Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3687-I

Appeal MA16-446-2

Township of Oro-Medonte

November 15, 2018

Summary: A request was made to the Township of Oro-Medonte (the township) for records pertaining to consultation with any Aboriginal group relating to a specified location. The township conducted two separate searches for responsive records. After conducting its initial search, the township issued an access decision, withholding portions of two records on the basis that they were not responsive to the request. At mediation, the appellant indicated that they wished to pursue access to the withheld information and also that they were of the view that further records should exist. In the township's subsequent search, further responsive records were not located. On appeal, the adjudicator finds that the portions of the records that the township indicated were not responsive are in fact responsive and orders the township to issue an access decision in respect of that information. The adjudicator also orders the township to conduct a further search 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.

Orders and Investigation Reports Considered: Order MO-2135-I.

OVERVIEW:

[1] A request was made to the Township of Oro-Medonte (the township) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records pertaining to consultation with any Aboriginal group in respect of a specified location since 2010. The appellant later clarified that they were seeking records from January 2010 onwards and also clarified the actual location of the property.

[2] Prior to issuing its access decision, the township issued a fee estimate and later a fee waiver denial, which the appellant appealed. Appeal MA16-446 was opened and was resolved at the mediation stage of that appeal. Following payment of the fee, the township continued to process the appellant's request.

[3] In its access decision, the township indicated that it had located 116 pages of responsive records and was granting partial access, citing section 12 (solicitor-client privilege) as the basis for withholding part of Record 44 and non-responsive to the request as the basis for withholding parts of Records 4 and 11. It also noted that duplicate records were not copied.

[4] The requester (now the appellant) appealed the township's decision to this office.

[5] During mediation, the appellant contended that additional records exist, thereby raising the issue of the reasonableness of the township's search for records. In support of their contention that additional records exist, they referred to seven records they received from the township which, in their view, suggested that further records should exist (for example, a letter from a specified Aboriginal group to the mayor refers to an earlier meeting).

[6] The township conducted a further search for records and advised that it did not locate additional responsive records. However, the township clarified that two, already provided, records actually addressed two of the appellant's raised concerns.

[7] Subsequent to this second search, the appellant remained of the view that additional records should exist. The appellant also advised the mediator that they wish to pursue access to the information withheld as non-responsive in Records 4 and 11, but do not wish to pursue access to the information withheld under section 12 in Record 44.

[8] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. The parties were invited to submit representations which were shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7.

[9] In this order, I find that the withheld portions of Records 4 and 11 are responsive to the appellant's request and order the township to issue an access decision regarding them. I also find that the township's search was not reasonable and order it to conduct a further search for responsive records.

RECORDS:

[10] The records at issue are Records 4 and 11, the severed information appears in emails. The appellant seeks access to the information in the records that was withheld

as non-responsive to the request.

ISSUES:

A. What records are responsive to the request?

B. Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: What records are responsive to the request?

[11] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
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> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

[13] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

Representations

[14] The township provided representations in this appeal and submits that following receipt of the appellant's request it expeditiously followed up for additional clarification regarding the timeframe of the request and the precise property that was the subject of the request. The township submits that the appellant clarified that their request was for records relating to consultation with any Aboriginal group in respect of a specified location since 2010.

[15] The township submits that immediately upon receiving the clarification from the appellant, it emailed the request to its senior management team which is comprised of the heads of the township's departments. The township noted that when it contacted the senior management team, it included the actual request, the time period for the request, a description of the applicable property, a property location map and the roll numbers for the properties. The township submits that the only department that was able to locate responsive records was its development services department.

[16] The township refers to Order MO-2135-I where it was confirmed that institutions should adopt a liberal interpretation of a request and that ambiguity in a request generally should be resolved in the requester's favour. The township submits that it adopted a liberal interpretation of the appellant's request and states that, for example, it did not limit its search for records relating to any one particular Aboriginal group. It also indicates that it employed a broad interpretation of the request for "consultation records" to include, without being limited to, emails, letters, phone call records, diary entries, memos, reports in which Aboriginal groups were mentioned in reference to the specified location.

[17] The township submits that the records provided to the appellant were reasonably responsive to the request. It refers to Order P-880 where it was stated that "the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request." The township submits that the request for "consultation records with any Aboriginal group in respect of" the specified location is what set the boundaries of relevancy and circumscribes the records which it ultimately identified as being responsive to the request.

