

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3819-I

Appeal MA18-252

Township of Scugog

August 16, 2019

Summary: The township of Scugog (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specified complaint, and the decision to engage an Integrity Commissioner to investigate the complaint. In response, the township issued an access decision, which the requester appealed. Through mediation, the issues were clarified and further disclosure was made. The township withheld two records in full on the basis of the labour relations/employment exclusions under sections 52(3)2 (negotiations) and 52(3)3 (meetings) of the *Act*. The appellant added invoices to his request, and the township partially disclosed them to him, and relied on the exemptions at sections 8(1)(d) (confidential source), 14(1) (personal privacy), and 12 (solicitor-client privilege) of the *Act* to withhold portions of the invoices. The issues of reasonable search (under section 17) and the public interest override (at section 16) were also added to the scope of the appeal. During adjudication, the issue of the possible application of the confidentiality provision at section 223.5(3) of the *Municipal Act, 2001* was added to the scope of the appeal, and the "personal information" in the invoices was removed from the scope of the request.

In this order, the adjudicator finds that neither of the exclusions claimed apply to the records for which they were claimed, and she orders the township to issue an access decision without resorting to a labour relations/employment exclusion. The adjudicator also finds that the confidentiality provision at section 223.5(3) of the *Municipal Act, 2001* does not apply to the invoices, and that none of the exemptions claimed apply to the invoices either. In addition, she does not uphold the reasonableness of the township's search, and orders a further search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 2.1, 8(1), 12, 17, 42, 52(3)2, and 52(3)3; *Municipal Act, 2001*, SO 2001, c25, as amended, sections 223.5(1) and (3).

Orders Considered: Orders P-532, P-568, P-1409, P-1485, PO-2225, PO-2472, PO-2518, PO-2520, PO-2524, PO-2607, PO-2614, PO-2626, PO-2952, MO-1682, MO-1964, MO-1994, MO-2344, MO-2975-I, MO-3215, MO-3541, and R-980015.

OVERVIEW:

[1] In a specified year, and many months apart, the Township of Scugog (the township) received complaints against certain township councillors. After each complaint was made, the township hired an Integrity Commissioner to investigate the complaint. For ease of reference, I will refer to the complaints as Complaint 1 and Complaint 2 in this order.

[2] The township received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA, or the *Act*) for records relating to Complaint 2:

Please provide all documents and records relating to the receipt of a Code of Conduct complaint against [named councillor] and [named councillor] in October of [year], the decision to engage an Integrity Commissioner to investigate this complaint, and the evaluation, selection and awarding of a contract to [named individual] to act as Integrity Commissioner for the Township of Scugog, including Requests for Proposals, Requests for Tenders, Requests for Quotations or other Calls for Bids, and all Tenders, Quotations or Proposals, contracts, emails, telephone records, faxes, minutes, letter, memoranda, and reports to council.

[3] In response, the township issued an access and fee decision, advising the appellant that he would receive partial access to Records 1-4, and that a third party (an affected party) had to be notified¹ about Record 5. The township's decision included an index of records indicating that:

- Record 1 (a township Code of Conduct complaint re: Complaint 2) would be partially withheld under the mandatory personal privacy exemption at section 14(1) of the *Act*;
- Record 2 (an e-mail exchange about the appointment of a specified individual as Integrity Commissioner for Complaint 2) would be partially withheld under specified exemptions (this record was later disclosed in full);
- Record 3 (a specified Request for Quotation (RFQ) for Professional Services for an Integrity Commissioner) would be disclosed in full;

¹ According to section 21 of the *Act*.

- Record 4 (Evaluation of Proposals corresponding to the same RFQ number as in Record 3) would be withheld under the exclusions at sections 52(3)2 and 52(3)3 of the *Act*; and
- Record 5 (RFQ response of a specified person) is a record that the township was required to notify a third party about before issuing an access decision.

[4] The requester (now the appellant) appealed the town's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office). Although the township had advised the affected party of his appeal rights, the affected party did not file an appeal of the township's decision to disclose some information.

[5] The township subsequently issued a revised decision with respect to Record 5, to withhold it in full on the basis of the exclusions at sections 52(3)2 and 52(3)3 of the *Act*.

[6] Mediation led to several developments:

- the full disclosure of Record 2;
- the claiming of the exclusions listed in sections 52(3)2 and 52(3)3 of the *Act* for Records 4 and 5;
- the appellant's additional request for the invoices issued by the Integrity Commissioner to the township (Records 6-9), and two access decisions being issued in relation to them, granting partial access to the information, and withholding portions of the records on the basis of the exemptions at sections 8(1) (law enforcement), 12 (solicitor- client privilege) and 14(1) (personal privacy) of the *Act*;
- the addition of reasonable search as an issue; and
- the addition of the public interest override (under section 16 of the *Act*) as an issue.

[7] Since no further mediation was possible, this appeal moved to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[8] I began the inquiry by issuing a Notice of Inquiry, setting out the facts and issues on appeal, to the township and an affected party. The affected party did not initially provide representations, but later added the issue of the applicability of the confidentiality provisions in the *Municipal Act, 2001*² to the scope of the appeal. The

² SO 2001, c25, as amended.

township declined to provide representations.³ I then sought and received written representations from the appellant on the issues in the Notice of Inquiry. The township's reply and the affected party's representations were shared with the appellant. During this process, the appellant removed "personal information" from the scope of the appeal in relation to Records 6-9, stating that he is not seeking access to "identifying information" in those records. The township and the appellant also exchanged additional representations, and the affected party did not provide anything further.

