

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3515-I

Appeal MA15-617

Township of Uxbridge

November 2, 2017

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Township of Uxbridge for records relating to a business, including records relating to a site plan application and by-law complaints. The township granted the appellant with partial access and claimed that the withheld portions of the records qualified for exemption under sections 12 (solicitor-client privileged information) or 14(1)(personal privacy). The appellant appealed the application of the exemptions and questioned the reasonableness of the township's search. The adjudicator finds that disclosure of the personal information relating to other individuals to the appellant would constitute an unjustified invasion of personal privacy under section 14(1). The adjudicator also finds that the exemption under section 12 was properly applied to withhold the information the township claims contains solicitor-client privileged information. However, the township is ordered to conduct to a further search for specific records. The appeal is upheld in part.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.2(1) "definition of personal information", 12, 14(2)(d), 14(3)(b) and 17.

OVERVIEW:

[1] The appellant, on behalf of a community organization, submitted a 4-part request to the Township of Uxbridge (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specified property operating a business, including records relating to a site plan application, annual events occurring at the business and complaints the township received.

[2] The township issued an access decision granting the appellant partial access to the responsive records. The township claims that the withheld information qualifies for exemption under the personal privacy provisions under section 14(1) or contain solicitor-client privilege exemption under section 12. The township provided an Index of Records to the appellant with its access decision.

[3] The appellant appealed the township's decision to this office regarding the application of the exemptions. The appellant also raised questions about the reasonableness of the township's search for responsive records.

[4] During mediation, the township conducted a further search for records and located 9 additional records. The township issued a revised decision letter, granting the appellant partial access to these records, claiming that the exemptions under sections 14(1) and 12 apply. At the end of mediation, the appellant confirmed that he still believed that additional records should exist. The appellant also confirmed that he seeks access to the withheld portion of the records the township claim qualifies for exemption.

[5] The file was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry. During my inquiry, the parties were invited to provide written representations to this office which they did. Though the names and contact information relating to several individuals filing complaints with the township are identified in the records, their views on whether they consent to the disclosure of their information was not canvassed in this appeal.

[6] In this order, I find that the township properly applied the exemptions at sections 12 and 14(1) to withhold portions of the records. I also order the township to conduct a further search for specific records, as I am satisfied that the appellant established a reasonable basis for concluding that certain additional records may exist.

RECORDS:

[7] The records at issue in this appeal are the documents, emails and correspondence identified in the Index of Records the township provided the appellant with its revised decision letter, dated October 7, 2016. The records are described in the chart below:

Record No.	Description of Record	Disclosed?	Exemption?
14.	Emails between the Director of Legislative Services/Clerk, Chief Building Official and Project Engineer. Re: Site Plan, dated May 28, 2015	Partial Release	S. 12
22.	Emails between the Director of Legislative Services/Clerk, Counsel and the appellant.	Partial	S. 12, S. 14

	Re: Bylaw amendment application, baseline site plan application and compliance with O. Reg 140/02, dated July 13-30, 2015	Release	
25.	Emails between the Director of Legislative Services/Clerk, Chief Building Official and Counsel, dated July 31, 2015.	Partial Release	S. 12
26.	Emails between the Director of Legislative Services/Clerk, Counsel and External Municipal Planner, dated July 30-31, 2015 Email from Director of Legislative Services/Clerk and a councillor, dated July 31, 2015	Partial Release	S. 12
28.	Email and attachment from the appellant to Mayor, Council and Staff. Re: Bylaw amendment application, baseline site plan application and compliance with O. Reg 140/02, dated August 10, 2015	Partial Release	S. 14
31.	Draft No. 3 and notes – Site Plan Development Agreement, dated August 31, 2015	Partial Release	S. 12
38.	Emails between the Manager of Municipal Law Enforcement and residents, including the appellant. Re: Noise Measurement and Safety Concern, dated May 12-25, 2015 Email from Manager of Municipal Law Enforcement Re: Noise Measurement and Safety Concern, dated May 25, 2015	Partial Release	S. 14
39.	Formal complaint to the Township By-law Department, dated May 22, 2015	Partial Release	S. 14
55	Agenda, Correspondence and Minutes from the July 14, 2014 Council Meeting. Email from the Director of Legislative Services/Clerk to a councillor, dated June 27, 2014.	Partial Release	S.14
56	Emails between a councillor and residents,	Partial	S.14

	dated May 13, 2015.	Release	
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ISSUES:

- A. Do some of the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 14(1) apply to the personal information at issue?
- C. Does the discretionary exemption at section 12 apply to records 14, 22, 25, 26 and 31?
- D. Did the township properly exercise its discretion in applying section 12 to the records?
- E. Did the township conduct a reasonable search for records?

