

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3587-F

Appeal MA16-239-2

The Corporation of the Township of South Glengarry

April 9, 2018

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. In Order MO-3510-I, the township was ordered to provide a written summary of all steps taken in responding to the request so that the adjudicator could determine if its search was reasonable. In this further order, the adjudicator finds that the township's search was reasonable.

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

OVERVIEW:

[1] The Corporation of the Township of South Glengarry (the township) received a request under the 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] The township relied on section 12 (solicitor-client privilege) of the *Act* to withhold records.

[3] At mediation, the township agreed to waive its reliance on section 12, however, subsequent to the mediation, it advised that it was a mistake to waive the section 12 exemption and indicated that the records would not be disclosed.

[4] At issue in this appeal is the issue of reasonable search which was raised by the appellant in mediation after he indicated a belief that more records should exist.

[5] In Interim Order MO-3510-I, I ordered the township to answer questions relating to its search and to provide affidavits from the person or persons who conducted the actual search.

[6] In compliance with the order, the township provided representations describing its search. After a review of these representations, I invited the township to answer further specific questions about the search. I then sent the material to the appellant. In response, the appellant provided his own representations.

[7] In this order, I find that the township's search was reasonable and dismiss this appeal.

DISCUSSION:

[8] The sole issue in this appeal is whether the township's search for responsive records is reasonable.

[9] In compliance with Interim Order MO-3510-I, the township provided responses to my specific questions as well as two affidavits sworn by the individuals who conducted the searches.

[10] The township's clerk, who conducted the search, provided an affidavit confirming that she organized the search for responsive documents by speaking to all staff involved in the search. She notes that the deputy-treasurer was authorized to act in her absence when the appellant came into the office.

[11] The township notes that when the appellant came into its office to review his assessment for 2017, the deputy-treasurer was instructed to speak with him. The township notes that it was at that time that the deputy-treasurer helped the appellant review cheques issued to the township's solicitor and also the emails that went with each invoice. In support of its representations on search, the township also provided an affidavit from the deputy-treasurer confirming this information.

[12] According to the affidavit of the deputy-treasurer, he searched the software for records of payments to the solicitor and shared this information with the appellant in February 2017. The deputy-treasurer notes that as a result of the search, four cheques were viewed and included the cheque numbers. The deputy-treasurer also set out that two other cheques, though not related to the appellant's questions were also viewed.

[13] The deputy-treasurer confirmed that he searched on behalf of the clerk in the VADIM software for records of payment to the township's solicitor and shared this information with the appellant in February 2017 as well as helping the appellant find his property in the assessment roll book. The deputy-treasurer refers to his qualifications to perform this search noting that his supervisory role in Corporate Services enables him to find this sort of information quite easily.

[14] The township notes that after receiving the request, the appellant had been contacted by email, mail and in person. The township submits that the appellant asked additional questions that were unrelated to the request.

[15] The township submits that no records regarding the appellant's request were destroyed under its retention By-law.

[16] The appellant was provided with a copy of the township's submissions and provided his own representations. The appellant seems to take the position that further records should exist. The appellant acknowledges, in his representations, that the sole issue in this appeal is reasonable search. However, in much of the 8 pages of representations, the appellant speaks to the section 12 exemption and his entitlement to view those redacted records.¹

[17] The appellant points to an earlier affidavit of the township's clerk where it was indicated that township staff expended 200 hours in their search relating to the appellant's request. In the more recent affidavit from the township's clerk, the appellant notes that the clerk indicated that she conducted the searches pertaining to the appellant's request.

[18] The appellant refers to the delay and prejudice noting that the clerk did not answer the questions put to the township in the Notice of Inquiry relating to its search. The appellant questions the clerk's actions at mediation (waiving the solicitor-client privilege) submitting that the clerk did not understand that the waiver related to the very records that were redacted. The appellant therefore questions how familiar and knowledgeable she was about the records. The appellant refers to Commissioner Brian Beamish in Order MO-2697 where he stated that "[a]n important aspect of a reasonable search is that it is conducted by staff who are familiar with, and knowledgeable about, the records."

