

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3955

Appeal MA18-74

Township of Clearview

September 21, 2020

Summary: The appellant submitted a six-part access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Clearview (the township) for records relating to the township's relationship with a particular Business Improvement Association (BIA). In its decision letter, the township claimed that no responsive records exist with respect to parts 1, 3, 4 and 5 of his access request and deemed part 6 to be "frivolous and vexatious." The appellant appealed the township's decision to this office and raised a number of issues, particularly with respect to the authority and conduct of the township's clerk. In this order, the adjudicator finds that the elected council is the "head" of the township for the purposes of the *Act* under section 3, and that it properly delegated its powers or duties to the clerk, in accordance with the requirements of section 49(1). He also finds that the clerk was not in a conflict of interest, either actual or reasonably perceived, in making a decision on the appellant's access request. With respect to the township's search for responsive records, he finds that it conducted a reasonable search for records that are responsive to the appellant's access request, except for part 5. Finally, he finds that part 6 of the request is not frivolous or vexatious for the purposes of section 4(1)(b) of the *Act* and section 5.1 of Regulation 823. He orders the township to conduct a further search for records that are responsive to part 5 of the appellant's access request and to issue a new access decision with respect to part 6.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 3, 4(1)(b), 17 and 49(1); Regulation 823, section 5.1.

Orders Considered: Interim Order M-457 and Order M-524.

OVERVIEW:

[1] The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Clearview (the township) for the following records:

1. The records of the motion and vote by council designating the Clerk [named] as a council representative on the [named] BIA [Business Improvement Association].
2. The records of the motion, vote and wording by the executive of the [named] BIA that was presented through the council representative of the BIA (as a committee of council for the Township of Clearview) to council that was subsequently rejected by the withdrawal of the proposer and the failure to obtain a second for the motion.
3. The records related to the rejected motion of council in regard to the changes to the BIA constitution PRIOR to its adoption by the members including the name of councillor/motion proposer who brought the above motion to council on behalf of the executive for the [named] BIA.

Response to include the records of:

- A. the motion and wording voted upon by the [named] BIA executive as presented to council by the named council representative from the BIA committee; and,
 - B. the copies of that process as included in the minutes; and
 - C. the wording provided to the clerk by the named council member from the BIA committee for inclusion into the agenda and meeting content including the "path" taken by the motion from the executive to council in the absence of either of the named elected council representatives from the last two BIA meetings.
4. The records of the report/signed and dated letter of approval from the OBIA representative [named] referenced by BIA Treasurer [named] confirming the OBIA's approval of the wording of the [named] BIA constitution as presented to members and voted upon at the [named] BIA AGM.

In light of the number of draft versions of the constitution presented for discussion purposes the response to include CERTIFIED records of the copy of the "draft" BIA constitution and the PROCEDURAL bylaw (the one referenced within the draft) as provided to the OBIA/[named representative] for review, comment and approval together with the "marked up" copies of the returned

documents showing the approval of each section of the draft by [named representative] with any comments or changes.

5. The records of the report/signed and dated letter of approval of Ontario Ministry of Municipal Affairs representative [named] and referenced by the Clerk [named] in regard to the asserted Ministry representative's approval of the wording of the [named] BIA constitution as presented to members and voted upon at the [named] BIA AGM.

In light of the number of draft versions of the constitution presented for discussion purposes the response to include CERTIFIED records of the copy of the "draft" BIA constitution and the PROCEDURAL bylaw (the one referenced within the draft) as provided to the Ministry's representative [named] for review, comment and approval together with the "marked up" copies of returned documents showing the approval of each section of the draft by [named representative] with any comments or changes.

6. The records of the **PROCEDURAL BYLAW** referenced in a number of Clearview Township bylaws and definitions. Response to include the full wording and date of adoption of the **PROCEDURAL** bylaw by council together with the reasons why this bylaw cannot be found on either clearview.ca nor the Clerks web site using the Clerks website search engine and the keyword "**Procedural.**"

*This is **NOT** a request for the records of the "**PROCEDURES**" bylaw also referenced in a number of other places that can be found using the search engine of the Clerks web presence. Residents of Clearview have been informed by Councillor [named] (one of the council representatives on the [named] BIA) after a number of questions from those who could not obtain a copy of the referenced document that there is no such item as a "**PROCEDURAL**" bylaw.*

It is that apparently "secret" document unavailable from the "repository of bylaws" on the Clerks web presence that was used to change the voting rights of BIA members at their recent AGM.

