appropriate fashion, in accordance with township procedures or in accordance with municipal bylaws. My jurisdiction is to determine whether the township conducted a reasonable search for records responsive to the request and I accept that it has.

[30] In conclusion, I am of the view that in the circumstances of this appeal the township has discharged its onus and has provided sufficient evidence to support its position that it has made a reasonable effort to identify and to locate records responsive to the request. On that basis, I uphold its search.

Issue B: Does the discretionary exemption at section 38(a), read in conjunction with section 8(1)(a), or does section 8(1)(a), on its own, apply to the records identified as responsive to part 2 of the request?

[31] The township located four records responsive to part 2 of the request and denied access to all of them under the discretionary law enforcement exemption at section 8(1)(a) of the *Act*. As records 5, 7 and 8 contain the personal information of the appellant, the appropriate exemption under which to determine its disclosure is section 38(a), read in conjunction with section 8(1)(a). For record 6, which does not contain the personal information of the appellant, the exemption that might apply is section 8(1)(a).

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

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, **8**, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

[33] In this case, section 38(a) might apply in conjunction with section 8(1)(a) to records 5, 7, and 8. Section 8(1)(a) might apply, on its own, to record 6. Section 8(1)(a) states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

interfere with a law enforcement matter.

[34] Previous orders have found that the term "law enforcement" can cover a municipality's investigation into a possible violation of a municipal by-law;⁷

[35] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.⁸

[36] It is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because

⁷ Orders M-16 and MO-1245.

⁸ *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

of the existence of a continuing law enforcement matter.⁹ The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.

[37] For section 8(1)(a) to apply, the matter in question must be ongoing or in existence. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters.

Representations

[38] In its representations on the application of section 8(1)(a), the township states that at the time that the decision letter regarding the request was issued, the bylaw complaints referred to in the request were still being actively investigated. It submits:

The township has always taken the position that records relating to a formal bylaw complaint are available [under the *Act*] when the Bylaw Department has officially closed the complaint. As the complaints were not closed at the time when the decision letter was issued, an exemption was claimed.

[39] In his representations, the appellant does not specifically address the possible application of the law enforcement exemption at section 8(1)(a) to the records identified as responsive to part 2 of his request.

Analysis and finding

[40] In the circumstances of this appeal, I find that it has not been established that section 38(a), read in conjunction with section 8(1)(a), applies to records 5, 7, or 8. I also find that it has not been established that section 8(1)(a) applies, on its own, to record 6.

[41] As noted above, it is not enough for an institution to take the position that the harms under section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter. The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative. In my view, the township has not provided any evidence, let alone evidence of a detailed and convincing nature, to demonstrate a risk of any type of harm arising from the disclosure of the information in records 5, 6, 7, and 8. Additionally, from my review of the information at issue it is not self-evident that any harm might occur from its disclosure.

⁹ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

[42] I note that many portions of the records identified as responsive to part 2 of the request consist of emails that were either sent from or addressed to the appellant. Specifically, record 5 consists entirely of a series of email exchanges between the township's Manager of Municipal Bylaw and the appellant and much of the email exchange that makes up record 8 consists of emails between township staff and the appellant. As the appellant was either the recipient or the author of these emails and I have no evidence that their disclosure will interfere with an ongoing law enforcement matter, I do not accept that the township has established a basis upon which to deny the appellant access to this information under section 38(a), read in conjunction with 8(1)(a).

[43] Additionally, based on my review of record 6, an email from the township's Chief Building Official to the Manager of Municipal Bylaw, the responsive portions of record 7 which are the Manager of Municipal Bylaw's phone records¹⁰, and the portions of record 8 which consist of email exchanges between township staff, I find that I have not been provided with sufficient evidence to conclude that their disclosure will interfere with an ongoing law enforcement matter. Therefore, I find that the information in these records is not exempt from disclosure under either section 38(a) (records 7 and 8) or section 8(1)(a) (for record 6).

[44] Furthermore, although the township's representations do not confirm whether or not it has concluded its investigations into the bylaw complaints referred to in part 2 of the request and to which records 5, 6, 7, and 8 relate, amongst the documents provided by the appellant in support of his representations are emails between township staff and the appellant which, on my review, confirm that the investigations into the bylaw complaints are now closed.

[45] Accordingly, I find that neither 38(a), read in conjunction with section 8(1)(a), nor section 8(1)(a), on its own, apply to records 5, 6, 8 in their entirety, or to the portions of record 7 that are responsive to part 2 of the request. As a result, I do not uphold the township's decision to withhold them.

ORDER:

1. I order the township to disclose to the appellant records 5, 6 and 8 in their entirety and the responsive portions of record 7, by **March 17, 2017**.
2. I uphold the township's search for responsive records.

Original Signed By: _____
Catherine Corban

February 14, 2017 _____

¹⁰ I note that the majority of the phone records that make up record 7 contain information that is not only not responsive to part 3 of the appellant's request but also includes the personal information of individuals other than the requester. The only portions of record 7 that are responsive to the request are two discrete portions (in the middle of the second page and at the bottom of the third page of the record) that relate to calls from the appellant about the property identified in the request.

Adjudicator