[9] For the reasons that follow, I do not uphold the township's access decision, or the reasonableness of its search. I order the township to disclose certain information in the invoices, and to issue an access decision for other information. Given my findings, it is not necessary to discuss the public interest override at this time⁴ or the township's exercise of discretion.

RECORDS:

[10] Three records responsive to the request were disclosed in full, and are not at issue in this appeal. Due to their relationship to records that are at issue, for clarity, I will describe them below using information that has already been disclosed to the appellant:

- Record 1 – Code of conduct complaint (re: Complaint 2);
- Record 2 – An e-mail exchange appointing a specified person as Integrity Commissioner (re: Complaint 2); and
- Record 3 – [Specified number] Request for Quotation (RFQ, or RFP) for Professional Services of an Integrity Commissioner (for Complaint 1).

[11] There are six records at issue in this appeal, which I describe below using information that has already been disclosed to the appellant:

³ The township declined to provide representations despite being given an additional opportunity to do so, and its obligations to participate in the inquiry as an institution under the *Act*. The township indicated to staff from this office that it maintains its position from mediation, despite being advised that the adjudicator does not have access to anything that is subject to mediation privilege.

⁴ This was argued by the parties in the context of Records 4 and 5, over which the township claimed exclusions. Since I have found that the exclusions do not apply and will be ordering the township to issue an access decision, it is not necessary to discuss the public interest override section 16 at this time.

- Record 4 – Evaluation of proposals submitted in response to RFQ,⁵ withheld in full under the employment and labour relations exclusions [sections 52(3)2 and 52(3)3];
- Record 5 – the proposal of a named candidate for Integrity Commissioner in respect of the RFQ for Complaint 1,⁶ withheld in full under the employment and labour relations exclusion [section 52(3)2 and 52(3)3]; and
- Records 6, 7, 8, and 9 – invoices of the Integrity Commissioner to the township, in relation to Complaint 2. These records have been partially disclosed. Some information has been withheld on the basis of the discretionary exemptions at sections 8(1) (law enforcement) and 12 (solicitor-client privilege), and the mandatory exemption at section 14(1) (personal privacy). The application of the confidentiality provision in section 223.5(1) of the *Municipal Act, 2001* has also been raised for these records.

ISSUES:

Preliminary issue: Are Records 4 and 5 responsive to the request?

- A. Does section 52(3)2 and/or 52(3)3 exclude Records 4 and 5 from the *Act*?
- B. Does the duty of confidentiality relating to an Integrity Commissioner in section 223.5(1) of the *Municipal Act* apply to Records 6, 7, 8, and 9?
- C. Do Records 6, 7, 8, and 9 contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the discretionary exemption at section 8(1) apply to Records 6, 7, 8, and 9?
- E. Does the discretionary exemption at section 12 apply to Records 6, 7, 8, and 9?
- F. Did the township conduct a reasonable search for records?

⁵ It is evident that this was in respect of Complaint 1, given the RFQ number identified in the index of records provided to the appellant.

⁶ It is evident that this was in respect of Complaint 1, given the township’s shared representations regarding Record 5 and Record 2.

DISCUSSION:

Preliminary issue: Are Records 4 and 5 responsive to the request?

[12] From the exchange of representations between the parties, it appears that a clarification is needed as to why Records 3, 4, and 5 (created in the wake of Complaint 1, made in February of a specified year)⁷ are responsive to the request for records related to Complaint 2 (made in October of the same year). In his representations on the issue of reasonable search, the appellant raises concerns about a “disconnect” between Record 3 and Records 4 and 5 (although he maintains that Records 4 and 5 are “certainly relevant” to his request). Therefore, I will explain why Records 3, 4, and 5 are indeed responsive to the appellant’s request. That is not to dismiss the appellant’s concerns about the reasonableness of the township’s search, which I will discuss later in this order.

[13] To understand the connections between Records 4 and 5 and the request, it is necessary to look at Records 2 and 3, which the township fully disclosed to the appellant.

[14] Record 2 is an e-mail exchange between the township and the person chosen to be the Integrity Commissioner to investigate Complaint 2. It is clear from Record 2 that the same person was hired to be the Integrity Commissioner in response to Complaints 1 and 2.

[15] While the township has not clearly explained how the bidding process for the two complaints unfolded, it is clear that there was some relationship between the engagement of the Integrity Commissioner for each complaint. The township evidently felt that Records 3, 4, and 5 were reasonably related to the request. Based on my review of the records disclosed to the appellant and those remaining at issue, I agree. Therefore, I find that the township was correct to identify Records 3, 4, and 5 as reasonably related to the appellant’s request. Again, this is not to dismiss the appellant’s concerns about the reasonableness of the township’s search.

Issue A: Does section 52(3)2 and/or section 52(3)3 exclude Records 4 and 5 from the *Act*?

[16] The township has withheld Records 4 and 5 in full on the basis that the exclusions at sections 52(3)2 and 52(3)3 of the *Act* apply to them. For the reasons that follow, I find that they do not.

⁷ As noted above, this is evident through the township’s shared representations and/or index of records.

General Principles

[17] Sections 52(3)2 and 52(3)3 say:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[18] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) apply, the records are excluded from the scope of the *Act*.

[19] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 2 or 3 of section 52(3), it must be reasonable to conclude that there is "some connection" between them.⁸

[20] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.⁹

[21] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.¹⁰

[22] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.¹¹

⁸ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

⁹ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

¹⁰ Order PO-2157.

¹¹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

[23] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.¹²

[24] I will examine each of the exclusions claimed in turn, beginning with the one at section 52(3)3.

Section 52(3)3: Meetings, etc. about labour relations or employment related matters in which the institution has an interest

[25] For section 52(3)3 to apply, the township must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment- related matters in which the institution has an interest.