[2] In response, the township sent a decision letter to the appellant that followed the same numbering as in his access request. It stated:

1. The Township conducted a search in accordance with the *Act*. There are no responsive records.
2. The minutes for the November 13, 2017 Clearview Township Council meeting are publicly available on the Township's website under <http://www.clearview.ca/home/government/council/council-agenda-and-minutes>

3. The Township conducted a search in accordance with the *Act*. There are no responsive records.
4. The Township conducted a search in accordance with the *Act*. There are no responsive records.
5. The Township conducted a search in accordance with the *Act*. There are no responsive records.
6. The Township deems this request item to be frivolous and vexatious.

[3] The appellant appealed the township's access decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute. During mediation, the appellant stated that he:

- takes issue with the township's designation of the head, pursuant to section 3, and the delegation of the head's powers pursuant to section 49(1) of the *Act*;
- takes the position that the delegated head was in a conflict of interest in responding to his access request;
- takes issue with the township's decision with respect to items 1 to 5 of his request and challenges the adequacy of the township's search for records; and
- takes issue with the township's decision that part 6 of the request is frivolous or vexatious.

[4] I issued notices of inquiry to the parties and received representations from both the township and the appellant on the issues to be resolved in this appeal.

[5] In this order, I find that the elected council is the "head" of the township for the purposes of the *Act* under section 3, and that it properly delegated its powers or duties to the clerk, in accordance with the requirements of section 49(1). I also find that the clerk was not in a conflict of interest, either actual or reasonably perceived, in making a decision on the appellant's access request. With respect to township's search efforts for responsive records, I find that it conducted a reasonable search for records that are responsive to the appellant's access request, except for part 5. Finally, I find that part 6 of the request is not frivolous or vexatious for the purposes of section 4(1)(b) of the *Act* and section 5.1 of Regulation 823. I order the township to conduct a further search for records that are responsive to part 5 of the appellant's access request and to issue a new access decision with respect to part 6.

ISSUES:

- A. Who is the "head" of the township for the purposes of the *Act* under section 3? Did the head delegate a power or duty granted or vested in it under section 49(1) and, if so, was this delegation done properly?
- B. Was the clerk of the township in a conflict of interest in making a decision on the appellant's access request?
- C. Did the township conduct a reasonable search for records?
- D. Is part 6 of the appellant's access request frivolous or vexatious?

DISCUSSION:

A. Who is the "head" of the township for the purposes of the *Act* under section 3? Did the head delegate a power or duty granted or vested in it under section 49(1) and, if so, was this delegation done properly?

[6] As noted above, the appellant takes issue with the township's designation of the "head," pursuant to section 3, and the delegation of the head's powers pursuant to section 49(1) of the *Act*.

"Head" of township

[7] The "head" of an institution has a number of powers and duties under the *Act*, including a duty to respond to access requests from the public for records that are in the custody or under the control of the institution.¹

[8] The term, "head," is defined in section 2(1) as follows:

"head", in respect of an institution, means the individual or body determined to be head under section 3;

[9] Section 3 of the *Act* sets out the process for establishing or designating the "head" of the municipality for the purposes of the *Act*. It states, in part:

(1) The members of the council of a municipality may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipality for the purposes of this Act.

...

¹ See sections 19 and 22 of the *Act*.

(3) If no person is designated as head under this section, the head shall be,

(a) the council, in the case of a municipality;

...

[10] The township submits that its elected council is the "head" for the purposes of the *Act* and cites section 3(3). In his representations, the appellant does not appear to dispute the township's position on this issue.

[11] In the absence of evidence to the contrary, I find that the "head" of the township for the purposes of the *Act* under section 3 is the council of the township, which is made up of elected officials, including the mayor, the deputy mayor and seven councillors.²

Delegation of powers or duties

[12] Section 49(1) of the *Act* gives the head the discretion to delegate its powers or duties to others. It states:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

[13] The township submits that on November 14, 2011, its council delegated, in a by-law, all powers and duties of the head under the *Act* to its clerk. It attached a copy of bylaw number 11-73, which states, in part:

Whereas Council deems it necessary and expedient to amend the Municipal Freedom of Information and Protection of Privacy Delegation By-Law Number 11-03;

Now Therefore the Council of the Corporation of the Township of Clearview enacts as follows:

1. That the Municipal Freedom of Information and Protection of Privacy Delegation By-Law Number 11-03 is hereby amended as follows:

That Council hereby confirms delegation of all of the powers and duties of the head with respect to the Act to the Clerk of the Corporation of The Township of Clearview.

² www.clearview.ca/government-committees/council

...

