

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-3625-R

Appeal MA16-239-2

Order MO-3587-F

The Corporation of the Township of South Glengarry

June 25, 2018

Summary: Order MO-3587-F arose from a request for records held by the township. The appellant appealed the township's exemption claim and argued that additional responsive records ought to exist. At adjudication, reasonable search was the sole issue in dispute. After an initial inquiry, the adjudicator issued an interim order, ordering the township to answer specific questions about its search. Following the issuance of the interim order, the parties provided further representations and the adjudicator issued Order MO-3587-F finding that the township's search was reasonable and dismissing the appeal.

The appellant requested a reconsideration of Order MO-3587-F. In this reconsideration order, the adjudicator denies the reconsideration request.

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

OVERVIEW:

[1] This order addresses a request by the appellant that I reconsider Order MO-3587-F, in which I found that the township had conducted a reasonable search for records responsive to the appellant's request. The appellant initially submitted a request to the township pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records, documents and materials sent by a specified solicitor

to the township, including legal fees, pertaining to all court proceedings involving the appellant as well as the outcome of the court proceedings.

[2] After identifying responsive records, the township issued a decision relying on section 12 (solicitor-client privilege) of the *Act* to withhold the records in full.

[3] The appellant appealed the township's decision to this office. At mediation, the township agreed to disclose the records and issued a revised decision to that effect (the revised access decision). As discussed below, the township appears to have disclosed some information pursuant to the revised access decision, although it also appears the appellant is not satisfied with that disclosure. In light of the township's revised access decision, the mediator's report listed reasonable search as the only remaining issue for adjudication. The sole issue before me, therefore, was whether the township had conducted a reasonable search for records.

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

[5] 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.

[6] Ultimately, I upheld the township's search for responsive records as reasonable in Order MO-3587-F, and dismissed the appeal.

[7] The appellant now seeks a reconsideration of Order MO-3587-F. He claims that section 18.01(a) of the IPC's *Code of Procedure* applies and there was a fundamental defect in the adjudication process. He also claims that section 18.01(b) applies and that there was some other jurisdictional defect in the order.

[8] In the discussion that follows, I find that the appellant has not established any basis upon which I should reconsider Order MO-3587-F. Accordingly, I deny the appellant's reconsideration request.

DISCUSSION:

[9] As stated in Order MO-3587-F, where a requester claims additional responsive records exist beyond those identified by the institution, the issue to be decided is whether the institution conducted a reasonable search for records as required by section 17 of the *Act*.¹ If, after conducting an inquiry, the adjudicator is satisfied that

¹ Orders P-85, P-221 and PO-1954-I.

the institution carried out a reasonable search in the circumstances, the adjudicator will uphold the institution's search. If the adjudicator is not satisfied, the adjudicator may order further searches.

[10] 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 made a reasonable efforts to identify and locate responsive records.² To be responsive, a record must be reasonably related to the request.³

[11] 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 that are reasonably related to the request.⁴ An adjudicator will order a further search if the institution does not provide sufficient evidence to demonstrate that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[12] Although the requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.⁶

Interim Order

[13] The appellant took issue with the township's search for records responsive to his original request. This was raised with the mediator. During the inquiry the township was invited to submit representations in response to a Notice of Inquiry with specific questions about its search. The township did not provide representations at that stage of the appeal, as requested. After considering the appellant's own representations, I issued Interim Order MO-3510-I, where I ordered the township to answer the specific questions I originally put to it in the Notice of Inquiry.

Final Order

[14] Following the issuance of the interim order, the township provided representations which were provided to the appellant who provided his own representations. After receiving the appellant's representations, the township was invited to provide reply representations, which it did. The appellant was provided with a copy of the township's reply and chose to provide sur-reply representations. Also, as noted, I invited the township to answer specific questions relating to its search and this representation was shared with the appellant who responded with a further set of

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

representations.

[15] After receiving and reviewing the representations of the township, which included two affidavits concerning its search, it appeared that the appellant continued to believe that further responsive records should exist as he continued providing representations on this issue.

[16] In Order MO-3587-F, I reviewed the parties' evidence and upheld the township's search as reasonable. In that order, I found that the township had provided sufficient evidence to show that it had conducted a reasonable search for records as required by section 17 of the *Act*. I also noted that the appellant, in his final representations, stated that he accepts the results of the township's search and provided no suggestion or reasonable basis for me to conclude that further responsive records should exist.

