

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3895-I

Appeal MA17-526

County of Norfolk

January 29, 2020

**Summary:** The County of Norfolk (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to a property owned by the requesters. The county identified responsive records and issued an access decision granting the requesters partial access to the records. Some information was withheld pursuant to the solicitor-client privilege exemption at section 12 of the *Act*. The requesters appealed the decision and raised the issue of reasonable search under section 17 of the *Act*. This interim order addresses only the issue of reasonable search. The adjudicator finds that the county did not conduct a reasonable search for responsive records and orders it to conduct a further search.

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

### OVERVIEW:

[1] The County of Norfolk (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information related to a particular property owned by the requesters (the "Lakeshore Property"):

1. All records pertaining to the Lakeshore Property;
2. All records pertaining to the portion of municipal land, including Lakeshore Road, adjacent to the Lakeshore Property (the "Municipal Lands") including, but not limited to, any municipal work completed on the Municipal Lands;

3. All records pertaining to all drainage and culverts currently, or historically, present on the Municipal lands;
4. All records pertaining to [a named individual]'s involvement with the Lakeshore Property and/or the Municipal Lands; and
5. All records pertaining to any communications among Town staff regarding the Lakeshore Property and/or the Municipal Lands.

[2] The county identified responsive records and granted the requesters partial access. It withheld some information pursuant to the mandatory exemption in section 14(1) (personal privacy) of the *Act* and the discretionary exemption for litigation privilege in Branch 2 of the section 12 solicitor-client privilege exemption. The county also indicated that it was withholding portions of other records because they were not responsive to the request.

[3] The county also told the requesters that it would be undertaking another search for responsive records. It located additional records and issued a supplementary decision in which it granted the requesters access in full to those additional records.

[4] The requesters, now the appellants, appealed the county's decision to grant them partial access to the records it identified in its initial search to this office.

[5] During the mediation of the appeal, the appellants told the mediator that they were pursuing access to the withheld records and they also stated that additional responsive records should exist. As a result, the issue of reasonable search was added to their appeal.

[6] Mediation did not resolve the issues and the matters were moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*.

[7] A Notice of Inquiry was sent to the parties and they provided representations in response. Some portions of the county's representations were withheld from the appellants because those portions met this office's confidentiality criteria in Practice Direction Number 7 of the *Code of Procedure*.

[8] After reviewing the records and the parties' representations, and for the reasons explained below, I decided to issue an interim order dealing only with the issue of reasonable search. In this interim order, I order the county to conduct a further search and issue a decision to the appellants regarding access to any additional responsive records it may locate. The remaining issue of whether the discretionary exemption in section 12 of the *Act* applies to the records at issue is deferred, pending the county's compliance with the order provisions in this interim order.

## **DISCUSSION:**

### **Background**

[9] The appellants and the county both say in their representations that there is ongoing litigation regarding an alleged drainage issue at the Lakeshore Property.

[10] The appellants say that the county owns land adjacent to the Lakeshore Property. They assert that there is a culvert located on the county's land that runs next to, and under, a road that is adjacent to the Lakeshore Property. The appellants allege that water, gravel, and/or other debris emanating from the culvert travelled onto the Lakeshore Property and caused damage.

[11] The county says that the appellants made a complaint about the alleged damage in approximately June of 2015 and that it advised its insurer of a potential claim on March 30, 2016.

[12] The county provided evidence that the appellants issued a Notice of Claim against the county in relation to the alleged damage to the Lakeshore Property on February 2, 2017, prior to making the request for information that is the subject of this appeal on February 28, 2017.

[13] As noted above, the county submits that the responsive records at issue in this inquiry are subject to the solicitor-client privilege exemption for litigation privilege at section 12 of the *Act*. The appellants disagree with the county's decision and also assert that additional responsive records that the county has not yet identified should exist. Given the context of this matter, it is possible that if the county located additional records, it may also claim that section 12 applies to that information as well. In the circumstances, in my view it is preferable that all responsive records should be identified before I assess the county's exemption claims. For that reason, this interim order addresses only the issue of whether the county conducted a reasonable search for records, as required by section 17 of the *Act*.