[14] The township submits that its decision to delegate the powers of head to the clerk was a valid exercise of its municipal authority pursuant to subsection 49(1) of the *Act* and subsection 23.1(1) of the *Municipal Act, 2001*.

[15] The appellant does not dispute the fact that the township's elected council delegated a power or duty granted or vested in it to the clerk under section 49(1). However, in the appeal letter that he submitted to the IPC, he argues that the "head" of the township should be an elected member of council and not a member of staff such as the clerk who "would automatically have a conflict of interest related to any decision for the release of records that the clerk had created or was maintaining under their total control." He further claims that the *Act* does not cover the delegation of the "head" role from an elected party to a staff member who cannot be held responsible for their actions at the voting booth.

[16] I am not persuaded by these arguments. A plain reading of section 49(1) makes it clear that the head of an institution (the township's council, in this case) has the discretion to delegate a power or duty vested in it to others, including "an officer or officers of the institution." The term "officer" is not defined in the *Act* or in the *Municipal Act*, but in Order MO-1800, the adjudicator noted that the meaning of the term "officer" in municipal law has been considered by the courts and the subject of academic writing. He found that these sources interpret the term "officer" to refer to a high-ranking individual within the municipal civic service, who exercises management and administrative functions, and who derives his or her authority either from statute or from council. Some examples could include the chief administrative officer, which in some municipalities is also known as the city manager; the clerk or deputy clerk; and the treasurer.

[17] Because all of these officers exercise management and administrative functions for a municipality, they would either create or be the subject of some records that are covered by the *Act*. If I were to accept the appellant's argument that an elected council should not delegate a power or duty granted or vested in it under the *Act* to an officer such as the clerk because that individual's involvement in the creation of records would result in an automatic "conflict of interest," this would render that part of section 49(1) inoperable, which could not have been the intent of the legislature. In my view, the appellant's submissions amount to a disagreement with the discretionary delegation authority set out in section 49(1) rather than evidence that the township did not properly delegate its powers and duties under the *Act* to the clerk in a proper manner.

[18] I find that in accordance with section 49(1) of the *Act*, the township's elected council exercised its discretion to delegate, in writing, through bylaw 11-73, the powers or duties vested in it as "head" for the purposes of the *Act*, to the clerk, who is an officer of the township. I find that this delegation meets the requirements of section

49(1) and was, therefore, proper. As a result, the powers and duties provided to the “head” in the *Act*, such as responding to access requests from the public for records, fall upon the clerk.

B. Was the clerk of the township in a conflict of interest in making a decision on the appellant’s access request?

[19] The appellant submits that the clerk was in a conflict of interest in making a decision on his access request.

[20] A “conflict of interest” is commonly understood as a situation in which a person, such as an elected official or public servant, has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties.

[21] In Ontario, there are various provincial laws and regulations that set out conflict of interest rules that apply, for example, to members of provincial parliament;³ current ministry employees and public servants employed in and appointed to public bodies;⁴ and members of municipal councils and local boards.⁵ There is no provincial law or regulation that sets out conflict of interest rules for municipal employees but some municipalities may have bylaws or policies that include such rules. In addition, municipal employees are subject to conflict of interest obligations established in common law.

[22] Previous IPC orders have considered the issue of conflict of interest with respect to staff at institutions that make decisions on access requests from the public under the *Act*, such as a clerk.⁶ In determining whether there is a conflict of interest, these orders posed the following questions:

- a. Did the decision-maker have a personal or special interest in the records?
- b. Could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker?

[23] These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

[24] In carrying out their functions under the *Act*, staff at institutions that make decisions on access requests from the public must comply with precise procedural

³ *Members’ Integrity Act, 1994*, S.O. 1994, c. 38.

⁴ Ontario Regulation 381/07 of the *Public Service of Ontario Act, 2006*, S.O. 2006, c. 35.

⁵ *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50.

⁶ See, for example, Orders M-640, MO-1285, MO-2073, MO-2605, MO-2867, MO-3204, MO-3208, PO-2381, MO-3513-I and MO-3672.

obligations. However, those obligations are not equivalent to the impartiality that is required of a judge or an administrative decision-maker whose primary function is adjudication.⁷

Analysis and findings

[25] The factual circumstances here are that the clerk served in an advisory role on a particular BIA. The appellant subsequently submitted a six-part access request for records relating to this BIA and the clerk issued a decision letter that responded to his request.

Personal or special interest

[26] As noted above, one question that must be asked in assessing whether the clerk was in a conflict of interest is whether she had a personal or special interest in the records requested by the appellant.

