

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-3810-F

Appeal MA16-446-2

Township of Oro-Medonte

July 31, 2019

**Summary:** The Township of Oro-Medonte (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records pertaining to consultation with an Aboriginal group relating to a specified location. The township conducted two separate searches for responsive records. At mediation, the appellant indicated that they were of the view that further records should exist and the township conducted a further search where further responsive records were not located. The appellant continued to be of the view that further responsive records should exist. In Interim Order MO-3687-I, the adjudicator ordered the township to conduct a further search for responsive records. The township conducted this search locating 211 pages of responsive records. The appellant continues to be of the view that further responsive records should exist and the township's search was not reasonable. In this final order, the adjudicator finds that the township's further search is reasonable and dismisses the appeal.

**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:** Orders M-813, MO-3471.

**Cases Considered:** *St. Elizabeth Home Society v. Hamilton (City)*, (2005), 148 A.W.C.S. (3d) 497 (Ont. Sup. Ct.).

### BACKGROUND:

[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] In its initial 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 would not be provided.

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

[4] 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, the appellant 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).

[5] 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.

[6] 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 not responsive in Records 4 and 11, but do not wish to pursue access to the information withheld under section 12 in Record 44.

[7] In Interim Order MO-3687-I, I found that the withheld portions of Records 4 and 11 were responsive to the appellant's request and ordered the township to issue an access decision regarding them. I also found that the township's search was not reasonable and ordered it to conduct a further search for responsive records.

[8] The township conducted a further search and provided an access decision to the appellant wherein it indicated that it located 211 pages of responsive records and subject to claimed exemptions, was granting access to them.

[9] The appellant provided further representations indicating that they continued to be of the view that further records should exist. The parties provided representations setting out their position with regard to the township's searches which were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[10] In this order, I uphold the township's search as reasonable and dismiss the appeal.

## **DISCUSSION:**

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

[12] As noted in Interim Order MO-3687-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.

[13] In this order, I have considered the appellant's representations in which they identify what they regard as evidence to show that further responsive records exist. I have also considered the township's representations in response. For the following reasons, I am now satisfied that the township's search was reasonable.

[14] While an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. On my review of the appellant's representations, I note that all of their representations focus on a belief that records should exist. While the appellant does not have to identify precisely which records the township has not located, they must provide a reasonable basis for concluding that such records exist. I find that the appellant's suggestion that further records exist is not supported by evidence which would convince me that there is a reasonable basis for concluding that additional records should exist. Also, I find that the township, in its representations, has provided adequate explanations to rebut the appellant's suggestion that further records exist.

[15] As noted, following the issuance of Interim Order MO-3687-I, the township conducted a further search and provided an access decision to the appellant indicating that it had located 211 pages of responsive records. The township provided an index of the records it located along with an affidavit sworn by the clerk who coordinated the search. The township also waived its fees relating to the production of these records.

[16] The appellant provided representations on this subsequent search and continues to be of the view that further responsive records should exist. In their representations, the appellant refers to the scope of the township's search and submits that the following is evidence that the township's search was not reasonable:

- Elected officials who are members of the Heritage Committee may have responsive records
- Responsive records may reside on personal email accounts of elected officials (specifically the deputy mayor)

- Responsive records may exist for consultations with the Metis Nation Ontario (MNO)
- There may be additional responsive records from/to the proponent's planner and/or property owner and/or the property owner's legal counsel
- Additional responsive records authored by the township's legal counsel may exist
- That a site assessment should have been located
- That the search raises questions with regard to whether responsive records may have been destroyed.

[17] In addition, in their subsequent representations, the appellant questions the experience of the clerk who conducted the search.

[18] I will deal with each of these submissions separately.

### **Experience of the clerk who conducted the search**

[19] In its representations, the township submits the following:

- Its clerk, who is also the designated head under the *Act*, conducted the subsequent search for responsive records
- The head engaged eight members of township staff to ensure that all responsive records were captured
- The township staff who carried out the search have received training with respect to the *Act*
- Township staff conducted an exhaustive search of township staff emails, physical files, digital/server files and notebooks
- A total of 211 pages of responsive records were located in this further search.

[20] The appellant questions the experience and knowledge of the employee conducting the search. They submit that the clerk was hired in 2018 and has no direct knowledge of Indigenous consultations that may have occurred during the period of the request. They submit that the clerk cannot speak from experience about the processes and procedures used by the township prior to the start of her employment, since she was not an employee during the period of the request. The appellant submits that they accept that the clerk has sufficient experience with requests under the *Act*, while she does not have direct knowledge about the subject matter of the request. They submit

that any knowledge obtained was after the fact, in part, from enquiry of staff and/or elected officials.