DISCUSSION:

A. Do some of the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. The township submits that records 22, 28, 38, 39, 55 and 56 contain the personal information of residents.

[9] The appellant’s submissions did not specifically address the issue of whether or not the records contain personal information.

[10] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.¹

[11] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.²

[12] I have reviewed the records and am satisfied that the information, identifying the appellant by his name, professional title and email address contained in records 22, 28

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

and 38 cannot be said to constitute his personal information. In my view, this information does not relate to the appellant in a personal capacity but refers his role as president of the community organization. Accordingly, the personal privacy provisions under the *Act* can not apply to information relating to the appellant contained in the records and I will order the township to disclose this information, contained in records 22, 28 and 38, to the appellant.³

[13] I also find that the remaining information at issue contained in records 38, 39, 55 and 56 contains the personal information of other identifiable individuals as defined in paragraph (d) and (h) of section 2(1).

[14] Records 38, 39, 55 and 56 consist of emails sent to the Ward Councillor and/or Manager of Municipal Law Enforcement from residents raising concerns about the subject property. Also included is a formal complaint form completed by a resident. Record 38 contains documents relating to the concerns raised by the appellant and other residents. The withheld information identifies the names, address, telephone numbers of the complainants. The township already disclosed the nature of the complaints to the appellant. I am satisfied that the remaining withheld information, identifying the names and contact information of the complainants, constitutes the personal information of other identifiable individuals as defined in paragraph (d) and (h) of section 2(1). I will go on to determine whether disclosure of this information to the appellant constitutes an unjustified invasion of personal privacy under section 14(1).

B. Does the mandatory exemption at section 14(1) apply to the personal information at issue?

[15] Under section 14(1), where a record contains personal information of another individual but not the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 14(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy.

[16] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 14(1).

[17] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties. However, if the information fits within any of paragraphs (a) to (e) of section 14(1) or within 14(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 14(1).

[18] If the information fits within any of paragraphs (a) to (h) of section 14(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy. Also, section 14(2) lists various factors that may be relevant in determining

³ Record 38 includes an email the appellant sent to the township. In his email, the appellant identifies another individual and his address. In my view it would be absurd to order the township to withhold the individual's name from the appellant which appears in an email he sent to the township.

whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).⁴

[19] The representations of the parties did not specifically address the issue of whether disclosure of the records to the appellant would constitute an unjustified invasion of personal privacy under sections 14(1). As a result, neither party raised the possible application of any of the factors in section 14(2) or presumptions in section 14(3). They also did not inform me as to whether any of the exceptions in section 14(1) or exclusions in section 14(4) could apply.

[20] I have reviewed the records and am satisfied that none of the exceptions in sections 14(1) or exclusions in section 14(4) apply. However, taking into account that the records address complaints about the business operating from the property, I am satisfied that the presumption under section 14(3) could apply in the circumstances in this appeal. In addition, given the type of personal information at issue it also appears that the factor favouring non-disclosure at section 14(2)(h) could apply.

14(3)(b): investigation into violation of law

[21] Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[22] The presumption can apply to a variety of investigations, including those relating to by-law enforcement.⁵ The presumption only requires that there be an investigation into a possible violation of law.⁶

[23] Having reviewed the records, I am satisfied that the records were compiled and are identifiable as part of an investigation into a possible violation of municipal noise and parking by-laws. Though it appears that one of priorities of the community organization was to object to the subject business' pending application for non-conforming uses, the records demonstrate that several individuals filed complaints with the township about potential noise and parking by-law infractions. These complaints were sent via email to the Ward Councillor or Manager of Municipal Law Enforcement or were made formally by submitting a Formal Complaint Form. In addition, in the portions

⁴ Order P-239.

⁵ Orders MO-2213, PO-1849 and PO-2608.

⁶ Orders P-242 and MO-2235.

of the records disclosed to the appellant it appears that the township responded to some of these complaints by assigning officers to investigate the complaints.

[24] Given the subject matter of the records, I am satisfied that the presumption at section 14(3)(b) applies to records 38, 39, 55 and 56.