[27] The township submits that the clerk does not hold any financial interest in the records or issues in relation to the request, nor has the appellant provided sufficient evidence to establish that when making the decision, the clerk had any kind of personal or special interest in the records. The township also provided a sworn affidavit from the clerk in which she states that she does not own real estate or rent in the BIA area, and neither she nor any of her family members have a financial interest in the subject matter of the appellant's access request.

[28] The appellant submits that a conflict of interest is a situation in which a person or organization is involved in multiple interests, and serving one interest could involve working against another. He then draws a distinction between a "primary interest" and a "secondary interest." He claims that a "primary interest" refers to the principal goals of the profession or activity, such as the duties of public officer. A "secondary interest" includes personal benefit and is not limited to only financial gain but also such motives as the desire for professional advancement.

[29] He also refers to two early IPC decisions, Interim Order M-457 and Order M-524, which involved situations where the institutional decision-makers responding to access requests had personal interests in the records being sought. He submits that in both cases, the IPC adjudicators identified a conflict of interest on the part of the decision-makers, and required that their powers be re-exercised by another, properly authorized, decision-maker.

[30] Because the clerk served in an advisory role on the BIA and then made a decision on an access request for records relating to that organization, I find that she

⁷ Order PO-2381, which cited *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 SCR 624, 2003 SCC 58 (CanLII).

clearly had some interest in these records. In my view, however, this interest was relatively minor and not sufficient to trigger a conflict of interest on her part. There is no evidence before me to show that she had a personal or special interest in the records beyond her role in providing assistance to the BIA. Although the appellant suggests that a personal interest could include motives such as a desire for professional advancement, he does not provide any evidence to show that this was one of the clerk's motives when she made a decision on his access request.

[31] In addition, I find that the facts in the two orders cited by the appellant are distinguishable from those in the appeal before me, because the individuals who made access decisions in those two matters had a significant personal interest in the requested records. In Interim Order M-457, a clerk decided to withhold records relating to appropriate compensation for specific city staff including herself. In Order M-524, a police chief decided to withhold a transcript of tape recordings of conversations between himself and other individuals. I find that the relatively minor interest that the clerk had in the requested records in this appeal is not akin to the significant personal interest of the two municipal decision makers in Interim Order M-457 and Order M-524.

[32] In summary, I find that the relatively minor interest that the clerk had in the records requested by the appellant is not sufficient to establish that she was in a conflict of interest in making a decision on his access request.

Perceived conflict of interest

[33] Another question that must be considered is whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the clerk when she responded to the appellant's access request.

[34] The appellant states that a conflict of interest exists if the circumstances are reasonably believed to create a risk that a decision may be unduly influenced by other, secondary interests, and not on whether a particular individual is actually influenced by a secondary interest. He submits that conflicts of interest interfere with professional responsibilities in a specific way, namely, by interfering with objective professional judgment.

[35] He further states that at the outset, he provided the township with an option, based upon the "perceived" conflict of interest of the clerk, to have the clerk recuse herself from processing his access request and have either the township's elected council or the IPC determine if the requested records should be disclosed to him. He further states that he made this offer to the clerk to allow her to review her "moral compass" and determine whether her response to his request for records might represent any form of conflict of interest.

[36] The township submits that a well-informed person, considering all of the

circumstances, could not reasonably perceive a conflict of interest on the part of the clerk with respect to the appellant's access request.

[37] It points out that in accordance with section 204(2.1) of the *Municipal Act, 2001*, the board of management of the BIA is a local board of the township. As a senior staff member of the township, the clerk serves as an advisor to the BIA. It submits that due to her experience and position, the clerk assisted the BIA with revisions to its constitution and assisted with the execution and oversight of BIA elections. It further states that this is similar to the assistance the clerk provides to other public boards that fall under the township's jurisdiction.

[38] The township submits that merely engaging in the creation of a document or being involved in a matter which ultimately forms part of a request does not lead to an inference of a conflict of interest. In particular, it cites Order MO-3208, in which the adjudicator recognized that in a small municipality, the municipal clerk will necessarily be required to process requests for records that relate to matters in which she might have been involved. It submits that the adjudicator found that such situations are not sufficient to establish a conflict of interest.