Parts 1 and 2: collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications

[26] The township submits, and I find, that the township prepared, maintained, and used Record 4. Therefore, Record 4 meets Part 1 of the test.

[27] I also accept the township's submission that this preparation, maintenance or usage was in relation to a meeting to evaluate the proposals submitted for the position of Integrity Commissioner, and used in determining the successful candidate. Therefore, Record 4 also meets Part 2 of the test.

[28] The township submits, and I accept, that Record 5, as a response to the RFQ for an Integrity Commissioner, was collected, maintained, and used by the township. Therefore, Record 5 meets Part 1 of the test.

[29] I also accept that this collection, maintenance and use by the township was in relation to meetings, consultations, and communications by the township with the Integrity Commissioner appointed. Therefore, I find that Record 5 also meets Part 2 of the test.

¹² *Ministry of Correctional Services*, cited above.

Part 3: labour relations or employment-related matters in which the institution has an interest

[30] The township submits that Records 4 and 5 are records “related to labour relations and employment matters as [they are] in regard to a job competition,” for the “position of Integrity Commissioner.” As I will explain below, I find insufficient evidence to accept this position, and instead, find that the records relate to the selection of an independent contractor. Accordingly, neither record meets part 3 of the test.

[31] In order for a record to meet part 3 of the test for section 52(3)3, there must be labour relations or employment-related matters to speak of.

[32] While the IPC has found that the phrase “labour relations or employment-related matters” applies in the context of a job competition,¹³ it has done so in cases involving competitions for *employment* positions.

[33] Beyond its assertion that the records relate to a “job,” I find insufficient evidence that the appointment of an Integrity Commissioner to investigate a specific complaint meant that the Integrity Commissioner was an employee of the township. The authority to appoint an Integrity Commissioner comes from the *Municipal Act, 2001*,¹⁴ and the township’s Code of Conduct (to which it referred me) substantially repeats much of the language in that statute. However, I find that this is not evidence that this relationship has the “trappings” of an employment relationship¹⁵ (such as the possibility of disciplinary action, a performance review system, and/or being on a payroll). There is no evidence before me that any of these elements existed in the relationship between the township and the Integrity Commissioner. Nor is there any reference in Records 4 and 5 to indicate that the successful candidate would be a township employee.¹⁶ The fact that the township paid the Integrity Commissioner for his work¹⁷ does not elevate, or transform, the relationship to one of employer-employee.

[34] Rather, Records 4 and 5 clearly refer to a specific call for proposals put out by the township (Record 3). I find that this is tendering process consistent with the “hiring,” not of an employee, but an independent contractor. The township evaluated the proposals (as reflected in the title of description of Record 4 by the township), and one of those bids was the winning proposal (Record 5). It is helpful to note that the phrase “in which the institution has an interest” means more than a “mere curiosity or concern”, and refers to, as the Ontario Court of Appeal says, “matters involving the

¹³ Orders M-830 and PO-2123.

¹⁴ *Supra*.

¹⁵ Order PO-2952, a case involving a quasi-judicial independent decision maker.

¹⁶ A factor considered in Order PO-2520.

¹⁷ As evidenced by the invoices at issue in this appeal (Records 6-9), showing the township being billed by the hour, which is itself inconsistent with an employer-employee relationship.

institution's own workforce.¹⁸ There is no evidence before me that the Integrity Commissioner chosen through Records 3, 4, and 5 was a member of the township's "own workforce." Without an employment relationship, Records 4 and 5 cannot qualify as "employment-related" under section 52(3)3 (or section 52(3)2, as discussed later).

[35] Furthermore, there is no evidence that there was a "labour relations" or analogous relationship between the Integrity Commissioner and the township, similar to those found by the Ontario Court of Appeal in a case of involving other non-employees who billed the government (physicians).¹⁹ There is no evidence before me that the township and the Integrity Commissioner (or a representative of the Integrity Commissioner) had an ongoing collective bargaining relationship regarding working conditions, benefits, and other compensation, for example. Therefore, I do not accept that Records 4 and 5 could qualify as one of "labour relations" for the purposes of the exclusions in the *Act* either.

[36] In conclusion, Records 4 and 5 do not meet Part 3 of the test for section 52(3)3 because there was no employment relationship or labour relations (or analogous) relationship to speak of. The position of Integrity Commissioner was one of independent contractor. Since all three parts of the test must be met for section 52(3)3 to apply and Part 3 is not met, section 52(3)3 does not apply. It is, therefore, unnecessary to address whether exceptions to it in section 52(4) could apply.

Section 52(3)2: negotiations or anticipated negotiations re: labour relations or the employment of a person by the institution

[37] For section 52(3)2 to apply, the township must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations *relating to labour relations or to the employment of a person by the institution* (emphasis added); and
3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.²⁰

¹⁸ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹⁹ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

²⁰ Orders M-861 and PO-1648.

Part 1: collected, prepared, maintained or used

[38] The township submits, and I accept, that Record 4 was prepared, maintained and used by the township in coming to its decision about the appointment of an Integrity Commissioner. Therefore, Record 4 meets Part 1 of the test.

[39] Likewise, the township submits, and I accept, that Record 5 (as an RFQ proposal) was collected, maintained, and used by the township. Therefore, Record 5 meets Part 1 of the test.

Part 2: negotiations relating to labour relations or employment

[40] The collection, preparation, maintenance, or use referred to in Part 1 had to be in relation to negotiations (or anticipated negotiations) relating to labour relations or to the employment of a person by the institution. This presupposes the existence of a relationship (or anticipated relationship) of employment or labour relations.