[18] The township submits that the portions of records that were retrieved and remain in dispute were redacted and not disclosed to the appellant as they did not reasonably relate to the request because they were not relevant to consultation with Aboriginal groups in respect of the specified location. The township submits that as the redacted portions of the records do not relate to the request, it is not obliged to disclose those portions of the records to the appellant.

[19] The appellant also provided representations in this appeal, after being provided with a copy of the township's representations. The appellant submits that the township may have restricted access to Indigenous consultation records by redacting, and not disclosing, consultation records with other Indigenous groups it deemed did not relate

to the specified location. The appellant submits that other than their own community, there were only two other Indigenous communities that expressed an interest in the specified location which included a specified Indigenous group. The appellant submits that this issue was important to these communities and that it is reasonable to expect that any consultations with them, directly or indirectly, related to the specified location.

[20] The township was forwarded a copy of the appellant's representations and it submitted reply representations. In its reply representations, the township referred to the request noting that it was for "[a]ny and all consultation records with any Aboriginal group in respect of [a specified location] since 2010."

[21] With regard to its duty to consult, the township submits that "consultation" has both legal and non-legal, or conversational meanings. The township refers to the Supreme Court decision in *Haida Nation v. British Columbia (Minister of Forests)*[3] where the Court indicated that certain decisions of the Crown require the Crown to undertake consultation with affected First Nations or Aboriginal groups prior to the Crown rendering a decision. The township submits that it understands that to be the narrower "legal" meaning of consultation. However, in other situations there may be communications or interactions with Aboriginal groups which are not within the narrow legal definition, especially where the parties are not the Crown. The township submits that it interpreted "any and all consultation records" to mean all records regarding interactions among the township and Aboriginal groups during the relevant time and pertaining to the defined subject and time matter of the request. The township submits that as it was unclear whether the appellant intended to restrict the request for records to those meeting the narrower legal definition, the township, in the interest of transparency, determined that all records within the time period regarding the subject matter would be disclosed.

Analysis and finding

[22] The request is for consultation records with any Aboriginal group in respect of a specified location since 2010. As stated, to be considered responsive to the request, records must "reasonably relate" to the request.

[23] In reviewing the representations, I am satisfied that the township contacted the appellant after receiving the request to seek clarification concerning the scope of the request. As set out in the township's representations, in seeking this clarification the appellant indicated that the request was for records relating to consultation with any Aboriginal group in respect of the specified location since 2010.

[24] The withheld portions of Records 4 and 11 are emails and after my review, I find

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[3] [2004] 3 SCR 511.

that these withheld portions are responsive to the request. The withheld information in these records concerns mostly a summary of the information in a letter attached to each email. I note that in each case the attached letter was provided to the appellant. Based on my review of the records and the representations, I find that the withheld information reasonably relates to the subject matter of the appellant's request because the information relates to the consultation process with Aboriginal groups.

[25] As submitted by the township in their initial representations, when it sought clarification about the request from the appellant it was clarified that "the request was for records relating to consultations with any Aboriginal group." From my review of the withheld portions of Records 4 and 11, I find that the information reasonably relates to the request and is not outside the scope of the request.

[26] The township itself referred to Order MO-2135-I where Adjudicator Loukidelis stated that "[i]t is a well-settled principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the Act. Ambiguity in the request should be resolved in the requester's favour." In my view, a liberal interpretation of the appellant's request would include the withheld information at issue in this appeal. As noted in the township's representations, it stated that after receiving clarification from the appellant regarding the request, it employed "a broad interpretation" of the request for consultation records to include but not limited to "emails, letters, phone call records, diary entries, memos, reports, etc. in which Aboriginal groups were mentioned in reference to" the specified location. In my view, the withheld portions of Records 4 and 11 fit into this broad interpretation of the request. Therefore, I do not uphold the township's position that the withheld information is not responsive to the request.

[27] As I have found that the withheld information is responsive to the appellant's request, I will order the township to issue an access decision with respect to the withheld portions of Records 4 and 11.

Issue B: Did the institution conduct a reasonable search for records?

[28] 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.[4] 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.

[29] 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

[4] Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.[5] To be responsive, a record must be "reasonably related" to the request.[6]

[30] 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.[7]

[31] 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.[8]

[32] 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.[9]

[33] 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.[10]

Representations

[34] In its representations, the township relies on an affidavit sworn by the Director, Legislative Services/Clerk of the township (the affidavit of the director) which it submits provides clear evidence that its searches were reasonable in the circumstances. The township submits that the staff who carried out the searches received training with respect to the *Act* and conducted their searches in locations where the records in question might be located.