[39] I agree with the township on this particular point. The clerk's obligations are not equivalent to the impartiality that is required of a judge or an administrative decision-maker whose primary function is adjudication.⁸ In Order MO-3208, the adjudicator addressed an appeal in which the Town of Collingwood denied an appellant access to records relating to a law enforcement matter. The appellant in that matter alleged that the town's clerk, who made the decision to deny access, was in a conflict of interest because she was involved in a by-law enforcement matter that was the subject of the requested records. The adjudicator stated:

I acknowledge that the town clerk was originally involved in the by-law enforcement matters that gave rise to the records responsive to the appellant's request. However, I accept that her involvement in such matters falls within the scope of her responsibilities as town clerk. I also accept that in a small municipality, the responsibilities of FOIC [freedom of information coordinator] are often undertaken by the individual who fills the role of the town clerk and that in such instances, as FOIC, the clerk will necessarily be required to process requests for records that relate to matters in which she might have been involved. In my view, this is not sufficient to establish a conflict of interest.

[40] I agree with this reasoning and find that it applies in the facts of the appeal before me. The clerk's involvement with the BIA fell within the scope of her management and administrative duties as an officer of the township. Given that the

⁸ *Ibid.*

township is a relatively small municipality, it is inevitable that the clerk, as the delegated decision-maker under the *Act*, will be required to make decisions on requests for the records that relate to matters in which she may have been involved, such as the activities of the BIA. In my view, this does not mean that she was in a reasonably perceived conflict of interest in making a decision on the appellant's access request.

Actual conflict of interest

[41] The appellant further asserts that the perceived conflict of interest that he identified in his original access request became an actual conflict of interest when the clerk claimed that records authored and transmitted by her to the Ministry of Municipal Affairs (the ministry) "did not exist."

[42] This appears to be a reference to a further access request that the appellant submitted to the ministry under the *Freedom of Information and Protection of Privacy Act (FIPPA)*. These records apparently include email correspondence between the clerk and ministry staff relating to the drafting of a constitution for the BIA.

[43] The clerk did not identify these records as being responsive to the appellant's six-part request to the township. Consequently, the appellant appears to be suggesting that the clerk knew these records existed, which shows that she was in an actual conflict of interest in making a decision on his access request.

[44] I am not persuaded by these submissions. Under Issue C below, I will be addressing whether the clerk conducted a reasonable search for records that are responsive to the appellant's six-part access request. In my view, this is simply one of the issues that must be resolved in this appeal and the appellant's submission that it shows an actual conflict of interest on the clerk's part is unfounded.

Conclusion

[45] For the foregoing reasons, I find that the clerk was not in a conflict of interest, either actual or reasonably perceived, in making a decision on the appellant's access request.

C. Did the township conduct a reasonable search for records?

[46] In the decision letter that the township sent to the appellant, it stated that it has no records that are responsive to parts 1, 3, 4 and 5 of his access request. In his appeal letter, the appellant stated that he is challenging the adequacy of the township's search for records.

[47] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a

reasonable search for records as required by section 17.⁹ 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.

[48] 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.¹⁰ To be responsive, a record must be "reasonably related" to the request.¹¹

[49] 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.¹²

[50] 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.¹³

[51] 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.¹⁴

[52] The township states that it conducted a reasonable search for the records requested by the appellant. It submits that an experienced employee (the clerk) expended reasonable efforts to conduct a search to identify any records that were reasonably related to the appellant's access request.

[53] It further submits that given the specific nature of the records requested and the clerk's role as an advisor to the BIA, she was also the person who was most knowledgeable about the records requested due to her involvement with that organization and her prior communications with the appellant.

[54] To support its position that it conducted a reasonable search for records that are responsive to the appellant's access request, the township provided a sworn affidavit from the clerk that sets out her efforts to locate responsive records. In this affidavit, the clerk first addresses whether she contacted the appellant for additional clarification with respect to his request for records. She states:

⁹ Orders P-85, P-221 and PO-1954-I.

¹⁰ Orders P-624 and PO-2559.

¹¹ Order PO-2554.

¹² Orders M-909, PO-2469 and PO-2592.

¹³ Order MO-2185.

¹⁴ Order MO-2246.

I did not contact the Appellant for additional clarification with respect to the Request for the following reasons:

a. The Request was extremely specific and detailed. Upon careful review of the Request, I was satisfied that I understood the Request and was in a position to adequately respond to the Request.

b. In addition, and as detailed elsewhere in the Township's written submission to the IPC on this appeal, I have previously been in contact with the appellant about some of the requested records. These communications assisted my understanding of the Request as a whole.

[55] She then sets out the searches that she undertook to locate records:

Following receipt of the request I personally undertook a search for responsive records. I concluded that there were no responsive records with respect to 4 of the 5 requested records.