[41] However, in the discussion about section 52(3)3, I found that there was no such employment or labour relations (or analogous) relationship (or anticipated relationship) between the township and the Integrity Commissioner. It was one of institution and independent contractor. Therefore, it is not necessary to discuss whether there is sufficient evidence that Records 4 and 5 were in fact related to negotiations or anticipated negotiations – since any such negotiations were not related to labour relations or the employment of a person.

[42] Because all three parts of the test for the exclusion at section 52(3)2 must be met for the exclusion to apply and Part 2 is not met, it is not necessary to examine whether Part 3 applies, and I find that the exclusion at section 52(3)2 does not apply to Records 4 and 5.

[43] Since neither of the exclusions claimed apply because the Integrity Commissioner was an independent contractor (not an employee) and had no labour relations or analogous relationship with the township, I will be ordering the township to issue an access decision relating to Records 4 and 5, without resorting to section 52(3) of the *Act*.

Issue B: Does the duty of confidentiality relating to an Integrity Commissioner in section 223.5(1) of the *Municipal Act, 2001* apply to Records 6, 7, 8, and 9?

[44] For the reasons that follow, I find that the confidentiality provision in section 223.5(1) of the *Municipal Act, 2001* does not apply to Records 6, 7, 8, and 9.

[45] Part V.1 of the *Municipal Act, 2001* (a part of the statute entitled "Accountability and Transparency") allows for the appointment of accountability officers, including an Integrity Commissioner.²¹

[46] Part V.1 contains a confidentiality provision that prevails over *MFIPPA* as a result of certain provisions of the *Municipal Act, 2001* and section 53(1) of *MFIPPA*:

- Section 223.5(1) of the *Municipal Act, 2001* is the confidentiality provision relating to an Integrity Commissioner. It says:

The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

- Section 53(1) of *MFIPPA* states that *MFIPPA* "prevails over a confidentiality provision in any other *Act* unless the other *Act* or this *Act* specifically provides otherwise."
- The *Municipal Act, 2001* contains such a specific provision, at section 223.5(3): the confidentiality provision at section 223.5(1) of the *Municipal Act, 2001* prevails over *MFIPPA*.

[47] This office has not treated section 53(1) of *MFIPPA* as a jurisdiction-limiting provision, but rather as a direction that *MFIPPA* is not the controlling statute for protecting the confidentiality of information that falls within the scope of the confidentiality provision in another statute.²² I must determine, therefore, whether the information at issue in Records 6-9 is captured by the wording of section 223.5(1) of the *Municipal Act, 2001*.

[48] Examining the confidentiality provision more closely, it is noteworthy that it relates to "all matters that come to [the Integrity Commissioner's] knowledge in the course of his or her duties under [Part V.1]." The Integrity Commissioner's duties include matters relating to the application of municipal codes of conduct.²³ He or she may "exercise such powers and duties as assigned" by the municipality in performing their duties,²⁴ and conduct inquiries into whether a municipal councillor has contravened a code of conduct.²⁵

²¹ Section 223.3 of the *Municipal Act, 2001*.

²² See, for example, Orders MO-2975-I and MO-3541.

²³ Section 223.3(1), *Ibid.*

²⁴ Section 223.3(2), *Ibid.*

²⁵ Section 223.4(1), *Ibid.*

Significant disclosure already made

[49] Here, Records 6-9 are invoices submitted by the Integrity Commissioner to the township for his services as Integrity Commissioner. The township has already disclosed a significant portion of Records 6-9 to the appellant, including the final dollar amounts charged and the names of the councillors against whom Complaint 2 was made. The township has withheld snippets of information on certain pages, and fully withheld the detailed breakdown of the charges.

The parties' positions

[50] The affected party argues that the Integrity Commissioner is to preserve secrecy with respect to "all matters that come to [the Integrity Commissioner's] knowledge in the course of his duties," and that "this protection should extend to any accounts" which the Integrity Commissioner submits to the township. He argues that these "accounts . . . may reveal discussions that [the Integrity Commissioner has] had with witnesses which should remain confidential." These arguments were shared with the other parties in this appeal.

[51] In response to the affected party's representations, the appellant clarified that he seeks only information that may help him to "understand and quantify the time and cost involved in conducting the investigation, without breaching the confidentiality of any discussions that formed part of the investigation." His representations also make it clear that he is not seeking personally identifying information or topics of conversation.

[52] Although I offered the affected party an opportunity to respond to the appellant's representations, he did not do so.

[53] Initially, the town did not claim that the confidentiality provision applied to these records in its reply to the appellant's representations. It only took that position after the affected party provided representations to this office. The township now argues that the confidentiality provision in the *Municipal Act, 2001* applies to "all matters" that are "known, collected or created for the purpose of this section of the *Municipal Act*," and that, therefore, the information withheld in Records 6-9 cannot be disclosed.

Analysis

[54] In my view, the township's position is inconsistent with the significant portions of Records 6-9 that it has already disclosed. The township simply asserts that "what is not and has not remained confidential is the total cost" of the Integrity Commissioner's services. However, it does not explain why the information disclosed about total costs (or any other information disclosed in these records) does not fall under the words "all matters" in the confidentiality provision. Therefore, I find the township's argument unpersuasive on this point.

[55] I also do not accept the township's characterization of the scope of records

caught by the confidentiality provision in the *Municipal Act, 2001*. The township refers to "all matters...if they are known, collected or created for the purpose of" the confidentiality provision. However, this is not what the confidentiality provision says, and the township's representations cast a wider net than the confidentiality provision itself. The wording in the *Municipal Act, 2001* is "all matters that *come to [the Integrity Commissioner's] knowledge in the course of his or her duties under this Part*" [emphasis added]. Given this difference in scope between the wording of the statute and the township's arguments, I am unpersuaded to accept the township's position about the reach of the confidentiality provision to these records.