Reconsideration Process

[17] The IPC's reconsideration process is set out in section 18 of the IPC's Code of Procedure. The relevant portions of section 18 read as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

The appellant's reconsideration request

[18] The appellant argues that the adjudication process was flawed. From my review of the appellant's request, it is evident that he takes issue with my order in two respects:

1. Access and Manner of Access

- The decision recognized that records were redacted but the decision to identify records and exemptions was not considered or adjudicated
- I did not set out in detail any records/exceptions and expressly put my mind to them
- I recognized a request for access in the decision without dealing with the right to "examine"
- I erred in my interpretation on the application of section 12 of the *Act*.

2. Reasonable Search finding

- The appellant states that at paragraph 31 of my order, I failed to recognize his undisputed evidence of emails that I referred to earlier in my order
- I erred in my interpretation on the application of section 17 of the *Act*.

[19] The appellant points to a fundamental initial step being “identify records” stating that the township at mediation decided to grant access in full, but did not provide the records. He submits that subsequent to the mediation, the township claimed that it made a mistake and that no records would be disclosed. He submits that I did not adjudicate his request to “examine original.” The appellant also submits that I recognized that records were redacted but I failed to identify records and did not consider the township’s exemptions to these records. He also took issue with my suggestion that he had viewed the records. The appellant suggests that procedural fairness was denied as I did not address the real issues.

[20] The appellant also submits that there is some other jurisdictional defect in the decision. He states that I did not apply any test under the *Act* in a consistent manner and that the order lacks the “justification, transparency and intelligibility,” that is required within the decision making process. The appellant states that when the decision is considered as a whole, it is not possible to say that it falls “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

Analysis and finding

[21] At mediation, the parties discussed the records that the township withheld pursuant to section 12 (solicitor-client privilege) of the *Act*. According to the mediator’s report, it was at mediation that the appellant indicated that he was of the view that further records exist.

[22] As the issue of access to records withheld under section 12 was resolved at mediation when the township issued the revised access decision, the only remaining issue at adjudication was reasonable search and the parties were invited to provide representations on that issue.

[23] The township did not provide representations in the first stage of the inquiry process despite being invited to do so. The appellant’s representations addressed the issue of reasonable search but the appellant also made submissions on the section 12 exemption.

[24] The appellant’s representations were provided to the township who then submitted representations in reply. The township noted that the appellant’s submissions referred to his ability to access records and submitted that this was beyond the scope of the inquiry. The appellant provided further representations in response to the

township's submission. The appellant continued to speak to receiving full access to the records. However, the appellant also referred to the reply by the township suggesting that the township was attempting to raise a new issue in its reply, being solicitor-client privilege, without adequate reasons or particulars.

[25] After issuance of Interim Order MO-3510-I, the township provided the answers to the Notice of Inquiry which it had failed to do prior. This was shared with the appellant who, in turn provided additional representations. In those representations, the appellant acknowledged that reasonable search was the sole issue in this appeal under the heading "The Sole Issue". The bulk of these representations (8 pages) addressed the issue of reasonable search and it appeared that the appellant understood that this was the only issue before me.

[26] Prior to issuing Order MO-3587-F, in reviewing the material, I decided that there were specific questions about the search that I needed the township to clarify. I invited the township to provide answers to specific questions. The township provided further representations which were shared with the appellant. In those representations, the township stated that it was confident that all records, including the records that were found after the initial search, had been viewed by the appellant. The appellant provided further representations after being provided with the township's answers to my specific questions.

[27] In Order MO-3587-F, I found that the township had provided sufficient evidence to show that it had made a reasonable effort to identify and locate responsive records. I also found that the appellant had not provided a reasonable basis to conclude that further records exist.

The appellant's arguments about access and manner of access

[28] Based on the information provided by the appellant in his reconsideration request, it appears he disagrees with my decision as I did not decide on his request to "Examine Originals," and because I did not make a determination on records withheld under the section 12 exemption. However, neither of these issues were before me.

[29] On the issue of access to records withheld under section 12, during the inquiry it appeared that the appellant acknowledged and agreed that this was not an issue in my inquiry. This is evident in his last 2 submissions, as he did not make submissions on this exemption and even objected to the township raising the issue, as noted above.