14(2)(h): supplied in confidence

[25] Section 14(2)(h) states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(h) the personal information has been supplied by the individual to whom the information relates in confidence

[26] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.⁷

[27] This office has consistently held that there is a reasonable expectation of confidentiality when an individual's personal information is collected while filing a complaint.⁸ Accordingly, I am satisfied that when the individuals in question sent emails or submitted a formal complaint form with the township and/or their Ward councillor to complain about a specified business, they did so with an assurance of confidentiality. In making my decision, I also took into consideration that the township's website advises that council recently implemented a policy that all by-law complaints must be submitted in writing. Its website also assures potential complainants that their names and information collected in processing their complaint is protected under the *Act*.

[28] Accordingly, I find that the factor at section 14(2)(h) weighing in favour of privacy protection is relevant in the circumstances of this appeal.

Summary

[29] I found that the presumption at section 14(3)(b) and factor favouring privacy protection at section 14(2)(h) apply in the circumstances of this appeal. As the appellant has not raised the application of any factors weighing in favour of disclosure, I find that disclosure of the personal information at issue to the appellant would constitute an unjustified invasion of personal privacy under sections 14(1).

[30] Accordingly, I uphold the township's decision to withhold the names, addresses and email addresses of other individuals identified in records 38, 39, 55 and 56 from

⁷ Order PO-1670.

⁸ See for example Orders MO-2859 and MO-3426.

the appellant.

C. Does the discretionary exemption at section 12 apply to records 14, 22, 25, 26 and 31?

[31] The representations of the parties did not specifically address whether records 14, 22, 25, 26 and 31 contain solicitor-client privileged information. In its representations, the township states that the section 12 exemption was “applied correctly”. In response, the appellant states that he anticipates that the records may contain “some comments” from the township’s counsel but that he requires this office to review whether the section 12 exemption was properly applied.

[32] 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.

[33] 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.

Branch 1: common law privilege

[34] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[35] 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.⁹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁰ 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.¹¹ The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹²

[36] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either

⁹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁰ Orders PO-2441, MO-2166 and MO-1925.

¹¹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. CA.).

¹² *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

expressly or by implication.¹³ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁴

[37] I have reviewed the records and am satisfied that the withheld information in records 14, 22, 25, 26 and 31 fall within the ambit of branch 1.

[38] Record 14 is an email exchanged between an external project engineer and the township's Director of Legislative Services/Clerk (clerk). Though the township's counsel was not a recipient of this email, the advice he provided the township's clerk is contained in the withheld portion.

[39] Record 22 contains an email chain between the township's clerk and counsel.

[40] Record 25 is an email chain initially exchanged between the township's counsel and clerk. In the first email, the township seeks legal advice from counsel who responds by email. It appears that counsel's response is forwarded to a Ward councillor and township employees. In one exchange, counsel is not copied but a portion of his email response appears to have been copied and inserted in the body of the email exchanged between employees.

[41] Record 26 is an email from the town's counsel to the township's Director of Legislative Services, Chief Building Official, Manager of By-Law Services and an external municipal planner.

[42] Record 31 is a draft site plan development agreement with staff notations made on its face. The township did not withhold the agreement or notations from the appellant but withheld three pages of handwritten notes and an email from the town's lawyer to the clerk. On my review of this document, I am satisfied that the notes were made by the clerk during discussions or meetings she had with the township's lawyer.

[43] In my view, disclosing the withheld portions Records 22, 25, 26 and 31 would reveal the direct communications between the township's counsel and staff. I am also satisfied that disclosure of the withheld portions of Record 14 and parts of Record 31 would indirectly reveal legal advice obtained by counsel. Accordingly, I am satisfied that the records form part of the "continuum of communications" recognized as falling within the ambit of solicitor-client communications under branch 1, subject to my finding as to whether the privilege has been waived.

Loss of privilege

[44] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and

¹³ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁴ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

- voluntarily demonstrates an intention to waive the privilege.

[45] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.¹⁵

[46] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁶ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁷

[47] Based on my review of the records, it appears that the municipal planner and project engineer in receipt of 2 of the emails I found fall within the ambit of branch 1 do not hold an office or are employed by the township. I wrote to the township and inquired about its working relationship with these individuals. The township responded that the municipal planner and project engineer in receipt of the records 14 and 26 are independent consultants. The township advised that it has retained the individuals on a contractual basis for a number of years.