[56] In addition, I find that neither the affected party nor the township identified what "matters" came to the knowledge of the Integrity Commissioner in the course of his duties under the *Municipal Act, 2001* that would be revealed by disclosing the breakdown of costs and activities in Records 6-9. In this appeal, this is problematic in light of the appellant specifically removing identifying names and topics of conversation from the scope of the appeal.

[57] Having reviewed Records 6-9 in full, I find that the information at issue is general in nature. It would not reveal what the confidentiality provision covers, namely "all matters that [came] to [the Integrity Commissioner's] knowledge in the course of his or her duties under [Part V.1 of the *Municipal Act, 2001*]." It would not "reveal discussions" with witnesses, as argued by the affected party, for example. What the information at issue reveals is that on certain dates, and for certain periods of time and at corresponding costs, the Integrity Commissioner engaged in activities that might be expected in fulfilling his role (such as having telephone conversations or working on a report). I find that the fact that these activities were engaged in is not a "matter" that "[came] to [the Integrity Commissioner's] knowledge in the course of his or her duties" under the *Municipal Act, 2001*, and that, therefore, the confidentiality provision does not apply to these records.

[58] Since I have found that the confidentiality provision at section 223.5(1) of the *Municipal Act, 2001* does not apply to Records 6-9 after information that is no longer within the scope of the appeal is withheld, *MFIPPA* is the controlling statute for determining access to these records. Therefore, I will now consider the township's claims about the application of the exemptions at sections 8(1), 12, and 14(1) of *MFIPPA* to Records 6-9.

Issue C: Do Records 6, 7, 8, and 9 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[59] For the reasons that follow, given the appellant's removal of personal information from the scope of his request, the remaining information at issue in Records 6-9 does not contain "personal information" as defined under section 2(1) of the *Act*.

[60] The term "personal information" in section 2(1) of the *Act* means "recorded information about an identifiable individual." To qualify as personal information, it must

be reasonable to expect that an individual may be identified if the information is disclosed.²⁶ Section 2(1) also lists examples of “personal information” (such as name,²⁷ address,²⁸ and personal views or opinions²⁹), but the listed examples are not exhaustive. Therefore, information that does not fall under the listed examples may still qualify as personal information.³⁰

[61] In Records 6-9, the names of some individuals clearly appear in a business, professional, or official capacity, and for other individuals it is unclear what capacity their names appear. It is undisputed that Records 6-9 do not contain the personal information of the appellant.

[62] To qualify as personal information, the information must be about the individual in a personal capacity.

[63] Section 2.1 of the *Act* also relates to the definition of “personal information” under the *Act*:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[64] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.³¹ Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³²

[65] Based on my review of Records 6-9, I find that the name (and initials), title, and contact information belonging to the Integrity Commissioner and his staff, and another Integrity Commissioner consulted, is not “personal information” under section 2.1 of the *Act*. I find that there is nothing “about” these individuals in their personal capacities that has been withheld in Records 6-9.

[66] Whether or not Records 6-9 contain personal information about other individuals named in these records is less straightforward.

²⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

²⁷ Paragraph (h) of the definition of “personal information” at section 2(1) of the *Act*.

²⁸ *Ibid*, paragraph (d).

²⁹ *Ibid*, paragraphs (e) and (g).

³⁰ Order 11.

³¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³² Orders P-1409, R-980015, PO-2225 and MO-2344.

[67] The appellant has removed "information that might identify individuals in their personal capacities" or "any details of the identity of individuals or the nature of the information shared" from the scope of the appeal.

[68] Nevertheless, I find that all the names appearing in the records (other than those of the Integrity Commissioner, his staff, and another Integrity Commissioner) constitute "personal information" under the *Act*. The IPC has held that where individuals have been interviewed as witnesses³³ or where an employee's conduct has been called into question and investigated, that information constitutes personal information.³⁴ Adopting this approach to records generated because of an investigation into a complaint against two township councillors, I find that the names of individuals in Records 6-9 (even if appearing in a professional capacity) qualify as the personal information of those individuals. In the particular circumstances before me, I find that revealing their involvement in the investigation of Complaint 2 could reveal something of a personal nature "about" these individuals. I also find that if the location of an interview (in Record 6) is disclosed, it may identify individuals connected to this investigation, so I find that this location information is personal information under the introductory wording of the definition of that term in section 2(1).

[69] With the names in Records 6-9 and the location in Record 6 removed from the scope of the appeal, I find that the remaining break-down of time to perform tasks and associated costs is not "personal information" as defined under the *Act*. It would not reveal something of a "personal" nature about either of the two councillors investigated, or any other identifiable individual. As a result, this remaining information is within the scope of the appeal, and further, cannot be exempt from disclosure under the personal privacy exemption at section 14(1) because only "personal information" can be withheld under section 14(1).

Issue D: Does the discretionary exemption at section 8(1) (law enforcement) apply to the information at issue in Records 6, 7, 8, and 9?

[70] For the reasons that follow, I find that the township has not established that a law enforcement exemption under section 8(1) applies to information at issue in Records 6-9.

[71] Under section 42 of the *Act*, if an institution refuses access to a record (or part of a record), the institution has the burden of proof to show that the record (or part of the record) withheld falls within one of the specified exemptions in the *Act*.

[72] It is not enough for an institution to take the position that the harms under

³³ See, for example, Orders P-1485, MO-1682, MO-1964 and MO-3215.

³⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

section 8 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.³⁵ The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³⁶

[73] The township submitted, and I find, the investigation in question qualifies under the definition of "law enforcement."³⁷

[74] The township did not cite which part of section 8(1)³⁸ it was claiming.

[75] However, it argues that disclosure of Records 6-9 could disclose the identity of a confidential source of information, and that disclosure would deter people from participating in investigations in the future, due to an expectation of privacy. The township's argument about revealing a confidential source uses language found in section 8(1)(d), which says:

A head may refuse to disclose a record if the disclosure could reasonably be expected to, [. . .] disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source[.]

[76] The township did not provide supporting evidence of its position that disclosure could reasonably be expected to result in the consequences noted above. I note that the identities of the witnesses have been removed from the scope of the appeal. Accordingly, I find that the town has not met its burden to establish that Records 6-9 are exempt under any law enforcement exemption.

Issue E: Does the discretionary exemption at section 12 (solicitor-client privilege) apply to Records 6, 7, 8, and 9?

[77] As discussed below, I find that the township did not establish that section 12 applies to Records 6-9.

[78] Section 12 says:

³⁵ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

³⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

³⁷ Orders M-16 and MO-1245.

³⁸ Section 8(1) simply says, "A head may refuse to disclose a record if the disclosure could reasonably be expected to". Therefore, to claim a law enforcement exemption, an institution should cite one or more of paragraphs 8(1) (a) to (l).

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[79] Section 12 contains two branches: Branch 1 ("subject to solicitor-client privilege") is based on the common law, and Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege.

[80] As mentioned, section 42 of the *Act* requires an institution claiming an exemption over a record (or part of a record) to show that the exemption applies to the record (or part of a record) over which the exemption is claimed. When claiming section 12, the institution must establish that one or both branches of section 12 apply.

[81] Both branches of the discretionary exemption at section 12 presuppose the existence of a solicitor-client relationship. The protection of that relationship is the underlying purpose of the exemption.

[82] Here, the township asserted that section 12 applies, but did not provide representations in support of its position.

[83] From my own review of the records and the surrounding circumstances, I do not accept that section 12 applies to Records 6-9 because I find no evidence that the township and the Integrity Commissioner had a solicitor-client relationship. Records 6-9 are invoices from the Integrity Commissioner to the township for his services as an Integrity Commissioner. The fact that the invoices were generated by the law firm at which the Integrity Commissioner worked (as a lawyer) does not transform the relationship between the Integrity Commissioner and the township into one of solicitor-client.

[84] Since I have found that neither of the discretionary exemptions claimed (under sections 8(1)(d) and 12) apply to Records 6-9, it is unnecessary to address the township's exercise of discretion in applying these exemptions.

[85] Given my findings that the records are not exempt from disclosure, I will be ordering the remaining information at issue in Records 6-9 disclosed to the appellant.³⁹

Issue F: Did the township conduct a reasonable search?

[86] As set out below, there is insufficient evidence that the township conducted a

³⁹ Due to the disclosure to be ordered, it is also unnecessary to consider the possible application of the public interest override, which was raised at mediation (though only addressed in the parties' representations about Records 4 and 5).

reasonable search as required by section 17 of the *Act*, and I will order a further search.

General principles

[87] When an appellant 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 17.⁴⁰ 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.

[88] 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.⁴¹

[89] 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 show that it has made a reasonable effort to identify and locate responsive records.⁴² To be responsive, a record must be "reasonably related" to the request.⁴³

[90] 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.⁴⁴

[91] 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.⁴⁵

No evidence from the township, initially

[92] The township did not initially provide evidence about its search efforts in response to the questions posed in the first Notice of Inquiry that I sent it at the outset of the inquiry.

The appellant's initial evidence

[93] In response to the Notice of Inquiry issued to him, the appellant explained the basis of his belief that further responsive records exist.

⁴⁰ Orders P-85, P-221 and PO-1954-I.

⁴¹ Order MO-2246.

⁴² Orders P-624 and PO-2559.

⁴³ Order PO-2554.

⁴⁴ Orders M-909, PO-2469 and PO-2592.

⁴⁵ Order MO-2185.

[94] He argues that Record 2 (an e-mail exchange, which was disclosed to him) appears to refer to a telephone conversation, but no telephone records were provided, though he had specifically requested them.

[95] Regarding Records 4 and 5, he argues that presumably a contract would exist to engage the Integrity Commissioner at an eventual cost of over \$25,000, but no contract or evaluation of a request for proposal was identified by the township as responsive to his request.

[96] The appellant also submits that it is difficult to accept that over a period of more than four months, the Integrity Commissioner did not provide any updates or reports to Council, and was not in communication with the township regarding the progress of his investigation, or its terms.

The township's evidence in reply

[97] In response, the township's Director of Corporate Services/Clerk (the clerk) provided representations about the township's search for responsive records.

[98] The clerk explains that he is the Freedom of Information and Privacy Coordinator, and that he was assisted by the Legislative Services Associate for Corporate Services.

[99] He describes the subject matter of the request as a "past 'hot topic'" in the township. He describes the request as "clear and very specific, included a time frame and a list of the type of records sought, and provided sufficient detail to enable identification of the requested records."

[100] The clerk also explains that he identified township personnel to approach about a search on the basis of their understanding of the subject matter of the request, and the likelihood that they would have responsive records when considering their responsibilities. These were: the mayor, the chief administrative officer and his assistant, the manager of human resources, and the clerk himself (assisted by his own executive assistant).

[101] The staff approached to conduct a search were quoted the request "verbatim."