### ***Finding***

[21] I am satisfied that the search was conducted by experienced employees who expended a reasonable effort to locate records related to the request. I note the clerk's affidavit where she states that she engaged members of township staff to search in various areas including the CAO, chief financial officer/treasurer, director of developmental services, operations & community services, corporate services and fire & emergency services/fire chief, the manager of human resources, health & safety as well as the records management clerk. Although the appellant submits that the clerk was hired in 2018 and had no direct knowledge of Indigenous consultations that may have occurred during the period of the request, in my view, as the coordinator of the search direct knowledge about the subject matter of the request is not mandatory. The clerk actually employed members of township staff to conduct searches in various areas of the township's records and I am satisfied that the search was conducted by experienced employees who expended a reasonable effort to locate records relating to the request.

### **Elected officials who are members of the Heritage Committee may have responsive records/Responsive records may reside on personal email accounts of elected officials (specifically the deputy mayor)**

[22] The appellant submits that the township restricted the scope of its search resulting in responsive records not being found. They submit that the township should have included the current and past elected officials who are members of the Heritage Committee. The appellant submits that the township created a Heritage Committee on February 13, 2013 and one of its specific purposes is to "act as an advisory board to Council" on heritage issues. The appellant submits that it is reasonable to expect that the committee engaged in consultations with Indigenous communities and advised council accordingly.

[23] The appellant also submits that responsive records may reside on personal email accounts of elected officials. The appellant refers to a public meeting regarding the County of Simcoe Archaeological Management Plan where the deputy mayor signed a sign-in sheet using his personal email address. The appellant submits that the County of Simcoe sent an email to those who attended the public meeting, emailing the deputy mayor using the email address he provided. The appellant submits that the deputy mayor was using his personal email account for township business since 2015 and it is possible he has done so since 2015. The appellant submits that the deputy mayor, as chair of the Heritage Committee, is a key person in Indigenous consultations and responsive records may reside on his personal email account.

[24] The township submits that the Heritage Committee members' function is governed by the *Ontario Heritage Act* and the members provide advice and guidance to

township council from documents members receive and review in their official capacity as committee members. The township submits that the committee members are only provided with documents as listed in official agendas which are publicly available. The township also submits that any consultations with Indigenous communities or groups are conducted by its staff and are reported to committee members via official agendas; the committee members do not consult independently of township staff.

[25] The township submits that given the nature and duties of the heritage committee members, it is not reasonable to suggest that they would possess any further records other than those set out in official agendas.

[26] With regard to the appellant's assertion that the township should search the personal email account of its deputy mayor, the township submits that its deputy mayor attended a public meeting held by the County of Simcoe and provided his personal email address when signing into the meeting. The township submits that as the sign-in sheet demonstrates, the deputy mayor attended said meeting in his personal capacity as a private citizen, as such he provided his personal email address. The township submits that the appellant has not provided any evidence to substantiate the claim that the deputy mayor conducted township business through his personal email.

[27] In their reply, the appellant continues to submit that a reasonable search would include searching the personal email account of the deputy mayor, the chair of the Heritage Committee. The appellant submits that the chair's personal email account is not new and it is reasonable to assume the chair used his personal email account throughout the period of their request and, as the most senior person on the Heritage Committee, and a member of council, that he used his personal email account for Heritage Committee issues including Indigenous consultations.

[28] The appellant submits that I should consider the following when determining if the chair's personal email account may contain institutional (i.e. township) records relating to this matter:

- The *Ontario Heritage Act* authorized the township to create a Heritage Committee by way of a by-law.
- The township passed a by-law creating the committee.
- The chair is the most senior person on the committee and a member of Council.
- The chair presided over the committee during the period of their request.
- Indigenous consultations are an important issue for the Heritage Committee given the many registered and unregistered archaeological sites in the township.

- The sign-in sheet, and email from the County, are evidence that the Chair used his personal email account to communicate information about heritage issues.
- The township found few Indigenous consultation records from the searches and additional records may reside on the Chair's personal email account.

### ***Finding***

[29] In my view, the appellant has not provided a reasonable basis to suggest that further responsive records would be located if the township included a search of the emails of the current, and past, elected officials who are members of the Heritage Committee. I accept the township's submission that these committee members provide advice and guidance to township council and do not consult independently of township staff. Further, as submitted by the township, its Heritage Committee is provided with documents as listed in official agendas. The appellant submits that it is reasonable to expect that members of this committee engaged in consultation with Indigenous communities and advised council accordingly; however, in my view, they have failed to provide a reasonable basis to conclude that such records exist.