### **Did the county conduct a reasonable search for records?**

[14] When an individual that has made a request for information 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 of the *Act*.<sup>1</sup>

[15] 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

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.<sup>2</sup> To be responsive, a record must be "reasonably related" to the request.<sup>3</sup>

[16] 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.<sup>4</sup>

[17] 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.<sup>5</sup>

[18] 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.<sup>6</sup>

### **County's representations**

[19] The county says that it conducted a reasonable search for responsive records. In support of this assertion, it provided an affidavit from its Information and Privacy Supervisor that describes the details of its search.

[20] The Supervisor attested that the county's response to the appellants' request for records was

...significantly more complicated than an ordinary response to a municipal freedom of information request because of the broad searches required and the ongoing litigation, which resulted in 1) the creation of numerous privileged documents, and 2) files being sent to the legal services department for the risk management file.

[21] The Supervisor says that the county became aware of the appellants' complaint about the alleged drainage issues at the Lakeshore Property in approximately June of 2015. She says that the county notified its insurer of a potential claim by the appellants on March 30, 2016 and opened a "risk management file" in contemplation of litigation at the same time.

[22] The Supervisor provided evidence that the appellants filed a claim in relation to the drainage issues, naming the county as a defendant, on February 7, 2017.

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<sup>2</sup> Orders P-624 and PO-2559.

<sup>3</sup> Order PO-2554.

<sup>4</sup> Orders M-909, PO-2469 and PO-2592.

<sup>5</sup> Order MO-2185.

<sup>6</sup> Order MO-2246.

[23] With regard to the specific actions taken to search for records in response to the appellants' request under the *Act*, the Supervisor says that she sent an "FOI Memo" to the Manager of Roads and the Chief Building Official and asked that they conduct a complete and thorough search for all information in their departments that related to the appellants' request. The Supervisor says that the memo specifically directed that searches be conducted for physical and electronic records.

[24] The Supervisor explained that the county uses an electronic database system to manage paper records it received from former municipalities that were amalgamated into the county as of January 1, 2001. She says that this system is also used to manage the county's current paper records. The Supervisor attested that a search of the electronic database system was conducted and the only responsive records found were records already contained in the "building department file" for the Lakeshore Property.

[25] The Supervisor says that she was advised by a Records and Information Analyst for the county that a secondary search for records was conducted in April or May of 2017. She attests that the second search included a manual search of approximately 66 physical boxes of records received from the former City of Nanticoke.

[26] The Supervisor says that the various searches conducted produced the following results:

- The contents of the "property file" for the Lakeshore Property were forwarded to her office and a copy was made and produced to the appellants;
- The Roads Department reported that all records that were responsive to the request had already been requested by, and forwarded to, the Legal Services Department; and
- The Legal Services Department provided a copy of all of the information in their risk management file related to the property.

[27] The Supervisor also explained she had contact with the Legal Risk and Property Management Supervisor, who confirmed that a written complaint had been received from the appellants about the water drainage at the Lakeshore Property.

[28] The Legal Risk and Property Management Supervisor told the Supervisor that in response to that complaint, the Legal Services Department had requested a records search by the Norfolk County Public Works Department, including the Roads, Engineering and Drainage Departments. The Supervisor says she was informed that the records identified through the Legal Services Department's request to the Public Works Department were then sent to her office for review in relation to the appellants' request that is the subject of this appeal.

[29] The Supervisor says that the county has expended many hours and resources in responding to the appellants' request. She states that she is not aware of any other

records responsive to the request that have not been reviewed and believes that all avenues of search have been exhausted.

[30] The Supervisor also attests that there is a possibility that some records that were responsive to the appellants' request may no longer exist because they may have been destroyed pursuant to the county's records retention bylaws, or the bylaws of the former City of Nanticoke (which she says was amalgamated into Norfolk County in 2001).

[31] The Supervisor says that the county does not have records of what records were destroyed by the former City of Nanticoke because this information was not provided to the county as part of the amalgamation process. The Supervisor provided copies of the bylaws of the former City of Nanticoke and the county as exhibits to her affidavit.