[30] Also, the issue of whether or not the appellant could examine original records, or the manner of access, was never an issue before me and not one that appeared to be raised at mediation.⁷ In its representations, the township had indicated that the appellant had viewed all of the records but the appellant disputes this assertion in his

⁷ There is no mention of Manner of Access as an issue on the mediator's report.

reconsideration request. However, in the appellant's representation of March 21, 2018, he speaks to the institution's assertion that he viewed all of the records, noting that some of the records that he viewed were redacted. It is apparent from this representation that the appellant wants to view the original records without redactions. Again, this was not an issue before me as the sole issue was whether the township's search was reasonable. Any exemptions claimed and whether or not the appellant had viewed the records were not issues in this appeal.

[31] It appears that the appellant is of the view that the information that was withheld by the township as a result of its revised access decision was, or should have been, at issue in this appeal. In reviewing the township's revised access decision, it is clear that the appellant was informed that he had 30 days to appeal to the IPC. In my view, it was incumbent upon the appellant to file a new appeal with the IPC, if he took the position that the township failed to disclose records pursuant to the revised access decision.

[32] It is clear that the current access issues arose after the mediation in this appeal and therefore no mediation concerning what flowed out of the revised access decision was conducted. Mediation would enable the parties to identify, with the assistance of a mediator, what records were or were not disclosed in order to prepare the file to proceed to adjudication. Mediation, of course, would also assist the parties in settlement of the issue if possible, a benefit to both parties. Instead, the appellant addressed his issues with access to records by way of his first submission of representations in this appeal which had been established as a reasonable search appeal by the mediator and subsequently by myself.

[33] In addition, included with the appellant's first representation⁸, where he spoke of access to records withheld under section 12 of the *Act*, were a number of emails between himself and the township regarding access to documents arising from the revised access decision. It is evident that around the time the appellant was preparing his representations in this appeal, he was continuing to correspond with the township about access to records resulting from its revised access decision. An email dated February 9, 2017 from the township to the appellant notes that information the appellant was requesting on February 7 and 9, 2017 would not be provided and also suggests that the appellant was provided with access to records and that he was now requesting further information. In my view, it was clear that the parties continued to address access issues with one another and if the appellant became dissatisfied with the access provided, he was free to appeal as set out in the revised access decision. To attempt to address his issues regarding access from that decision in the context of this appeal would have been premature and, as mentioned, would not afford the parties the opportunity to address these issues in mediation.

⁸ These representations were dated February 13, 2017 and were received February 14, 2017.

[34] The nature of the appellant's concern in his reconsideration request is not entirely clear. In his reconsideration request, the appellant confirms that the adjudication was for reasonable search, "NOT an adjudication of specific records, and specific exemptions." However, he also notes that there was no adjudication of the request to "examine originals".

[35] Based on the information before me it appears that the appellant takes issue with the disclosure he has received under the revised access decision. As noted, it was open to the appellant to appeal the revised access decision if he was not satisfied with it. Alternatively, if the appellant is still interested in receiving this information there is nothing precluding him from making another request for the records. If the township's position has not changed, the appellant would have another opportunity to resolve the issue in mediation or take the issue to adjudication, if required. In fact, this appears to be exactly what the appellant has done since the township noted in one of its submissions that it has received another FOI request for the same information from the appellant.

[36] In conclusion, as the only issue in this appeal was reasonable search that is the only issue that I dealt with in both Interim Order MO-3510-I and Order MO-3587-F. In my view, it would have been premature to try to adjudicate the access issues as it is apparent that these issues were still unfolding during my inquiry into the reasonable search issue.

Reasonable search finding

[37] In his reconsideration request, the appellant refers to undisputed evidence of emails that accompanied the cheques located by the Deputy-Treasurer's search. He suggests that I failed to consider these emails when I conclude at paragraph 31 of Order MO-3587-F, that the appellant did not provide a reasonable basis for me to conclude that further records may exist. However, since the appellant's position is that there is undisputed evidence of emails which the township confirms were located in the Deputy-Treasurer's search, this is not a relevant consideration to suggest that further records exist which the township has not located.

[38] After reviewing the appellant's reconsideration request, I find that none of the grounds for reconsideration in section 18.01 of the IPC's *Code of Procedure* is established. I find that there was no fundamental defect in this office's adjudication process, per section 18.01(a). In addition, I find that there is no other jurisdictional defect in the order, per section 18.01(b). Therefore, I find that the appellant's reconsideration request does not establish any of the grounds upon which this office may reconsider a decision.

ORDER:

I uphold my finding in Order MO-3587-F.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ June 25, 2018