With respect to request #1, I carefully reviewed council minutes. In accordance with s. 8.1 of the Township of Clearview Procedure By-Law (No. 12-19) minutes of all meetings, including closed meetings, are recorded and retained. I found no responsive records.

With respect to request #2, I conducted a search of the minutes of the Township council. I identified that the responsive records were publically available on the Township website. I therefore provided the Appellant with a link to the public minutes.

With respect to request #3 (records relating to a rejected motion), no further record exists. As Clerk for the Township I am aware of all council meeting business. While a motion was brought forward at council to reduce the quorum necessary for the [named] BIA to pass its constitution, the motion's mover withdrew support and the motion was therefore withdrawn when no other council member replaced the mover's support. Accordingly, no further records exist. I note that the minutes provided to the Appellant in response to request #2 set out that the motion in question was withdrawn. The appellant was aware this motion was coming forward to Council as set out in his email dated November 13, 2017 to Council (with a copy to the Clerk) attached at Exhibit A.

With respect to request #4 (records of a " ... report/signed and dated letter of approval from the OBIA representative ... "), prior to conducting any search I was already aware that no such records existed. In my capacity as Clerk, I had previously assisted the BIA in conducting a

constitutional review. Therefore, any external approvals of the BIA constitution flowed through me or my office. Nevertheless, I personally reviewed my email history to confirm that no such record ever existed.

With respect to request #5 (records of the " ... report/signed and dated letter of approval of Ontario Ministry of Municipal Affairs ... "), no formal approval was received from the Ministry of Municipal Affairs. As I previously advised the Appellant prior to the Request, the Ministry had reviewed the [named] BIA, but had not provided formal approval. Attached at Exhibit B is a copy of my correspondence to the requester advising him of the Ministry's review. Therefore no further responsive records exist with respect to this request.

In summary, and as noted above, the Request was extremely particular and detailed. Because of my first-hand knowledge of council business, and my role in assisting the BIA conduct a constitutional review, I knew immediately that these records did not exist. To confirm my belief, I conducted searches in the only places that these records could possibly be held. I satisfied myself that the requested records did not exist.

I do not believe that any responsive records existed but have been destroyed.

[56] The appellant submits that the township did not conduct a reasonable search for records that are responsive to his access request, and his evidence relates mainly to part 5 of his request. In particular, he points to the fact that in response to a different access request that he submitted to ministry under *FIPPA*, he received records that included emails sent to the ministry that were "signed, dated and transmitted" from the clerk's email address relating to the drafting of the BIA constitution. He submits that given that these emails came from the clerk's email address, they confirm that responsive records exist that were not located by the clerk as part of her search efforts.

[57] I have considered the parties' representations and for the reasons that follow, I find that the township conducted a reasonable search for records that are responsive to the appellant's access request, except for part 5 of his request.

[58] The appellant's six-part access request is for specific records relating to the township's relationship with the BIA and particularly the clerk's involvement in assisting that organization in drafting a constitution. Because the clerk was assisting the BIA, I am satisfied that she constitutes an experienced employee knowledgeable about the subject matter of the appellant's access request and it was proper for her to be the person designated to carry out searches for responsive records.

[59] The township claims that it has no records that are responsive to parts 1, 3, 4

and 5 of his access request. With respect to parts 1, 3 and 4, I am satisfied that the township has provided sufficient evidence, as set out in the clerk's affidavit, to demonstrate that it has made a reasonable effort to identify and locate all responsive records within its custody or control. In my view, the appellant has not effectively rebutted the township's evidence or otherwise provided a reasonable basis for concluding that responsive records exist with respect to those parts of his request.

[60] However, I have concluded, for the following reasons, that the township did not conduct a reasonable search for records that are responsive to part 5 of the appellant's access request. In that part of his request, the appellant asked for the following:

The records of the report/signed and dated letter of approval of Ontario Ministry of Municipal Affairs representative [named] and referenced by the Clerk [named] in regard to the asserted Ministry representatives approval of the wording of the [named] BIA constitution as presented to members and voted upon at the [named] BIA AGM.

In light of the number of draft versions of the constitution presented for discussion purposes the response to include CERTIFIED records of the copy of the "draft" BIA constitution and the PROCEDURAL bylaw (the one referenced within the draft) as provided to the Ministry's representative [named] for review, comment and approval together with the "marked up" copies of returned documents showing the approval of each section of the draft by [named representative] with any comments or changes.