[48] Having regard to the township's evidence, I am satisfied that the municipal planner and project engineer were hired by the township to provide expertise and represent its interests. Accordingly, I find that there has not been a waiver of solicitor-client privilege in relation to records 14 and 26.

[49] Having regard to the above, I find that the solicitor-client privilege in branch 1 of section 12 applies to records 14, 22, 25, 26 and 31, subject to my finding on the township's exercise of discretion below.

D. Did the township properly exercise its discretion in applying section 12 to the records?

[50] The section 12(1) 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. 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

¹⁵ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁶ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹⁷ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

exercise of discretion based on proper considerations.¹⁸ This office may not, however, substitute its own discretion for that of the institution.¹⁹

[52] The representations of the parties did not specifically address the issue of whether the township properly exercised its discretion in applying section 12 to the withheld portions of records 14, 22, 25, 26 and 31. However, I am satisfied that the manner in which the township severed the records demonstrates that it took into consideration the purposes of the *Act*, including the principle that information should be available to the public. Given the nature of the withheld information and the extent to which it is significant to the township, I am also satisfied that the township took into account relevant considerations such as the purpose of the section 12 exemption. Furthermore, I was not presented with evidence demonstrating that the township exercised its discretion in bad faith or for an improper purpose. In addition, there is no evidence establishing that the township took into account irrelevant considerations.

[53] Accordingly, I find that the city properly exercised its discretion under section 12.

E. Did the township conduct a reasonable search for records?

[54] The appellant submitted the following request:

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 agents or consultants, and the Mayor and Council) in relation to any site plan application for the Subject Lands, from October 29, 2014 to September 8, 2015 [Site plan application records];
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) related to media inquiries, media reports or media outreach regarding [named business], from March 1, 2015 to July 31, 2015 [Media records];
3. 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) related to the 2015 [named business] events on May 16, 17 and 19-24, 2015, from March 1, 2015 to June 15, 2015 [2015 Event records]; and
4. 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) related to the 2014 [named business] events on June 21-22, 24-29, 2014, from April 1, 2014 to July 15, 2014 [2014 event records].

¹⁸ Order MO-1573.

¹⁹ Section 43(2).

Representations of the parties

[55] During mediation, the appellant's lawyer forwarded an 8-page letter detailing reasons why the appellant believed that additional records should exist. The letter submits that the township failed to locate the following types of records:

- Records from the mayor or councillors given their involvement in the subject-matter of the request;
- Records detailing communications with outside agencies, such as Durham Region, the Ministry of Natural Resources and a conservation authority regarding the proposed site plan given the site designations and proposed expansion of the property in question;
- Records relating to the fence extension, including site plan drawings. The appellant takes the position that these types of records should exist given the site designation along with an explanation as to why the fence extension was not indicated in the records provided. The appellant submits that there should be records to demonstrate that site development plans have been amended to include the installation of the fence;
- Records relating to the intended use of the picnic shelter. The appellant refers to an email²⁰ disclosed to him from the township and its planner which indicates that the property owner may seek to close in the picnic shelter and use it for another purpose. The appellant takes the position that additional records should exist documenting the township's discussion of the proposed change;
- Records relating to fuel containment. The appellant submits that records should exist to document the township's decision making process which resulted in it concluding that on-site fuel containment was not necessary, including communications with external agencies. In support of his position, the appellant refers to an email chain exchanged between the town's project engineer and clerk.²¹ I have reviewed the email disclosed to the appellant where the project engineer advises the clerk that it would be advisable to ensure that an existing fueling area is labelled on the site plan. However, a handwritten note indicates that there is no interest and the suggestion is not necessary;
- Records regarding the Bobolink species and need for the species protection. The appellant takes the position that records evaluating or conducting an environment assessment should exist taking into consideration the Ontario Municipal Board's Directive that the Bobolink was in need of protection and that the township was responsible to ensure that an environment assessment occurred;

²⁰ Record 23

²¹ Record 30.

