

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3431

Appeal MA15-418-2

Niagara Peninsula Conservation Authority

April 27, 2017

Summary: The appellant requested all records relating to him and his property from the Niagara Peninsula Conservation Authority (NPCA). In a series of decisions, the NPCA disclosed some information but withheld other information under various exemptions in the *Act*. The appellant appealed the NPCA's decision to withhold information under the exemption for solicitor-client information in section 12 of the *Act*. The appellant also raised the issue of whether the NPCA had conducted a reasonable search for records. This order finds that the NPCA properly applied the section 12 exemption to the records withheld under that exemption. In addition, while the NPCA failed to meet its obligations under the *Act* to retain records responsive to the appellant's request, its search for responsive records was reasonable and no further search for records is ordered.

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

Orders and Investigation Reports Considered: Order MO-3331.

OVERVIEW:

[1] The appellant has been involved in a series of disputes with the Niagara Peninsula Conservation Authority (NPCA) relating to the use of his property. Seeking information related to the disputes, the appellant made requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the NPCA for all documents relating to him and his property for a specified time period.

[2] In response, the NPCA disclosed some records, withholding some information they advised was available on its website and therefore comprised "public records," under the *Act*. Section 15(a) of the *Act* exempts from disclosure information published or available to the public.

[3] After the appellant filed an appeal, the NPCA disclosed more records to the appellant. However, the appellant continued to believe that he had not received all of the records responsive to his request.

[4] During mediation, the NPCA conducted further searches for responsive records and granted partial access to some additional records, withholding portions of the records under sections 12 (solicitor-client privilege), 14 (personal privacy), 8(1) (law enforcement) and 9(1) (relations with other governments) of the *Act*. The NPCA also withheld some records because they were either "public documents," (i.e. applying section 15(a)) "previously disclosed in legal proceedings," or already in the appellant's possession.

[5] The appellant was not satisfied with the NPCA's decisions and disclosure, and confirmed his concern about "missing records" and, in particular, the issue of whether the NPCA's search for responsive records was reasonable. The appellant also sought access to the records withheld under section 12 (solicitor-client privilege). Accordingly, the appeal moved to the inquiry stage on the issues of:

1. whether section 12 was properly applied to the records withheld on that basis; and
2. whether the NPCA conducted a reasonable search for records.

[6] During the inquiry into the appeal, I sought and received representations from the NPCA and the appellant. Representations were shared in accordance with *IPC Practice Direction 7*.

[7] This order finds that the records withheld by the NPCA under section 12 were properly withheld and that the NPCA conducted a reasonable search for records, though it failed to comply with its obligations under the *Act* to retain records responsive to the appellant's request.

RECORDS:

[8] The records at issue comprise emails and attachments withheld in part or in whole under section 12 of the *Act*. The withheld emails and attachments arise in relation to the erection of solar panels and the construction of a deck on the appellant's property.

ISSUES:

[9] The issues in this inquiry are:

- A. Does the discretionary 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 NPCA conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the records?

[10] Section 12 states:

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.

[11] 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.

[12] Branch 1 encompasses two heads of privilege as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.¹

[13] At common law, 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.² The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³ The privilege applies to "a continuum of communications" and 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

¹ Order PO-2538-R; *Blank v Canada (Minister of Justice)* (2006), 270 DLR (4th) 257 (SCC) (also reported at [2006] SCJ No 39).

² *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).

³ Orders PO-2441, MO-2166 and MO-1925.

so that advice can be sought and given.⁴

Statutory solicitor-client communication privilege

[14] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

Statutory litigation privilege

[15] 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.⁵

[16] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.⁶

Overview of parties’ arguments

[17] The NPCA relies on both the common law and statutory privileges to withhold records under section 12.

[18] The appellant’s representations acknowledge that he was involved in litigation with the NPCA but states that the litigation has concluded. The appellant does not address solicitor-client privilege.

[19] In its reply representations, the NPCA acknowledges that some litigation involving the appellant has ended but reiterates its position that the withheld information is still subject to privilege because:

1. solicitor-client privilege does not end with the end of litigation, and
2. litigation privilege continues because the NPCA is using the withheld records from the litigation that has ended in ongoing and related litigation proceedings which involve the appellant.

[20] Given the parties’ arguments relating to the end of litigation, I will first consider whether the withheld records are subject to the statutory privilege, since statutory litigation privilege does not end at the conclusion of litigation.

