

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3510-I

Appeal MA16-239-2

The Corporation of the Township of South Glengarry

October 25, 2017

Summary: The township received a request for all records sent by a specified solicitor to the township relating to court proceedings involving the appellant, as well as the outcome of court proceedings. The township responded by denying access to records relying on section 12 (solicitor-client privilege). The appellant appealed. At mediation, the township reversed its position regarding section 12, however, the appellant also claimed that the township had not conducted a reasonable search. In this interim order, the adjudicator finds that the township did not provide sufficient evidence that it conducted a reasonable search, and orders it to provide further evidence regarding the scope of the request and the nature of the searches conducted for responsive records.

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

BACKGROUND:

[1] A request was made to the Corporation of the Township of South Glengarry (the township) under the *Municipal Freedom of Information and Protection of Privacy Act*, for the following:

... records, documents and materials sent by solicitor (specified individual) to the township, including legal fees, pertaining to all court proceedings involving (the requester) as well as concerning the outcome of the court proceedings.

[2] In response to the request, the township issued a decision denying access to the requested records in full. The township relied on section 12 (solicitor-client privilege) of the *Act* to withhold the records.

[3] The requester, now the appellant, appealed the decision of the township.

[4] During mediation, the mediator had discussions with the appellant and the township.

[5] Following discussions with the mediator, the township advised that it no longer wished to rely on section 12 of the *Act* to withhold the records, and issued a decision granting access to the records in full.

[6] During discussions with the mediator, the appellant indicated that he believes more records should exist. As a result, the issue of whether the township conducted a reasonable search was added to the appeal as an issue.

[7] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry under the *Act*. During my inquiry, I sought and received representations from the appellant and the township.¹ Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and *Practice Direction 7*.

[8] In this interim order, I find that the township did not provide sufficient evidence that it conducted a reasonable search, and order it to provide further evidence regarding the scope of the request and the nature of the searches conducted for responsive records.

Preliminary Issue

[9] As noted, at the mediation stage of this appeal the township advised that it no longer wished to rely on section 12 of the *Act*, and that issue was therefore removed from the appeal when the file entered the adjudication stage. It is clear from the representations, however, that the township has since indicated that it continues to rely on section 12 for many records, and it takes the position that it has not waived privilege in those records. However, there is some confusion regarding whether these records are responsive to the appellant's request.

[10] The sole issue before me in this appeal is whether the township's search for records was reasonable, and I address this issue, as well as the proper interpretation of the request, below. I will not address any issues regarding access to the records, or whether section 12 may or may not apply to any responsive records in this order.

¹ The township only provided reply representations.

DISCUSSION:

Did the institution conduct a reasonable search for records?

[11] As the appellant claims that additional records exist beyond those identified by the township, I must determine whether the township conducted a reasonable search for records as required by section 17.² If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the township's decision. If I am not satisfied, I may order further searches.

[12] The *Act* does not require the township to prove with absolute certainty that further records do not exist. However, the township must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.³ To be responsive, a record must be "reasonably related" to the request.⁴

[13] 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.⁵

[14] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁶

[15] 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.⁷

[16] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.⁸

Appeal process and Representations:

[17] As noted above, I sent a Notice of Inquiry to the township identifying the facts and issues in this appeal. In the Notice of Inquiry, the township was asked to respond to the following:

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

⁷ Order MO-2246.

⁸ Order MO-2213.

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[18] The township did not provide representations in response to the Notice of Inquiry.

[19] I then invited the appellant to provide representations on the issues. Although much of the appellant's representations comment on the records for which the township is claiming solicitor-client privilege, I have parsed out the parts of the representation that speak to the appellant's belief that further records exist outside of what the township found in its initial search.

[20] In his representations, the appellant states that subsequent to receiving the township's access decision, he contacted the township and met with the deputy treasurer in order to inspect various records, some of which were included in his request and some of which were not.⁹ The appellant states that while he was in attendance, additional records were found,¹⁰ but that these were not provided to him. The appellant takes the position that this provides a reasonable basis to conclude that

⁹ Specifically, the appellant states that he was requesting to inspect 1) "the original records"; 2) "all invoices and related documents within the scope of the appeal"; and 3) an index of personal information banks pursuant to section 34 of the *Act*.

¹⁰ The appellant claims that at least six additional records were identified.

other records exist beyond those identified by the township, and that these additional records could be easily located.

[21] The township was forwarded the appellant's representations and invited to make reply representations which it provided.

[22] On the issue of reasonable search, the township submits that it conducted a reasonable search.

[23] The township identifies the nature of the request and then states:

It was at all relevant times the understanding of [the township] based on the communications with the appellant, that his request was focused on invoices received from the solicitor's office and court information together with communications to and from the appellant. ...

A search of municipal records was carried out and a detailed list of 20 documents was supplied to the appellant together with copies of the documents themselves. The Head's decision to waive solicitor-client privilege related only to those documents listed and supplied which it understood satisfied the request made by the appellant. At no point did the Head understand that the appellant was requesting all communications between legal counsel to the municipality and municipal staff or councillors.

[24] The township also states that included with the material supplied to the appellant was a detailed listing of all correspondence together with dates and times involved in the creation of certain relevant documents. The township notes that a full list of 292 emails was enclosed along with an invoice and similar lists of emails were provided to the appellant along with other accounts and draft accounts received by the township, its staff or councillors.