- Records relating to the media article. The appellant submits that additional records should exist, including emails from councillors and a promotional binder the property owner provided to council and the press;
- Records relating to the 2014 and 2015 annual events. The business operating from the specified property hosts an annual event. It appears that after the 2014 event, a petition from residents was presented to council expressing concern over the “escalation of operations” and increasing noise levels. The appellant advises that in response council decided to commission an acoustic noise study for the 2015 event. The appellant submits that the township did not follow up with a study but instead administered the tests themselves using newly acquired technology. The appellant takes the position that records should exist documenting the township’s decision to change its plan to commission a study. In addition, the appellant submits that records should exist which demonstrate that a qualified person or Acoustical/Noise Engineer interpreted the data collected by the township. In support of this position, the appellant refers a letter the township sent to his lawyer.²² The appellant also submits that the township’s search failed to locate email records between another complainant and the township’s Manager of Municipal Law Enforcement.²³ Finally, it appears the appellant takes the position that records generated in response to the sound measurements he sent to the township should exist;
- Records, such as “minutes” of telephone calls or in-person meetings should exist documenting discussions between township staff and councillors. In support of this position, the appellant refers to email records exchanged between staff and councillors which indicate that certain topics, such as the container issue, were to be discussed at a later date; and
- The appellant submits that he was not provided with “all versions” of site plan drawings, including updated or revised versions.

[56] During mediation, the township agreed to conduct a further search for records in the mayor’s and councillor’s record holdings. This further search located 9 additional records.

[57] The township issued a revised decision letter to the appellant providing partial access to the additional records located. In its revised decision, the township states it “...has documentation to prove its searches were exhaustive, and this can be provided, if needed”.

[58] The township’s representations focus on its further search which located 9 additional records. The township’s Deputy Clerk advises that when the township initially

²² The letter from the township’s Manager of Municipal Law Enforcement to the appellant’s lawyer, dated November 16, 2015. The letter appears to respond to the appellant’s submission of raw data to demonstrate increasing noise levels as opposed to any data the township may have collected.

²³ The appellant provided copies of an email chain for the period of May 9, 2015 to September 28, 2015 to his representations. He submits that the township’s search failed to locate these records.

processed the request, it did not contact the mayor or councillor to obtain responsive records as it took the position that their records were not in their custody or control. He advises that the township revised its position on whether it has custody or control of certain records and conducted a further search. In support of the township's position, the Deputy Clerk provided a copy of an email its Freedom of Information office sent to the mayor and 5 councillors to this office. The email states:

Please review [the request] and forward me any records you have regarding the matters. Only e-mails that pertain to the Township matter, and only if they were sent in your capacity as when you were conducting official Township business as Councillors (ie: during a Council meeting, or advising someone of an upcoming Council/Committee decision) need to be sent to me. Only emails within the bolded date periods listed after each item are required. While emails are the focus, please review any other records you may have pertaining to the request.

[59] In response, the appellant asserts that the township failed to conduct a reasonable search for responsive records. In support of his position, the appellant provided two binders containing background materials and a tabbed version of the records disclosed to him. A common theme in the materials submitted by the appellant is his concern about "governance" and "integrity" relating to the town's decision making processes. The appellant also takes the position that the numerous complaints and concerns the township received about the subject-property should have generated additional records than what was located. In particular, the appellant submits that correspondence he or his lawyer sent to the township should have generated records, such as telephone or in-person meeting minutes, which would document that these discussions took place and provide insight in the decisions that were made during these discussions.

Decision and Analysis

[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 17.²⁴ 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.²⁵ To be responsive, a record must be "reasonably related" to the request.²⁶

[62] A reasonable search is one in which an experienced employee knowledgeable in

²⁴ Orders P-85, P-221 and PO-1954-I.

²⁵ Orders P-624 and PO-2559.

²⁶ Order PO-2554.

the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²⁷

[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.²⁸

[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.²⁹

[65] In his submissions, the appellant indicates that the township failed to identify an email exchange between a complainant and the township's Manager of Municipal Law Enforcement for the period from May 9, 2015 to September 28, 2015. In this email exchange, the complainant raises a number of concerns about possible by-law violations at the subject property. As noted above, the appellant submitted a four-part request for records relating to:

- Site plan application records, from October 29, 2014 to September 8, 2015;
- Media records, from March 1, 2015 to July 31, 2015;
- 2015 Event records, from March 1, 2015 to June 15, 2015; and
- 2014 Event records, from April 1, 2014 to July, 2104.

[66] Given the subject-matter of the email, it would appear that some of the emails exchanged between the complainant and the By-Law Manager would be responsive to the portion of the appellant's request for 2015 event records (part 3 of the request). However, some of the more recent emails in the chain would fall outside the scope of the request as they were exchanged after June 15, 2015.