[35] As stated in the affidavit of the director, the township submits that:

- It sought and received clarification from the appellant regarding the scope of the request.
- Its clerk sent the request to the heads of all of its departments asking that the request be forwarded to the appropriate staff who follow the township's procedures in searching for responsive records.

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[5] Orders P-624 and PO-2559.
[6] Order PO-2554.
[7] Orders M-909, PO-2469 and PO-2592.
[8] Order MO-2185.
[9] Order MO-2246.
[10] Order MO-2213.

- Its staff searched for responsive records including electronic records comprised of documents and emails stored in its server, physical records stored in its physical storage areas as well as other physical records, including logs and reports not specifically stored in its physical storage areas.
- The heads of the departments responded to the clerk with the results of their searches.
- Only the development services department was able to locate responsive records.
- It issued its access decision noting that it had located 116 pages of responsive records and granted partial access.
- It conducted a subsequent search for additional responsive records and determined that none exists.

[36] The township submits that after issuing its access decision, the appellant appealed, contending that additional records exist. The township submits that an email was sent to the director of development services, the township's CAO and the mayor requesting that they carry out further searches for additional records relating to the submissions of the appellant. The township submits that in that email it emphasized that additional records may include, but are not limited to, phone call records, diary entries, memos, reports, etc.. The township submits that based on its explicit instructions, it was clear that all relevant staff understood the appellant's initial and subsequent request.

[37] The township refers to the appellant's suggestion at mediation that further records exist, and submits that the fact that some records refer to meetings taking place or being set up does not in and of itself indicate that there are or should be further records arising from any such meetings.

[38] In the appellant's representations, they refer to the township's duty to consult legal requirement which they submit is recognized by the federal and provincial governments when Indigenous communities' rights and interests are potentially affected by government decisions. The appellant is of the view that given this duty to consult, further responsive records should exist. The appellant submits that federal and provincial guidelines give direction to the public sector and emphasize using a clear and documented process that involves communication to and from the Indigenous communities. Referring to the federal government's guidelines, the appellant submits that the township, at a minimum, should have opened a tracking and issue management table and provided direction to its staff to retain all records related to Indigenous interests.

[39] The appellant submits that the township should have started consultations when it first became aware of the specified property owner's intention to change the use of

the property in late 2014 or at the latest when it received formal notification from the Ontario government that the site has archaeological potential, being June 2015. The appellant submits that archaeological information the township received from the province in November 2014 likely increased the obligation of the township to engage with Indigenous communities which led to the meeting in July 2015 between the township and a specified Aboriginal group, the Simcoe County warden and the Minister of Housing and Municipal Affairs; however, the appellant submits that no records of this meeting were provided.

[40] The appellant submits that it is a reasonable expectation that the township would formally notify Indigenous communities and provide sufficient information for them to determine their interests yet no such records were provided by the township. The appellant also submits that it understands that the township maintains a circulation list which is used to circulate to Indigenous communities when issues arise, yet no records were provided.

[41] The appellant submits that the first indication from the township that records of Indigenous consultations may exist is January 2016. The appellant submits that during the first six months of 2016, the township stated it conducted Indigenous consultations but failed to produce a number of records that were created during that period.

[42] The appellant referred to records that are known to exist that were not provided by the township in response to the access request. The appellant refers to a letter from a specified Aboriginal group sent to the mayor of the township, dated May 30, 2016, which documents the group's position on its rights and interests with respect to the specified location.11 The appellant submits that this letter raised the possibility of human remains on the specified location and asked the mayor to screen soil for any evidence of same. The appellant submits that this letter was not found in the township's search and also no record was provided showing the township's response to the letter. The appellant submits that those records would be key documents in the Indigenous consultation process.

[43] The appellant also refers to correspondence dated March 7, 2016 from a specified Aboriginal group that was recorded as received by the township in its council minutes. The appellant submits that this correspondence was sent in the middle of the period when Indigenous consultations were taking place. The appellant submits that there is evidence of contact before and after the date of the correspondence and they consider these records to be part of the ongoing consultation with the specified Aboriginal group, yet this record was not located in the township's search.

[44] The appellant refers to two letters from legal counsel for the specified location

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[11] The appellant provided a copy of this letter with their representations.

sent to several individuals including the township's legal counsel dated June and July of 2016. The appellant submits that since the township's legal counsel was copied on these letters, it is reasonable to assume that they gave copies to the township. The appellant submits that neither of these letters were found in the township's search.