[25] The township also submits that the appellant's representations focused on solicitor-client issues and not the main issue of reasonable search. The township further notes that it did not provide the appellant with copies of the email communications as it takes the position that solicitor-client privilege applies.

[26] The township provided an affidavit with its reply representations, sworn by its clerk. Besides addressing the waiver of solicitor-client privilege issue, the affidavit confirms two things:

1. The clerk spoke to all staff involved in the search relating to the appellant's request.
2. The total staff hours devoted to the search for records and "detailing" for the appellant was approximately 200 hours (as of swearing the affidavit).

[27] The appellant was sent a copy of the township's reply representations and he provided sur-reply representations. His sur-reply representations focus primarily on challenging the township's ability to claim the solicitor-client privilege for any records. With respect to the search issue, the claims that 200 hours "devoted to search and detailing" does not seem credible, and seems to refer to other activities (ie: making decision on access). The appellant also refers to the affidavit provided by the township noting that it does not refer to any affiant with knowledge of the request making a reasonable search. Although the appellant does not specifically address the township's identified understanding of the scope of the request, the appellant again refers to the additional records that he claims were located when he attended at the township offices.

Analysis and finding:

[28] As set out above, the *Act* does not require the township to prove with absolute certainty that further records do not exist. However, the township must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹¹ In this instance, and for the reasons set out below, I find that the township has not provided sufficient evidence to show that its search was reasonable.

[29] To begin, it is only in its reply representations that the township identifies how it interpreted the request and how it considered whether or not records were responsive to the request. The township did not provide responses to the questions set out in the Notice of Inquiry regarding whether it contacted the requester for additional clarification of the request and/or how it choose to define the scope of the request. This brings into question whether the township's interpretation of the request accords with the appellant's.

[30] The manner in which a request is interpreted, and the scope of the request, are vital in determining whether a reasonable search was conducted. As a result, I will order the township to provide answers to the questions regarding the scope of the request which were put to them in the Notice of Inquiry.

[31] Furthermore, even if the township's interpretation of the request as set out in its representations is correct, I have not been provided with sufficient evidence to satisfy me that the township conducted a reasonable search for responsive records in this appeal. Along with the township's reply representations, it provided an affidavit, sworn by the clerk who appears to have coordinated the search. The township's representations, and affidavit of its clerk, reference the number of hours undertaken "to fulfilling the request." It states that approximately 200 hours of staff time had been expended. The township submits that for a small municipality with an office staff of 13 people, 200 hours constitutes a reasonable search when all of the circumstances of the

¹¹ Orders P-624 and PO-2559.

request are considered. However, the test for a reasonable search is not the number of hours that the institution's staff have spent on the request. In addition, the township gives no indication of the manner in which those 200 hours were expended (between search and preparation of the records).

[32] In addition, in the appellant's representations he indicates that the deputy treasurer located more documents (6 in total) during a search conducted while the appellant was in attendance. As indicated, the appellant's representations were forwarded to the township which was invited to submit reply representations. In its reply, the township does not speak to the issue of these additional records. In this instance, it is necessary for the township to address the appellant's assertion that at least 6 additional responsive records were located after its own search was conducted, since it takes the position that its search was reasonable.

[33] In the circumstances, I find that the township has not provided sufficient evidence that it conducted a reasonable search, and I will order it to provide further evidence regarding the scope of the request and the nature of the searches conducted for responsive records.

[34] As a final note, in its reply representations, the township states that the appellant's representations did not specifically request an order that the township conduct a further search. The township seems to suggest that since the appellant does not refer to an order that it did not complete a reasonable search, he is not looking for that relief. I note that by the end of the mediation, the only issue identified as remaining in dispute was reasonable search. In addition, this was the only issue identified in the Notice of Inquiry. The fact that the appellant does not identify this as relief he is seeking, is not relevant to my analysis. In fact, the appellant provided sufficient information in his representations to address the issue of reasonable search including his belief as to why other records should exist.

ORDER:

1. I order the township to provide a written summary of all steps taken in response to the request. In particular:
 - a. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
 - b. If the institution did not contact the requester to clarify the request, did it:
 - i. choose to respond literally to the request?
 - ii. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the

requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

- c. Provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Include details of any searches carried out to respond to the request.
 - d. Is it possible that such records existed but no longer exist? If so, provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
 - e. Address issues relating to the documents which the appellant alleges were located by the deputy treasurer after the township had conducted its search.
2. I order the township to provide me with an affidavit signed by the person or persons who conduct the actual search. It should be signed and sworn or affirmed before a person authorized to administer oaths or affirmations by the individual(s) who conducts the search(es), by **November 27, 2017**, deposing their search efforts. At a minimum, the affidavit(s) should include information relating to the following:
- a. The names and positions of the individuals who conducted the searches
 - b. [the experience/qualifications...]
 - c. Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search, and
 - d. The results of the search.
3. If the township locates additional records as a result of its further search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
4. I remain seized of this appeal in order to address any outstanding issues.

Original Signed by: _____
Alec Fadel
Adjudicator

October 25, 2017 _____