[61] As noted above, the clerk stated in her affidavit that no responsive records exist with respect to part 5 of the appellant's access request because although the ministry reviewed the draft BIA constitution, it did not provide its formal "approval." The clerk also attached an email exchange between herself and the appellant prior to his access request in which the appellant asks whether the BIA constitution was "vetted" by someone at a provincial ministry office and her response, which states that an advisor at the ministry "reviewed" the document.

[62] In short, it appears that the township has records in its custody and control that document the fact that it sent the draft BIA constitution to the ministry for review. In fact, the appellant obtained copies of at least some of those records after filing an access request with the ministry. These records apparently include emails sent by the clerk to the ministry and other related records.

[63] However, the township is essentially taking the position that any such records are not responsive to part 5 of the appellant's access request because although the ministry reviewed the draft BIA constitution, it did not provide its "approval," as set out in the wording of part 5 of the appellant's access request.

[64] In my view, the township's conclusion that no records exist that are responsive to part 5 of the appellant's access request is based on an unduly narrow reading of this part of his request that runs contrary to its obligations under section 17(2) of the *Act*. Section 17 states, in part:

17. (1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[65] The appellant knew that the township had sent the draft BIA constitution to the ministry for review, but was under the misapprehension that this document had also been sent for "approval," which produced the wording in part 5 of his request. In her affidavit, the clerk states that she did not contact the appellant for further clarification about his request. In my view, this was an error, because once the clerk knew that part 5 of the appellant's request did not sufficiently describe the records sought by the appellant because he mainly used the word "approval" rather than "review," she should have, in accordance with section 17(2), clearly informed him of the defect in part 5 of his request and offered to assist him in reformulating it so as to comply with section 17(1). The fact that the clerk previously advised the appellant in an email that an advisor at the ministry "reviewed" the draft BIA constitution did not obviate her obligations under section 17(2) when the appellant subsequently submitted his access request for records.

[66] I would note as well that the IPC has found that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹⁵ In deciding that no responsive records exist, the township adopted a narrow rather than a liberal interpretation of part 5 of the appellant's request and failed to resolve the ambiguity in that part of the request in the appellant's favour.

[67] Finally, the IPC has found that to be considered responsive to an access request,

¹⁵ Orders P-134 and P-880.

records must "reasonably relate" to it.¹⁶ In the second paragraph of part 5 of his access request, the appellant asked for specific records provided to the ministry for "review, comment and approval." Although the township did not send the draft BIA constitution to the ministry for its "approval," the fact that the appellant used the words "review" and "comment" in his request should, on its own, have been sufficient grounds for the township to conclude that those records in its custody or control that document the review process with the ministry are responsive because they "reasonably relate" to part 5 of the appellant's access request.

[68] For the foregoing reasons, I find that the township did not conduct a reasonable search for records that are responsive to part 5 of the appellant's access request. In addition, given that the appellant obtained records from the ministry that apparently include emails sent by the clerk to the ministry relating to the draft BIA constitution, I find that the appellant has provided a reasonable basis for concluding that records should exist that are responsive to that part of his request. As a result, I will order the township to conduct a further search for such records and to then issue a new access decision to the appellant with respect to part 5 of his request.

D. Is part 6 of the appellant's access request frivolous or vexatious?

[69] In part 6 of his access request, the appellant asked for following:

The records of the **PROCEDURAL BYLAW** referenced in a number of Clearview Township bylaws and definitions. Response to include the full wording and date of adoption of the **PROCEDURAL** bylaw by council together with the reasons why this bylaw cannot be found on either clearview.ca nor the Clerks web site using the Clerks website search engine and the keyword "**Procedural**."

*This is **NOT** a request for the records of the "**PROCEDURES**" bylaw also referenced in a number of other places that can be found using the search engine of the Clerks web presence. Residents of Clearview have been informed by Councillor [named] (one of the council representatives on the [named] BIA) after a number of questions from those who could not obtain a copy of the referenced document that there is no such item as a "**PROCEDURAL**" bylaw.*

It is that apparently "secret" document unavailable from the "repository of bylaws" on the Clerk's web presence that was used to change the voting rights of BIA members at their recent AGM.

[70] In its decision letter to the appellant, the township stated that it deems part 6 of

¹⁶ Orders P-880 and PO-2661.

the appellant's access request to be "frivolous and vexatious," which is a reference to section 4(1)(b) of the *Act*, which states:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[71] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

(a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

(b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[72] The township submits that part 6 of the appellant's access request was overly narrow and an attempt to inappropriately, and in bad faith, harass and malign the township and its staff. It submits that the appellant used language that suggests wrongdoing (i.e. keeping a "secret document") when, in fact he had previously engaged with and corresponded about the very by-law he sought.