[67] The appellant refers to this email exchange as evidence that the township failed to conduct a reasonable search for responsive records. Though I accept that the appellant has demonstrated that the township's search failed to locate some of the emails relating to this email exchange, this evidence falls short on its own of demonstrating that the township's search for responsive records was unreasonable. The *Act* does not require the township to provide with absolute certainty that further records do not exist. Instead, the township must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

[68] In my view, much of the appellant's evidence is speculative in nature. Throughout his submissions, the appellant questions how the township handled matters related to the subject property. For instance, the appellant raised numerous concerns

²⁷ Orders M-909, PO-2469 and PO-2592.

²⁸ Order MO-2185.

²⁹ Order MO-2246.

about whether the township discharged its responsibilities with respect to the site plan application and questions how it managed the complaints it received. In addition, the appellant takes the position that a greater number of records than what was located should have been generated given his and his lawyer's involvement in the matter. It appears that the appellant takes the position that the township's record keeping practices should include documenting phone calls, meetings and discussions between staff and council members. However, I am not aware of any requirement that such discussions or meetings would have to be documented. Similarly, there would appear to be no requirement that the township's lawyer communicate his legal opinions to the township in writing. In my view the township's failure to locate records documenting such discussions does not establish a reasonable basis for concluding that additional records must exist. Accordingly, I find that the appellant has failed to establish that there is a reasonable basis to conclude that the following additional records exist:

- Records documenting telephone discussions or meetings council members or staff had regarding any site plan adjustments regarding the fence, picnic shelter, storage containers, or fuel containers.
- Records documenting telephone discussions or meetings council members or staff may have had with a reporter;
- Records documenting the township's discussions to not commission an acoustic study but to purchase technology and self-administer the acoustic tests; and
- Records documenting discussions between council members, staff or the township's lawyer relating to correspondence received from the appellant or his lawyer.

[69] Though I am satisfied that the searches were directed and conducted by experienced employees, knowledgeable in the subject matter of the request, the township's submissions did not provide a written summary of all the steps taken in response of the request other than the steps it took in its further search during mediation. Given the absence of contrary evidence, I find that there is a reasonable basis to conclude that the following additional records may exist. As a result, I will order the township to conduct a further search for:

- records detailing communications with external agencies regarding the Bobolink species, fuel containment and the proposed site plan, including any environmental assessments;
- revised and amended site development plans showing any proposed changes to the fence, picnic shelter or storage containers; and
- the promotional binder the property owner provided the township.

[70] Taking into consideration the above, I am also satisfied that the township's failure to locate an email exchange between a complainant and its Manager of

Municipal Law Enforcement warrants a further search. Accordingly, I will order the township to conduct further searches for records responsive to part 3 of the request in the By-Law Manager's record holdings.

ORDER:

1. I order the township to disclose the portions of the records 22, 28 and 38 that I found do not contain the appellant's personal information. For the sake of clarity, in the copy of the records enclosed with the order sent to the township, I have highlighted the portions of the records which **should not** be disclosed to the appellant.
2. I uphold the township's decision to withhold the remaining information at issue contained in records 14, 22, 25, 26, 31, 38, 39, 55 and 56 under sections 14(1) or 12
3. I order the township to conduct a new search for:
 - records detailing communications with external agencies regarding the Bobolink species, fuel containment and the proposed site plan, including any environmental assessments;
 - revised and amended site development plans showing any proposed changes to the fence, picnic shelter or storage containers;
 - the promotional binder the property owner provided the township; and
 - records responsive to part 3 of the request in the By-Law Manager's record holdings.
4. The township is to send representations on the results of its new search that it carries out to locate additional records and to provide me, by **November 24, 2017** an affidavit outlining the following:
 - a. the names and positions of the individuals who conducted the searches;
 - b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and
 - c. the results of the search.
5. The township's representations prepared in compliance with order provision 4 may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's Practice Direction Number 7, which is available on the IPC's website.

The township should indicate whether it consents to the sharing of its representations with the appellant.

6. I order the township to issue an access decision to the appellant regarding access to any additional records located as a result of the search ordered in provision 3, in accordance with the *Act*, treating the date of this order as the date of the request.
7. I order the township to provide me with a copy of its decisions rendered to the appellant in accordance with order provision 7.
8. I remain seized of this appeal in order to deal with any other outstanding issues arising from this interim order.

Original Signed by: _____

Jennifer James
Adjudicator

November 2, 2017 _____