[30] I now turn to the personal email accounts of the councillors who sit on the Heritage Committee and the deputy mayor who chairs the committee. For the same reasons stated above, I am not satisfied that searching these email accounts would yield responsive records. Given this finding, I do not need to address the issue of whether the township would have custody or control of such emails, if they existed.

[31] In the circumstances of this appeal, I am also not convinced by the appellant's representations that the fact that the deputy mayor signed into a public meeting regarding the County of Simcoe Archaeological Management Plan using his personal email address, and received email as a result, is evidence that the deputy mayor's personal emails are within the custody and control of the township. There is no evidence before me that the deputy mayor was acting in any decision-making capacity on behalf of the township, or that he had any more authority than that ordinarily associated with his duties as an elected official. In my view, there is insufficient evidence for me to conclude that the deputy mayor used his personal email address for township business.

### **Responsive records may exist for consultations with the Metis Nation Ontario (MNO)**

[32] The appellant submits that responsive records may exist for consultation with Metis Nation Ontario (MNO). The appellant refers to one responsive record that they submit shows that the township consulted with a Metis person who may be the current, or past, president of the MNO Georgian Bay Metis Council. The appellant submits that while it does not appear that the specified person attended a meeting, there may be

consultations that occurred previously. The appellant submits that any consultations with this individual or any other representative of the MNO are Indigenous consultations.

[33] The appellant refers to an Ontario Municipal Board (OMB) decision of February 18, 2016 and submits that one MNO consultation meeting was contemporaneous with the decision. The appellant submits that another consultation occurred near the date of the meeting as shown on Records C03. The appellant submits that more meetings may have occurred between the two dates or subsequent to the meeting date on the Record C03.

[34] The township submits that all responsive records relating to Indigenous consultations were examined, which would have included any records with respect to consultations with MNO. The township submits that the appellant has not provided a reasonable basis to conclude that further record may exist and that this allegation is wholly speculative.

### ***Finding***

[35] In my view, the appellant has not provided a reasonable basis to suggest that further responsive records should be located with regard to MNO consultations. After examining the OMB decision referenced by the appellant, it is clear that it is a pre-hearing decision concerning an application under the *Planning Act* dealing with the alleged failure or neglect of the township with regard to zoning by-law to permit a temporary use by-law. One of the items dealt within the decision was a confirmation that "to be recognized as a member of a Metis First Nation in Ontario, a person or group should be eligible for membership in the Metis Council of Ontario." The appellant submits that the township did not locate records about how the chair arrived at his understanding and since it was a formal hearing, it is reasonable to expect that it was in the form of a written consultation record. However, in my view, the appellant's submissions are speculative. The township conducted its subsequent search and located one record relating to MNO consultations. The appellant's suggestion does not provide a basis to order the township to conduct a further search. Further, the appellant suggests that it appears that a specified Metis person was not at the meeting reflected in Record C03 and therefore consultations occurred previously. However, I also find this suggestion to be speculative. There is no indication in the record that the specified Metis person was not at the meeting and in any event the township conducted its further search and provided the records that it located. The appellant's submission, in my view, is not sufficient to order the township to conduct a further search.

**There may be additional responsive records from/to the proponent's planner and/or property owner and/or the property owner's legal counsel**

[36] The appellant refers to an email dated 2016-11-11, from the township to the proponent's planner which indicates that the township was requesting that the planner contact the Huron-Wendat Nation "directly to determine the nature, scope and timing of



the further recommended archaeological assessments they have referred to.” The email also stated that “[i]t would be appreciated if the Township can be kept informed of any further updates on this matter.”

[37] The appellant submits that the responsive records provided did not include any records from the planner of the property owner and one responsive record was from the proponent’s legal counsel. The appellant submits that Indigenous consultations occurred throughout the period of their request, and given the township’s directive to the planner, it is reasonable to assume there are responsive records from the planner or the property owner provided to the township.

[38] The township submits that the appellant merely cites correspondence from the township to the proponent’s planner asking to be kept appraised of any further developments. The township submits that merely pointing to correspondence asking to be kept undated does not provide sufficient evidence to demonstrate that there is a reasonable basis for their belief that additional responsive records should exist.