⁴ *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).

⁵ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

⁶ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer) (2002)*, 62 O.R. (3d) 167 (C.A.).

Submissions

[21] Regarding the statutory privilege, the NPCA submits that all records withheld under section 12 were prepared by counsel retained by the NPCA and were used in giving or seeking legal advice and were created in contemplation of and for use in litigation with the appellant.

[22] In its submissions regarding common law privilege the NPCA elaborates that the withheld records arise from litigation involving the appellant. The NPCA submits that the withheld records contain correspondence between staff and lawyers retained by the NPCA. The NPCA submits that records that don't directly contain legal advice or a request for advice were passed between its solicitors and the NPCA for the purposes of keeping each party informed on legal issues involving the appellant. The NPCA says that all communications with solicitors retained by NPCA that are responsive to the request were made in confidence, which is implied at common law.

[23] Regarding litigation privilege, the NPCA says the records withheld from the appellant are related to specific litigation and the email communications with solicitors retained by the NPCA were for the sole purpose of preparing a case for trial.

[24] The NPCA says the appellant has been involved in litigation with the NPCA since 2000 and that the records are about two legal matters. The first is the construction of a deck, which occurred after a second matter which ended with a ruling in the appellant's favour regarding erection of solar panels without a permit. The NPCA say the first matter is before the courts, and disclosing records regarding the second matter to the appellant could compromise that first matter.

Analysis and findings

Records:

[25] I have reviewed the emails and attachments withheld under section 12 of the *Act* and am satisfied that the records comprise communications between the NPCA and their legal counsel seeking or receiving legal advice or were prepared by the NPCA's legal advisors in contemplation of or for use in litigation.

[26] I am satisfied that the emails were intended to be confidential. While some are marked privileged and confidential and contain an assertion that they are exempt from disclosure and others do not, this alone is not determinative. As the emails were circulated between NPCA staff and their legal advisors only, and either contain legal advice or were created in contemplation of or for use in litigation with the appellant, I am satisfied that the emails and attachments were intended to be confidential.

[27] Because of the nature of the records at issue and based on my review of them, it is not necessary to identify with precision which records fall within the solicitor-client communication part of the exemption and which fall within the litigation part of the

exemption. The records clearly fall within the scope of the statutory privilege.

[28] As noted above, statutory litigation privilege does not end when litigation ends, so there is no issue with the application of section 12 to the records even if, as the NPCA accepts, litigation has ended with respect to one matter. Accordingly, the records clearly fall within the scope of the statutory privilege.

[29] The parties do not raise the issue of waiver and there is no evidence to suggest that privilege in the records was waived by the NPCA.

[30] Subject to my findings on the NPCA's exercise of discretion, the records can be withheld under the second branch of section 12 of the *Act*. Therefore, I will not consider whether the first branch of section 12 applies to the records.

Issue B: Did the NPCA exercise its discretion under the *Act*? If so, should this office uphold the exercise of discretion?

[31] 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. In an appeal, the Commissioner may determine whether the institution failed to do so.

[32] 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; or it fails to take into account relevant considerations.

[33] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations. This office may not, however, substitute its own discretion for that of the institution.⁷

[34] I am satisfied that the NPCA exercised its discretion. The NPC's representations express a desire to protect privileged communications, particularly while litigation with the appellant is ongoing. This is consistent with the purpose of section 12, and is therefore a legitimate basis for its decision to withhold the records. I am satisfied that the NPCA did not base its exercise of discretion on irrelevant factors.

[35] I therefore uphold the NPCA's exercise of discretion to rely on section 12 to withhold the records at issue.

Issue C: Did the NPCA conduct a reasonable search for records?

[36] The appellant raised the issue of the reasonableness of the NPCA's search for

⁷ Section 54(2).

records.

[37] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁸ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[38] 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.⁹ To be responsive, a record must be "reasonably related" to the request.¹⁰

[39] 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.¹¹

[40] 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.¹²

[41] 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.¹³

Submissions of the parties

[42] The NPCA says it did not contact the appellant for more information or clarification about his request as the request was simply for all records relating to him and his property, so clarification was unnecessary.

[43] The NPCA provided evidence of the searches conducted by NPCA staff for responsive records. The evidence is from the NPCA's Communications Specialist, who is also the NPCA's information and privacy coordinator. This employee advises that he took over conduct of the appellant's request at the mediation stage, after another NPCA employee had completed the initial search for records.