[32] With regard to the county, the Supervisor says that since 2002 storm and water works records are subject to destruction after five years and road construction and maintenance records are subject to destruction after six years. She also says that employee records are subject to destruction after six years from the date an employee was terminated. She says that the employee that the appellants sought records in relation to ceased being an employee more than six years ago.

[33] In any event, the Supervisor says that no potentially responsive records have been destroyed since the county commenced using the electronic records management system referred to above (which is used to keep track of the destruction of records).

### **The appellants' representations**

[34] The appellants deny that the county conducted a reasonable search for responsive records. The appellants say that they received a "Document and Redaction Explanation List" from the county. They submit that a number of the documents the county released do not appear in that list. They allege that the absence of some of the records in the list suggests that the list is incomplete.

[35] The appellants also submit that none of the documents contained in the list provided by the county are dated earlier than 2016. They assert that "it is hard to believe that there is no correspondence or other documents from 2015 relating to [their] complaint or documents relating to the Lakeshore Property or drainage or culverts generally pre-dating 2016."

[36] The appellants also raise, for the first time, an issue that was not listed in the Notice of Inquiry that was sent to them at the start of this inquiry. They allege that the county has failed to forward the request to another institution pursuant to section 18 of the *Act*, even though it claimed that there are responsive records that they cannot provide because they are held by another municipality.

### **The county's reply**

[37] In reply, the county says that contrary to the appellants' claim that it has failed to disclose records that exist which are dated prior to 2016, it has provided access to several records dated prior to 2016, most of which were part of the building department file for the Lakeshore Property.

[38] The county says it is not improperly withholding documents. It asserts that the appellants' allegation ought to be disregarded because it is founded only in the appellants' own suspicions and is not supported by evidence.

[39] With regard to the appellants' assertion that the county failed to forward their request to another institution, the county says that this allegation seems to stem from a misunderstanding of the information provided to the appellants. The county says that it conducted a secondary search to determine whether there were additional records from the former City of Nanticoke Public Works department that were dispersed to either the county or Haldimand County.

[40] The city says it was determined that the City of Nanticoke's records were placed under its custody and control and therefore Haldimand County would not have records. The county says that there is and has never been any indication that a municipality other than Norfolk County has possession or control over any records responsive to the appellants' request.

### **Appellants' sur-reply**

[41] In their sur-reply to the county's reply, the appellants reiterate their assertion that there are unexplainable gaps in the chronological scope of the responsive records. They note that the Supervisor specifies in her affidavit that the county first became aware of the appellants' complaint about the drainage issue in June of 2015, almost a year before the risk management file was opened on March 30, 2016.

[42] The appellants say that the earliest document in the list provided by the county is dated May 5, 2016. They submit that it is not clear what could have prompted the county to open a risk management file a year after their complaint about the drainage issues if no other responsive records exist from that timeframe.

[43] The appellants also note that the Supervisor specifies in her affidavit that the March 30, 2016 date relates to when the county notified their insurer with respect to a potential insurance claim, yet they point out that no documents from this date have been identified as responsive. The appellants argue that the timing of the opening of the risk management file and the lack of any responsive documentation in or around the date it was created suggests an unaccounted for gap in responsive records.

[44] Finally, the appellants submit that because the Lakeshore Property is on the border of Haldimand County, the county should have made some inquiries to determine

whether Haldimand County had any responsive records.

### **Findings and analysis**

[45] After reviewing the parties' representations and the copy of the records provided to this office by the county, I agree with the appellants that there appears to be a chronological gap in the information the county identified as responsive to their request. In particular, I note the absence of communications that pre-date the year 2016.

[46] I have considered the county's submission that it did provide responsive records that were dated prior to 2016, for example, the building department's file. I am not satisfied by that explanation for the reasons that follow.

[47] I agree with the appellants that it is reasonable to expect that there would be communications, or other notes or records, relating to steps taken by the county in or around June of 2015, when it received the complaint by the appellants about the alleged drainage issue at the Lakeshore Property.

[48] I also agree with the appellants that it is reasonable to expect there would be some sort of documentation or communications that would indicate what prompted the county to notify its insurer and open a "legal risk file" related to the 2015 complaint almost a year later in 2016. As such, I will order the county to conduct a further search for records, including communications, notes, and any other forms of documentation, that exist between June 2015 and May 2016.