[102] The clerk also contacted the previous clerk, who had been involved at the time of the matter to identify the location of any responsive records and to address any search gaps. In addition, the search also "involved" the former Integrity Commissioner, whom the township was required to notify of the request as a third party who might have an interest in disclosure. No further details were provided about the township's contacts, if any, with either of these two individuals.

[103] The clerk submits that no records related to the request would have been destroyed, given the relative currency of the issue and its (unspecified) retention policy.

[104] The “methods of search” were listed as: electronic files; keyword search of computer databases; information banks of staff; confidential files of chief administrative officer and mayor; searching emails; physical search in office cabinets for paper files and records, and in notebooks for any handwritten notes; examining file indices and listings of records; and examining contents of files to identify records that meet search criteria.

[105] In addition, the clerk explains that the “*main file* most relevant to the search” was under the care and control of his department, and that he was “easily able to identify and locate” it [emphasis added]. He submits that the \$33.40 fee assessed to process the request, which includes a total of one hour time spent on manual searching and preparation of records, shows how easy it was to identify and locate the file.

[106] Furthermore, the clerk states that “[o]ther searches were performed immediately upon receipt of the request and responses received by the set timeline for response of [a specified date].” No further details were provided about these searches.

[107] The clerk states that as a result of the search, Records 1-5 were located.

[108] Finally, the clerk notes that during mediation, a further request was made for invoices submitted by the Integrity Commissioner (Records 6-9), and that these records have been partially released to the appellant.

[109] Based on the above, the township submits that it has clearly identified that an appropriate search for records was conducted.

The appellant’s sur-reply evidence

[110] In response to the township’s representations, the appellant states that the township’s (above-noted) representations about its search is the first time that the township has indicated that more than one proposal was received for the position of Integrity Commissioner. He argues that this should have been made clear earlier in the process, and that the other responses to the RFQ should have been identified as responsive records, even if they were not released to him.

[111] Under a section about Records 4 and 5, the appellant argues that Complaint 1 and Complaint 2 are unrelated, that Record 3 was the RFQ for Complaint 1, and that any proposals received by the township in response to that RFQ would not be valid for subsequent complaints (such as Complaint 2, the subject matter of his request).

The township’s supplementary evidence

[112] In response to the appellant’s sur-reply representations, the township did not provide further details about its search.

[113] However, under a section about Records 4 and 5, the township submits that the appellant’s arguments about Records 4 and 5 mean that the appellant suggests that

these records are not responsive to his request and should not have been revealed. The town argues that, given the reference to Record 5 in Record 2 (which was fully disclosed), Records 4 and 5 were included as responsive records to this request "in an effort to be open and transparent." The township also states that "the appellant is still requesting the RFQ The RFQ (record 3) has been released in its entirety."

[114] [In addition, the township argues (as it had earlier) that the scope of the Integrity Commissioner's responsibilities can be found in the publicly available *Municipal Act, 2001* to address the appellant's request for information about the scope of the duties he was hired to perform.

The appellant's supplementary evidence

[115] In response, the appellant reiterates that Record 3 is the RFQ for Complaint 1 and could not be valid for another complaint. Therefore, he argues that there is a disconnect between Records 3, 4, and 5, and that Records 4 and 5 are "certainly" relevant to his request, as they may demonstrate that the Integrity Commissioner was hired with proper due diligence and parameters, despite "the non-applicability" of Record 3.

[116] In addition, the appellant argues that an RFQ refines the general duties set out in the *Municipal Act, 2001*, to a specific set of circumstances, and that the RFQ establishes the scope for a particular set of circumstances. He submits that Record 3 establishes that scope for Complaint 1, but not Complaint 2.

Final township representations

[117] The township submits that "[t]he RFQ used to engage the Integrity Commissioner has been released. Restating that it's not relevant does not create another record." In addition, it argues (as it had earlier in the inquiry) that "defining the reason or intent of why a person seeks a record does not change the record."

Analysis

[118] For the reasons set out below, I find that the township's evidence of its search efforts is insufficient for me to uphold its search as reasonable and that the appellant has established a reasonable basis for believing that additional records exist.

[119] While I accept that experienced employees, knowledgeable about the subject matter of the request were asked to conduct the search, that is not enough for me to find that the township's search was reasonable. I am unable to sufficiently understand from the township's representations what type of search or searches each employee conducted and where each search was conducted. Nor am I able to discern what search terms were used, though that information would be especially reasonable to know for electronic searches.

[120] Regarding the township's submissions about the ease of locating responsive records, I find that the mention of "the main file relevant to this request" suggests that additional responsive records could exist, and that the township did not satisfactorily address the suggested implication behind its own description.

[121] Moreover, although it was reasonable for the clerk to contact the previous clerk who had been involved at the time of the incident, I find that it is not clear from the township's representations what the result of that contact was (e.g., whether that individual conducted a search at all, and if so, what steps they took, etc.).

[122] Furthermore, I find the township's submission that "[o]ther searches were performed immediately upon receipt of the request and responses received by the set timeline for response of [a specified date]" to be vague and unhelpful to understanding its search efforts. It is not clear from this submission who performed these "other searches," where they searched, using what search terms, and what the results of those searches were. This, too, makes it difficult to find that the township provided sufficient evidence of the reasonableness of its search efforts.

[123] On the other hand, I accept the appellant's submission that over the course of four months, it would be reasonable to expect that the Integrity Commissioner communicated with the township and/or the township's council, about matters such as the progress of his reports. Given the gaps in the township's evidence about its search efforts noted above, I find that it is not clear who, if anyone, searched for such communications, and the particulars of that search.