[44] The employee's evidence is that he conducted his search for records using compliance search tools in Microsoft Office 365, and also by engaging the NPCA's

⁸ Orders P-85, P-221 and PO-1954-I.

⁹ Orders P-624 and PO-2559.

¹⁰ Order PO-2554.

¹¹ Orders M-909, PO-2469 and PO-2592.

¹² Order MO-2185.

¹³ Order MO-2246.

information technology service provider to search user files on shared and private drives. He states that physical files were also accessed from local storage. The NPCA Communications Specialist says NPCA staff were contacted to conduct a search of their emails and files, and the search produced only files that had already been located through the other search methods. The NPCA says all of the responsive files were indexed. I will discuss the NPCA's indexes of responsive records further below.

[45] The NPCA's representations concede that additional responsive records could have existed but were no longer accessible at the time of the searches for records. The NPCA explained that one of the reasons why some records are no longer accessible is due to technology upgrades by the NPCA. The NPCA's email accounts and information technology services were formerly managed by the Municipality of Niagara Region. The NPCA says the migration of email accounts in March 2015 from the Regional Municipality of Niagara resulted in some legacy accounts becoming inaccessible. I address the issue regarding records listed in NPCA indexes of responsive records that are no longer accessible below.

[46] In relation to NPCA's admission that additional responsive records could have existed but were no longer accessible, the appellant submits that in failing to secure data away from legacy accounts, the NPCA failed to follow standard office procedures.

[47] The appellant's representations identified named individuals for whom he believes records should exist, including the freedom of information coordinator ("FOIC") at the time of his request. In its reply representations, the NPCA says it did search the records of the named individuals. It acknowledges that due to the email migration discussed above, the NPCA no longer had access to the former FOIC's email account.

[48] The appellant also points to a reference in NPCA board meeting minutes to an emailed complaint letter. He says the fact that a copy of the letter has not been provided to him is evidence of the NPCA's failure to conduct a reasonable search. The NPCA sent the appellant a letter dated April 29, 2016 that specifically addresses the appellant's request for the complaint letter, amongst other matters. The NPCA's letter states that it has searched but been unable to locate the complaint letter. The appellant's submissions point out that the NPCA's letter of April 29, 2016 refers to the date of the board meeting which references the existence of the complaint letter as being held on December 13, 2012, when in fact the letter was referenced at the December 13, 2013 board meeting. I am satisfied from the context of the NPCA's letter that it understood the appellant's request and merely mistyped the year the relevant board meeting occurred in its April 29, 2016 letter. I do not believe that the reference in the letter to the incorrect year was the reason for the NPCA's inability to locate the record the appellant seeks. In my view, the more likely explanation is that the record was unable to be located due to the information technology upgrades mentioned above.

[49] The appellant's representations also included copies of three letters of demand he sent to the NPCA requiring them to provide him with proof that the NPCA has

authorization and jurisdiction to encumber his property. The appellant says he did not receive a response to these demands. I do not consider these demand letters are requests for information under the *Act* or are relevant to the issue of whether the NPCA conducted a reasonable search for records.

Analysis

[50] The NPCA's evidence satisfies me that it made a reasonable effort to identify and locate responsive records as required by section 17 of the *Act*.¹⁴

[51] I am satisfied by the NPCA's explanation that the request's scope was sufficiently clear that it did not need to clarify the scope of the appellant's request.

[52] Because the NPCA employee who provided an affidavit about the search only became responsible for the request when it had reached the mediation stage, he may have lacked some knowledge of the request's lengthy history. However, as the employee given responsibility for responding to access requests at the NPCA, he was best placed to deal with the request. Further, the NPCA employee became increasingly familiar with the records at issue as he conducted additional searches for records, and disclosed additional records to the appellant during the course of the appeal. Further, the NPCA employee's evidence is that the physical search for records produced only duplicates of records found through its electronic searches. This provides some assurance that the search processes were thorough.

[53] The NPCA also explained why technology changes that effected its access to legacy email accounts may have resulted in responsive records not being located.

[54] For these reasons I am satisfied that the NPCA's information and privacy coordinator expended a reasonable effort to locate records which reasonably related to the request¹⁵ and that ultimately, the NPCA conducted a reasonable search for records.