[45] The appellant suggests that given that records known to exist were not located, it is a reasonable assumption that additional consultation records exist and submits that given the lack of records documenting communications during the first six months of 2016, it is highly likely that additional records exist that were not located or that were destroyed.

[46] The appellant submits that they are aware of a meeting that occurred with the mayor of the township and others in July 2015 which included the Grand Chief of a specified Aboriginal group, yet no records were provided to them pertaining to this meeting.

[47] The appellant submits that the township provided comments about a specified Aboriginal group's archaeologist by posting on its website that the archaeologist "conducted an onsite review of [the specified location] after [a specified event] 2016 event set up was complete." The appellant submits that the 2016 event ran at the end of July so the setup would have been done a few weeks prior meaning the archaeological assessment was likely done in early July. The appellant submits that it is reasonable to assume that the specified Aboriginal group or its archaeologist communicated with the township before the report was complete. The appellant submits that the township posted on its website that "information" from the archaeologist was shared with the township and the appellant submits that it is reasonable to assume that this includes written records from the archaeologist or the specified Aboriginal group. The appellant submits that none of this information was found in the township's search for responsive records.

[48] The appellant submits that in a letter from the Ministry of Municipal Affairs and Housing (MMAH) dated June 9, 2015, the ministry advised the township that two sites of a specified Aboriginal group may be on or near the property that was specified in the request.[12] The appellant submits that this letter was posted on the township website but was not found in the township's searches. In addition, the appellant submits that if the township had not already consulted with Indigenous communities, as required, this letter from MMAH should have prompted them to start the process and the letter would be the first record in the file. The appellant submits that in addition to not providing the MMAH letter, the township has not provided any records of Indigenous consultation from June 9, 2015 through December 31, 2015.

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[12] The appellant provided a copy of this letter with their representations.

[49] The appellant refers to the affidavit of the director which they submit raises the possibility that records were destroyed when he states that "[t]here is a possibility that records may have existed and were deemed to be Transitory Records and destroyed in accordance with the Record Retention By-law." The appellant submits that given the importance of the specified location to the public, the legal requirement to comply with the duty to consult requirements and the township's stated policy that Indigenous consultations are "serious," very few records would be transitory.

[50] The appellant also submits that there is virtual certainty that other records exist from January 1, 2016 to May 31, 2016. They refer to a four month period from February through May 2016 where they submit that the township was actively consulting with a specified Aboriginal group about the archaeology of the specified location. They submit this is evidenced by the meeting with the group on April 19, 2016, and an email from a specified individual of the group dated February 29, 2016 (Record 19).

[51] In the township's reply representations it submits that with regard to the appellant's assertion that additional records exist, it conducted a further search in February, 2017. The township submits that in providing instruction to staff for the subsequent search, the director emphasized that additional records may include, but are not limited to, phone call records, diary entries, memos, reports etc. The township submits that no additional responsive records were located in this further search.

[52] The township submits that the appellant has not provided sufficient evidence to demonstrate that there is a reasonable basis for the belief that additional responsive records should exist. The township submits that the appellant's belief that further records exist, is purely speculative with no evidence provided to substantiate the claim.

[53] With regard to the appellant's assertion that the township possibly destroyed records, the township refers to the affidavit of the director where he refers to "transitory records" and the Records Retention By-law, No. 2013-116 and the *Municipal Act*, 2001, which it submits contains provisions for records retention and the destruction of records. The township submits that it retains and destroys records in accordance with its by-law and that the provisions for the destruction of transitory records are proper and not uncommon in most, if not all, municipal record retention by-laws. The township submits that the appellant's assertion that the township inappropriately destroyed records is wholly without merit and should be disregarded.

[54] With regard to the appellant's suggestion that as a result of the duty to consult further records should exist, the township submits that it has provided submissions regarding the nature of the search undertaken and the records produced as a result as well as the expansive interpretation it took of the request. The township submits that to the extent the appellant participated in any consultations, or is familiar with any third party that participated, the appellant would have actual knowledge of the content of those meetings and conversations and may have its own records or the records of such third parties. However, the township further submits that the existence of such

meetings and conversations does not automatically mean that it has the same or similar records. The township maintains that it carried out an adequate search and provided access to the responsive records that exist.