### ***Finding***

[39] The appellant points to correspondence from the township to the proponent’s planner asking to be kept apprised of further developments as evidence that further records from the proponent’s planner or the property owner should exist. However, I agree with the township that correspondence asking to be kept updated does not provide sufficient evidence to demonstrate a reasonable basis that additional records should exist. In my view, the township searched its record holdings, located a responsive record and provided it to the appellant, subject to claimed exemptions. The appellant has not provided a reasonable basis to conclude that further responsive records.

### **Additional responsive records authored by township’s legal counsel may exist**

[40] The appellant submits that additional responsive records authored by the township’s external legal counsel may exist. The appellant submits that Record B05 was authored by the township’s legal counsel and although the township claims the exemption at section 8(1) for this record, it was identified as responsive to the appellant’s request. The appellant submits that the township did not ask legal counsel to search their files. The appellant also submits that it does not appear that the township searched its own legal files and no explanation was given for why this search was not done.

[41] The township submits that the appellant’s submission regarding searching the township’s legal counsel’s files has no merit. It submits that it conducted a thorough search of all relevant records and advised the appellant of responsive records that existed; in particular, it identified records authored by legal counsel. The township also submits that it cannot conduct a search of its external legal counsel’s records, as such records are not within its power, possession or control.

### ***Finding***

[42] The appellant submits that additional responsive records that were authored by the township's legal counsel should exist but the township did not ask its legal counsel to search their files. As the township pointed out, it searched its record holdings for responsive records and found one record that was authored by its legal counsel. I agree with the township that a reasonable search would not include a search of its external legal counsel's records, as such records are not within its custody or control.

[43] The appellant has also not provided a reasonable basis for me to conclude that the township would locate further records from its legal counsel if it completed another search of its own record holdings.

### **That a site assessment should have been located**

[44] The appellant submits that the township did not locate the on-site assessment from the archaeologist. The appellant submits that the township publicly stated that an archaeologist conducted an on-site review and forwarded his assessment to it. The on-site assessment was confirmed in Record A13. The appellant submits that it is not plausible that there are no written records of the archaeological assessment.

[45] With regard to a site assessment, the township submits that it does not have in its control and custody the independent archaeologist assessment as conducted in conjunction with the Huron Wendat First Nation. The township submits the following with respect to processes relating to archaeological assessments:

- That it receives notice from the Ministry of Tourism, Culture and Sport with respect to archaeological information regarding the clearance or identification of archaeological sites. The notice received from the Ministry of Tourism, Culture and Sport regarding archaeological significant sites does not necessarily include background or document-specific information.
- Record A13 is in the custody and control of the township as its mayor was a copied party on the correspondence and this record references a third party archaeologist assessment in consultation with the Huron Wendat First Nation.
- Documentation, including any archaeological assessments from third parties, is not the property of the township. The township does receive archaeological assessments as part of a planning application.

### ***Finding***

[46] The appellant submits that Record A13 confirms that there was an archeological assessment yet a site assessment was not identified in the township's search. However,

I accept the township's submission that Record A13 is in its custody and control as the mayor was a copied party on that correspondence. As noted by the township, this record references a third party archaeological assessment in consultation with the Huron Wendat First Nation. The township submits that it receives notices from the Ministry of Tourism, Culture and Sport with respect to archaeological information regarding clearance or identification of archaeological sites but that notification does not necessarily include background or document-specific information. The township also submitted that it does not receive archaeological assessments as part of a planning application. In my view, the appellant has not provided sufficient evidence to suggest that further responsive records may exist.

[47] I also note that in the appellant's representations made before the issuance of Interim Order MO-3687-I, the appellant noted that the township had referenced the site assessment on its website. The appellant refers to the wording of that public announcement as supporting the view that information from the site assessment was "shared" with the township. In my view, it does not necessarily mean that the site assessment was provided to the township but that information was conveyed. I am not convinced that a further search would result in locating the site assessment given the township's representations and the fact that one was not located in the township's search though it was well aware of the appellant's submission that such a record should exist.

### **Destruction of Records**

[48] The appellant submits that the township continues to say that transitory records may have been destroyed but has not provided a list of destroyed records or the dates of destruction. The appellant submits that records relating to Indigenous consultations are vital records and should not be destroyed. The township sets out in its affidavit that there is a possibility that records may have existed and deemed to be transitory records and may have been destroyed in accordance with the Records Retention By-law. However, in my view, in the circumstances of this appeal, there is no evidence of destruction of records pertaining to the appellant's request.

### **ORDER:**

The appeal is dismissed.

Original signed by \_\_\_\_\_

Alec Fadel  
Adjudicator

July 31, 2019 \_\_\_\_\_