[19] As noted above, after reviewing the parties' representations, I had additional questions with regard to the township's search and invited it to answer specific questions about its search. Further representations were received from the township which confirmed that the six documents the appellant viewed in the presence of the

¹ As noted in my interim order, the parties resolved the issue of section 12 redactions to the records at mediation, however, since mediation, the township reconsidered its position. The only issue in dispute at adjudication, presently, is reasonable search.

deputy-treasurer were not initially located in the township's search. The clerk who responded to my questions was not the clerk at the time of the original search. The clerk assumes that these six records were not found initially as they were located in the VADIM software program and it was possible that the previous clerk was unaware that these documents existed within the software as it was a program that the clerk did not use on a regular basis. The current clerk confirmed that she discussed the matter with the deputy-treasurer who confirmed that all financial files that were not located in the initial search have now been located through the VADIM software program and were viewed by the appellant.

[20] The appellant was provided with the township's additional representations and chose to make further representations of his own. In his representations, the appellant again asserts entitlement to view certain documents. The appellant's request to access certain records is not an issue within the scope of this appeal.

[21] In his representations, the appellant submits that the new clerk speculates on errors, anomalies and timelines but he suggests that a good faith effort would include a new search, not a defence of admitted problematic efforts. The appellant submits that the current clerk is speculating on the previous clerk's search, however, the appellant submits that no search was done within the 30-day timeline from the initial request and the appellant therefore queries how one can give any weight to the clerk's statements given her misstatement on the timeline. The appellant notes that the previous clerk's searches were months apart citing April 25, July 22 and November 7, 2016. In the relief requested, the appellant notes that he relies on his previous submissions, stating that he accepts the results of the search and requests that access be provided.

[22] The appellant asserts that the new clerk's misstatements and refusal to help or to recognize and correct errors are not in the public interest. He also states that the prior clerk's improper decisions are not in the public interest.

Finding:

[23] As noted in Interim Order MO-3510-I, in appeals involving a claim that further responsive records exist, the issue to be decided is whether the township conducted a reasonable search for records as required by section 17 of the *Act*. If I am satisfied that the township's search for responsive records was reasonable in the circumstances, the township's search will be upheld. If I am not satisfied, I may order that further searches be conducted.

[24] In Interim Order MO-3510-I, I ordered the township to answer a number of questions relating to its search. After receiving its representations, I was of the view that the township did not properly explain the six documents that were found by the deputy-treasurer so I contacted the township with specific questions about those records and the search in general which it, in turn, answered.

[25] I am now satisfied with the township's explanation relating to the six records referenced by the appellant. According to the deputy-treasurer, he assisted the appellant in February 2017, in searching his property on the assessment roll. The search was facilitated from a VADIM search and the records were physically located in the cheque box which were then shown to the appellant. The deputy-treasurer confirmed that four relevant cheques were viewed along with 2 unrelated cheques.

[26] The township's current clerk, who provided the last set of representations, clarified that the six records found by the deputy-treasurer were not initially found in the township's search. She noted that the deputy-treasurer found these records when he searched the VADIM software system. The clerk surmised that the previous clerk must not have looked in the VADIM software system, noting that this was not a program that the clerk utilized on a regular basis which would be the reason why those six documents were not originally located.

[27] Unlike MO-2697, referenced by the appellant, there is no evidence before me that the previous clerk was unfamiliar with the records as the Commissioner pointed out in that appeal. In this instance, the evidence supports that the previous clerk, who conducted the search, had a long history at the township and was quite familiar with the records involved with this search. I am not convinced that the previous clerk is not familiar and knowledgeable about the records because she resiled from her agreement to disclose records that are withheld under section 12 of the *Act*. This is not evidence that a reasonable search was not conducted. Further, it is clear that the deputy-treasurer searched the VADIM software system obtaining the relevant documents from that system. It appears that through inadvertence, the previous clerk initially did not search through the VADIM system herself. However, I am satisfied, based on the evidence, that once the VADIM system was searched, a reasonable search had been conducted.

[28] The appellant suggests that the township acted in bad faith for the following reasons: over a two year period it did not provide evidence of a reasonable search; neither clerk tried to help, ascertain or identify records, people or grounds; neither could find another knowledgeable person at the township who may have information pertaining to the records. The bulk of these submissions, however, do not deal with the issue of reasonable search.

[29] Further, I do not find that the appellant has provided sufficient evidence to show that the township has acted in bad faith in its search for responsive records. The township has now responded to all questions posed to it about its search.

[30] Also, I note that in the appellant's final representation, he states that he accepts the results of the search and asks that access to the records be provided. There is no suggestion that further records should exist.

[31] 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.²

[32] In this appeal, I find that the appellant has not provided a reasonable basis to conclude that further records exist and I, therefore, dismiss this appeal.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ April 9, 2018

² Order MO-2246.