[49] Finally, I note that the records themselves suggest that there are additional communications and/or documentation that may be responsive to the request that have not yet been identified by the county. While I cannot reveal the content of the information at issue, I note that Record 68 suggests that there are potentially three records predating that one that are likely to be responsive to the appellants' request.

[50] Similarly, the last page of Record 124 also suggests there are additional records that are likely to be responsive that have not yet been identified by the county. As a result, I will order the county to conduct a search for any additional records that predate those already provided, including those referred to in Records 68 and 124. In the event that the county does not locate any further records, I will order that it provide an affidavit that explains either why it does not have copies of the records referred to in Records 68 and 124, or alternatively, why they are not responsive.

[51] I am also not satisfied that the county has taken sufficient steps to locate all potentially responsive records. I noted above at paragraph 27 that the county stated in its representations that the Legal Services Department had asked the county's Public Works Department to search for records after it received the complaint from the appellants about the alleged damage to the Lakeshore Property in 2015. The county says that Public Works Department sent records to legal services, who later sent those records to the Supervisor for her review in relation to the appellants' request under the



*Act*, which is the subject of this inquiry.

[52] In my view, it is possible that this approach may not have resulted in all of the responsive records being identified. While there is certain to be some overlap in the records that the Public Works Department provided in response to the Legal Services Department's request for information related to the appellants' original complaint and those records that would be responsive to the appellants' request under the *Act*, I am not satisfied that all of the records requested by the appellants would have been captured by the Legal Services Department's original request.

[53] To be clear, the appellants' request is broad in scope and it seems possible to me that additional records could exist within the Public Works Department that may be responsive to the appellants' request but that were not provided to the Legal Services Department in response to its request for records relating to the appellants' complaint. As a result, I will order the county to conduct a search for responsive records held by the Public Works Department.

[54] I note that the appellant raised the issue of whether the county took satisfactory steps to determine whether another county may have records responsive to their request. Based on the affidavit of the Supervisor, I am satisfied that the county took reasonable steps to determine what would have happened to records when the 2001 amalgamation took place and I decline to order any further searches in that regard. If the appellants are of the view that another institution may hold records, they are free to make an access request to that institution.

[55] As I have noted earlier, given the context of the appellants' request and county's claim that the responsive records it has withheld that are at issue in this appeal are subject to litigation privilege pursuant to section 12 of the *Act*, it is reasonable to expect that if the county locates further records it may also assert that section 12 applies to that information as well. In my view, in the circumstances, it is preferable to assess the county's exemption claims after all responsive records have been identified.

[56] To be clear, I make no finding on whether the county's claim that section 12 of the *Act* applies to the records is valid. I will not consider that issue until the county has completed the search for records ordered in this interim order, issued a decision to the appellant, and provided a copy of that decision to this office with representations in support of its search, as ordered below. If necessary, this office may issue a revised Notice of Inquiry to the parties and additional representations may be sought.

## **ORDER:**

1. I order the county to conduct a further search for records responsive to the appellants' request in accordance with paragraphs 47 to 53 of this interim order.

2. I order the county to issue an access decision to the appellant regarding access to any records located as a result of the search ordered in order provision 1, in accordance with the *Act*, treating the date of this order as the date of the request.
3. I order the county to provide representations to this office on the new search referred to in order provision 1 by **March 2, 2020**, with an affidavit outlining the following:
  - a. The names and positions of the individuals who conducted the searches;
  - b. Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and
  - c. The results of the search.

If the county does not locate the records referred to in paragraphs 48 to 50, the affidavit is to explain why. The county's representations and affidavit may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in Practice Direction Number 7 of the IPC's *Code of Procedure* and is available on the IPC's website. The county should indicate whether it consents to the sharing of its representations and affidavit with the appellant.

4. I remain seized of this appeal in order to deal with all outstanding issues, including the determination of whether section 12 of the *Act* applies to the information the county has withheld.

Original signed by: \_\_\_\_\_  
Meganne Cameron  
Adjudicator

\_\_\_\_\_ January 29, 2020