[55] The appellant was provided with a copy of the township's reply and in turn submitted further representations in sur-reply. The appellant submits that they provided several documents and other indicators as evidence of missing records; however, the township in its reply representations, did not produce the records or provide an explanation as to why these specific records were not found. The appellant submits that the township's continued failure to produce documents that are known to exist (e.g. the letter of May 30, 2016), or where there is a reasonable expectation they exist, indicates that the searches were inadequate or that records were lost or destroyed.

[56] The appellant submits that the township did not address whether it complied with basic documentation standards and guidelines of the federal and provincial governments when conducting consultations with Indigenous communities. The appellant submits that unless the township grossly mismanaged the consultation process, it should have a consultation file and since one has not been produced, the only possibility is that consultation records were withheld or destroyed.

Analysis and finding

[57] 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.13 In this appeal, I have considered the appellant's representations in which they identify reasons why they believe that further responsive records exist. I have also considered the township's initial and reply representations. 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.

[58] In reviewing the representations of the township, it is apparent that in its subsequent search for records, completed in February 2017, township staff were directed to search for records relating to the submissions of the appellant during the IPC mediation. As noted, the appellant raised seven issues during mediation alleging that certain records should exist and the subsequent search found no records. However, I note that the various letters that the appellant submits should exist in their representations provided in adjudication were not part of the seven items raised at mediation.

[59] While I find that the appellant's representations to be speculative in many of the

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[13] Orders P-624 and PO-2559.

instances for which they claim records should exist, they also provided concrete evidence that certain records should exist with the township which the township did not locate after its initial and subsequent searches. As stated, the appellant provided a copy of a letter addressed to the mayor of the township from a specified Aboriginal group dated May 30, 2016. This letter was not identified in the township's search; however, it is a document that is related to the appellant's request and should have been located in its search. Since the appellant provided this document with their initial representations (which were provided to the township), the township had an opportunity to address why this record was not located in its reply representations. In my view, it was incumbent upon them to do so. However, the township did not speak to this record in its reply representations.

[60] The additional instances raised by the appellant of correspondence that should have been identified by the township also are not addressed by the township. This includes the letter from the Ministry of Municipal Affairs and Housing to the township's director of development services dated June 9, 2015. In addition, the appellant refers to a letter dated March 7, 2016 sent to the township by a specified Aboriginal group and referred to in the township's counsel minutes that likely would be responsive to the request but was not located in the township's search or addressed in its reply representations. Finally, the appellant submits that letters forwarded to the township's legal counsel should be amongst the records located by the township. With each instance, the township was provided with an opportunity to address why these records were not located in its search but, it failed to do so.

[61] The township refers to its records retention by-law which allows for the destruction of transitory records. The director's affidavit sets out relevant parts of the by-law including the meaning of "transitory records" as "records kept solely for convenience of and of limited value in documenting the planning or implementation of Township policy or programs." In reviewing the letters referred to by the appellant, and detailed above, I find that these would not be considered "transitory records" for the purpose of the by-law.

[62] As stated, the issue before me is whether the township's search for responsive records was reasonable and my inquiry does not include whether or not the township followed or implemented a consultation process that was in keeping with provincial or federal guidelines and/or recommendations. However, the appellant's submissions on the township's duty to consult is suggestive that records may exist that would document an ongoing consultation.

[63] Finally, given my finding on the scope of the request, there may be other responsive records which the township determined were not responsive when it reviewed the responsive records. Given the narrowed scope of the township's search, I find that it is reasonable that additional responsive information may exist.

[64] Accordingly, I find that the appellant has raised a reasonable basis to conclude that the township has not conducted a reasonable search for records responsive to their

request. As a result, I will order the township to conduct a further search for responsive records and to provide the details to this office regarding the results of said search.

ORDER:

1. I order the township to conduct further searches for records responsive to the appellant's request relating to this appeal. I order the township to provide me with an affidavit sworn by the individual who conducts the search(es) within 21 days from the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:

    a. information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities

    b. the identity/ies of individual(s) conducting the search and their titles

    c. the locations searched

    d. the results of the search

    e. if as a result of the further search(es) it appears that no further responsive records exist, a reasonable explanation for why such records would not exist.

2. 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.

3. The township shall issue an access decision with regard to the withheld portions of Records 4 and 11 in accordance with the provisions 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 deal with any outstanding issues arising from items 1 and 2 of this order.

Original Signed by: November 15, 2018

Alec Fadel
Adjudicator