[73] To support its position, the township makes the following additional submissions:

1. The particular request raises a non-issue. The terms "procedural by-law," "council procedures" or "procedure(s) by-law" are sometimes used interchangeably. It is not uncommon for someone (staff, member of council and even members of the public) to speak about a "procedural by-law" and a "procedures by-law," but these terms refer to the same by-law and associated records.
2. Township By-law 12-19, which is a "By-law Governing the Proceedings of Council and its Committees" is listed on the Township website as the "Procedure By-law" and is easily found in the by-law section of the Township's website, as is a document with a consolidation incorporating all amendments to the procedure by-law since its original enactment.

3. Correspondence from the Appellant - made in advance of the Request - demonstrates that he was fully aware of the relevant procedure by-law governing council and committee procedures (Township By-Law 12-19).

[74] The township attached copies of some of the appellant's email correspondence and submits that it demonstrates that he was aware, at the time of his request, that the only relevant procedure by-law in question is Township By-law 12-19.

[75] In his representations, the appellant challenges the township's position that his request for the "procedural bylaw" is frivolous or vexatious. He submits that the township has not provided him with any responsive records, nor the grounds in the *Act* upon which the township is relying to deem that his request for records was "vexatious".

[76] To demonstrate that his request for the township's "procedural bylaw" was reasonable and not frivolous or vexatious, the appellant also provides evidence that township staff have used this term in correspondence. For example, he cites the following passage from an email sent by the clerk:

The Township will be reviewing **our procedural by-law** in the future (most likely this year.) I will keep this email as reference to one area Council and our local boards should keep in mind when reviewing and approving all **procedural by-laws** moving forward.

[77] I have considered the parties' representations and for the reasons that follow, I find that part 6 of the appellant's access request is not frivolous or vexatious for the purposes of section 4(1)(b) of the *Act* and section 5.1 of Regulation 823.

[78] Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly.¹⁷ An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.¹⁸

[79] In my view, the appellant's access request for a "procedural bylaw" could be construed as overly persistent but falls short of the high bar set out in section 4(1)(b) of the *Act* and section 5.1 of Regulation 823. I find that there is insufficient evidence to support a finding that part 6 of his access request is frivolous or vexatious. I am not convinced that the township had reasonable grounds for concluding that this part of his request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the township, as required by section 5.1(a) of Regulation 823. Nor am I convinced that the township had reasonable grounds for

¹⁷ Order M-850.

¹⁸ *Ibid.*

concluding that part 6 of his request was made in bad faith or for a purpose other than to obtain access, as required by section 5.1(b) of the same regulation.

[80] In summary, I find that part 6 of the appellant's access request is not frivolous or vexatious for the purposes of section 4(1)(b) of the *Act* and section 5.1 of Regulation 823, and I will order the township to issue a new access decision to him that responds to that part of his request.

CONCLUSION:

[81] In this order, I have made the following findings with respect to the issues to be resolved in this appeal:

- A. The "head" of the township for the purposes of the *Act* under section 3 is the council of the township. Council exercised its discretion to delegate, in writing, through bylaw 11-73, the powers or duties vested in it as "head" for the purposes of the *Act*, to the clerk, who is an officer of the township. This delegation meets the requirements of section 49(1) of the *Act* and is, therefore, proper.
- B. The clerk was not in a conflict of interest, either actual or reasonably perceived, in making a decision on the appellant's access request.
- C. The township conducted a reasonable search for records that are responsive to the appellant's access request, except for part 5 of his request.
- D. Part 6 of the appellant's access request is not frivolous or vexatious for the purposes of section 4(1)(b) of the *Act* and section 5.1 of Regulation 823.

[82] Finally, I note that the appellant raised a number of other matters both in his representations and in other correspondence that he sent to me during the adjudication stage of the appeal process. These matters are either unrelated to the issues in this appeal or fall outside my jurisdiction, and I do not intend to address them.

ORDER:

1. The appeal is allowed in part.
2. I order the township to conduct a search for any records in its custody or under its control that are responsive to part 5 of the appellant's access request, based on my analysis and findings under Issue C of this order.

3. If the township locates responsive records as a result of the search referred to in order provision 2, I order it to issue an access decision to the appellant in accordance with the provisions of the *Act*, treating the date of this order as the date of the request.
4. I order the township to issue a new access decision to the appellant with respect to part 6 of his access request, based on my analysis and findings under Issue D of this order.

Original signed by: _____
Colin Bhattacharjee
Adjudicator

September 15, 2020 _____