[124] The appellant also points to a reference in Record 2 regarding (an apparent) telephone conversation, and notes that no telephone records were identified as responsive records, though specifically requested. I find that the township did not sufficiently address this in its representations, and the township's reference to "the main file" suggests that telephone records and other records of other types of communication responsive to the request were not searched.

[125] In addition, I find that there is a reasonable basis to believe that additional records exist, given the disclosure already made. As noted, the township fully disclosed Record 3, and then, eventually, Record 2. It also provided an index of responsive records to the appellant that specified the RFQ number of Records 3 and 4, and it disclosed the total cost to taxpayers involved in hiring the Integrity Commissioner (about \$25,000), through Records 6-9. Records 3 and 5 are referenced in Record 2, an email exchange that occurred on the same day, within about two and a half hours, between the township and the individual hired as Integrity Commissioner. The

substance of Record 2 is reproduced,⁴⁶ in part:

Email 1

As discussed yesterday, we need an integrity commissioner to investigate a complaint against two members of Council. Can you do this work for us, and will it be at *your previously quoted rate of \$250/hr (from our February RFQ call)?* [Emphasis added]

Email 2, with subject line Re: Integrity Commissioner

I would be happy to assist. And, yes, my rate will be \$250/hour.

Email 3, copying two individuals

Thanks [first name of Email 2's sender]. Looking forward to working with you again.

. . . .

I'll be in touch soon with the complaint package and a copy of our Code of Conduct.

[126] From Record 2, it is clear that the same person was hired to be the Integrity Commissioner in response to Complaints 1 and 2.

[127] From the information disclosed in Record 2, it appears that the individual contacted to investigate Complaint 2 did not submit a new proposal (a separate equivalent of Record 5) to do so. Since proposals had to be submitted in response to Record 3 during a specified time period in February, and Complaint 2 was made in October of the same year, it also appears that there were no separate equivalents of Records 3 and 4 generated in the wake of Complaint 2. These implications from the information disclosed could explain why the township did not locate separate "equivalents" of Records 3, 4, and 5 for Complaint 2.

[128] Nevertheless, I find that it would still be reasonable to expect additional records to exist regarding the engagement of an Integrity Commissioner to investigate Complaint 2, beyond what has been identified as responsive by the township, considering the following:

⁴⁶ Since Record 2 has been fully disclosed and disclosure under the Act is considered disclosure to the world, I can reproduce Record 2 in this public order. Names and contact information, though business information under the *Act* pursuant to section 2.1), are omitted for brevity.

- the nature of the underlying matter (a complaint against township councillors), described by the township as a “hot topic,” and the township’s previous experience that year with another investigation;
- the potential costs involved in hiring an Integrity Commissioner (especially given the township’s knowledge that fees of \$250/hour could be charged);
- the wording of the request (which includes records about the receipt of Complaint 2);
- the acknowledgement by the township (through its identification of Record 4) that other proposals were submitted to the township in response to its RFP, albeit regarding Complaint 1 (since the Integrity Commissioner appointed to investigate Complaint 2 was the same one chosen through the RFQ process in place in the wake of Complaint 1);
- the fact that the *Municipal Act, 2001* does not define the scope of any particular investigation into any particular complaint, including Complaint 2, though such parameters could reasonably be expected to be tailored and put in writing in response to the receipt of a complaint that would be investigated.

[129] These considerations by themselves, but also factoring in the above-noted insufficiency of the township’s evidence, leave me unclear as to how additional responsive records could not have been identified, and what steps the town took to retrieve such reasonably expected records. The township’s aforementioned description of “the main file” adds to this uncertainty.

[130] For these reasons, I have insufficient evidence before me to uphold the township’s search as reasonable, and I will order a further search for responsive records.

ORDER:

1. I do not uphold the township’s access decision on Records 4 and 5. I order the township to issue an access decision regarding Records 4 and 5 without resorting to section 52(3) of the *Act*. For the purposes of the procedural requirement of the access decision, the date of this order is to be treated as the date of the access request.
2. I allow the appeal of the township’s access decision regarding Records 6, 7, 8, and 9, in part. I order the township to disclose the portions of these records that do not contain personal information to the appellant, by **September 23, 2019** but not before **September 17, 2019**. A copy of the highlighted records is enclosed with this order to the township, for clarity. The highlighted portions are to be withheld as not within the scope of the appeal.

3. I do not uphold the township's search as reasonable. Accordingly,
 - a. I order the township to conduct a further search for responsive records. The search should be conducted by an experienced individual or individuals employed by the township who would be reasonably knowledgeable in the subject matter of the request. This would include any employees in the township's IT department.
 - b. I further order the township to provide me with an affidavit sworn by any employee or employees who have direct knowledge of the search, including the following information:
 - i. the name(s) and position(s) of the individual(s) who conducted the search;
 - ii. the steps taken in conducting the search (including the search terms used), and if a type of search that would normally be expected (such as a paper or electronic search) is not conducted, an explanation as to why that is;
 - iii. the results of the search; and
 - iv. if no records are located, an explanation for why no records are located.
4. I order the township to provide representations and affidavits to this office, in compliance with provision 2 of this order, by **September 17, 2019**. The representations and affidavits may be shared with the appellant unless there is an overriding confidentiality concern.
5. If the township locates further records responsive to the request as a result of the search, I order the township 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 for the purposes of the procedural requirements of the access decision. In order to verify compliance with this order, I reserve the right to require a copy of this revised decision.
6. I remain seized of this appeal in order to deal with any issues arising from provisions 2 and 3 of this order.
7. I reserve the right to require the township to provide this office with a copy of the records it discloses to the appellant as a result of order provision 1.

Original Signed By: _____
Marian Sami
Adjudicator

August 16, 2019 August 16, 2019 _____