Responsive records that cannot be located

[55] In the course of mediation of the appeal, the NPCA produced several indexes of responsive records, but did not supply a complete, unredacted copy of the records listed in the index. I therefore asked the NPCA to provide a copy of the unredacted records when responding to the Notice of Inquiry I sent to the NPCA to begin the adjudication stage of this appeal.

[56] The NPCA supplied records with its response to the Notice of Inquiry as requested. However, in reviewing the supplied records, I determined that not all of the records listed in previous indexes of responsive records had been provided to me.

¹⁴ Orders P-85, P-221 and PO-1954-I.

¹⁵ Orders M-909, PO-2469 and PO-2592.

[57] I again asked the NPCA for a complete set of records, and to reconcile the various indexes of records it had previously produced. In response to my further request for a complete set of the records at issue, the NPCA provided some additional records that had been referred to in earlier indexes of records, explained that some records listed in the index but not provided were duplicate index entries for the same record, and also advised that some records listed in previous indexes of responsive records could not be located. The records identified in NPCA indexes that it cannot locate are certain emails created between 2012 to 2015.¹⁶

[58] I then wrote to the NPCA asking for a detailed description of the records in the indexes that could not be found, and the reason why the records it did not provide could no longer be located. In response, the NPCA referred to the migration of email accounts in March 2015 which made some legacy accounts inaccessible. The NPCA also referred to an incident where some files were mishandled, which the NPCA says may have resulted in some files being misplaced and subsequently destroyed. The NPCA also acknowledged that while it made its best efforts to retain records, it had no record retention guidelines.

[59] The NPCA has advised that though it did not have a records retention policy until very recently, it does now have one.

[60] I found above that the NPCA's search for records was reasonable. However, the fact remains that the NPCA was unable to provide records it identified as responsive to the appellant's request.

[61] In Order MO-3331¹⁷, I also had to consider an institution's inability to supply records responsive to a request:

To give effect to the access provisions in the *Act*, a request for records requires the institution receiving that request to ensure that any responsive records are retained and not destroyed until the request has been satisfied and any subsequent proceedings before the Commissioner or the courts is completed.

Institutions have an inherent responsibility to retain records containing information which is the subject of a request under the *Act*, regardless of the operation of any records retention schedule or practice which may result in their destruction.

[62] The NPCA's inability to supply either the responsive records, or a sufficiently detailed description of the records to allow me to determine whether the records are

¹⁶ Fewer than 10 emails listed in the indexes as being withheld under section 12 the NPCA says it cannot locate. All appear to be emails between NPCA and legal counsel.

¹⁷ Paras 33 and 34. Referring to Orders MO-2244-I, MO-1725, MO-2809 and Interim Order M-1121.

subject to the section 12 exemption, is an unacceptable failure to comply with its obligations under the *Act*. I also note that the lost records prompted multiple requests for further information during this appeal that delayed its disposition.

[63] As noted above, the NPCA advised me it now has a records retention policy. It does not expressly say that the circumstances of this appeal prompted the development of such a policy, but the timing of the policy's adoption suggests it. The circumstances of this appeal highlight the importance of implementing a records retention policy. This increases the likelihood that institution decision making, including decisions regarding IT infrastructure that could impact records retention, adequately consider an institution's ability to comply with such a policy, and ultimately, with the *Act*.

[64] That the NPCA has now adopted a records retention policy is an essential response to the circumstances highlighted by this appeal. Another mitigating factor in this appeal is that the description of the missing records in the NPCA's indexes suggests that the lost records were of the same type as those at issue in this appeal, namely emails between NPCA and its legal counsel. I found that the NPCA had properly applied section 12 to all of the records NPCA did locate and provide to me. To be clear, I am not finding that section 12 would also apply to the missing records, as I do not have enough information to make such a finding.

[65] The remedy for finding that an institution failed to conduct a further search for the missing records is to order a further search for records. On balance, I have decided against ordering the NPCA to conduct a further search for records. As I found above, I am satisfied that the NPCA has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A failure to properly retain records is not remedied by conducting a further search. In adopting a record retention policy, the NPCA has made the first step toward preventing a recurrence of the circumstances in this appeal.

ORDER:

I uphold the NPCA's decision to withhold records responsive to the appellant's request under section 12 of the *Act*. I find that the NPCA conducted a reasonable search for records responsive to the appellant's request.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ April 27, 2017