Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3999

Appeal MA18-56

Hamilton Conservation Authority

January 27, 2021

Summary: The Hamilton Conservation Authority (HCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information from 2005 to 2017 about a well that was delisted in 2018 as a source of drinking water. The HCA disclosed 1,133 pages of responsive records, including meeting minutes, articles, various correspondence and emails, public health records and laboratory testing results from 2005 through 2017. The HCA denied access to 28 records on the grounds that they were solicitor-client privileged communications and therefore exempt under section 12 of the *Act* (solicitor-client privilege). The requester appealed the HCA's decision to this office, and also alleged that additional records exist that the HCA failed to identify or disclose. In this order, the adjudicator finds that the records at issue are solicitor-client privileged and therefore exempt under section 12. She upholds the HCA's exercise of discretion under section 12 and the reasonableness of the HCA's search, and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56, as amended, sections 12 and 17.

Orders Considered: Orders M-11 and P-1551.

Cases Considered: *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

OVERVIEW:

[1] This appeal arises from a change in access to a well (the Ancaster Well or the well) located within lands owned by the Hamilton Conservation Authority (HCA).

[2] Effective January 1, 2018, the Province of Ontario revised its water quality

standard for arsenic in drinking water. The safe limit was changed from 0.025mg/L to 0.010mg/L to be consistent with current guidelines for Canadian drinking water quality, the World Health Organization, the United States Environmental Protection Agency standards and other jurisdictions, because of arsenic's classification as a known carcinogen. The new standard applied to small drinking water systems.

[3] Because it was classified as a small drinking water system by Hamilton Public Health Services (HPHS), the Ancaster Well was subject to the new standard. Because of its high levels of arsenic and sodium,[1] once the change took effect the Ancaster Well no longer met the new water quality standard and was to be closed.

[4] The threatened closure of the well caused an outcry from individuals and groups who sought to keep the well open. In order to satisfy the demand to keep the well open, the HCA was required to change the well's operation to satisfy HPHS that it would not continue to be used as a small drinking water system. These changes included the addition of fencing, issuing access swipe cards, and requiring those who wanted to use the well to sign a waiver confirming their awareness that the water is not provided for drinking or cooking, is not tested, and is known to contain high levels of arsenic and sodium. The HCA was also required to put up signage by the well taps containing information similar to that on the waiver. Well users could purchase a $10 swipe card annually from the HCA for the gate to access the well.

[5] An individual opposed to the changes to the well's operation made a request to the HCA under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information relating to the well. The requester sought access to:

> …communications (emails, letters, faxes, meeting minutes and whatever other types of communications etc) and any and all other documents that occurred during the years of Jan 2005-Dec 11, 2017, for the water source and this property known as Ancaster Wells, located at 1109 Sulphur Springs Rd. also known as: PT LT 31 CON 1 ANCASTER, AS IN VM150487; S/T AB146681, AB337991, HL303384 ANCASTER, CITY OF HAMILTON." Also been referred to as Sulphur Springs Wells.

[6] The requester wrote hat she was also seeking access to:

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[1] In the five years prior to 2017, arsenic in the Ancaster Well water measured between 0.017mg/L and 0.023mg/L.

- outside information with ministries such a "MOECC, MOHLTC,[2] [public health services]…and whatever else;"
- information on "this land and water" since the federal government passed legislation regarding water quality in 2006; and,
- all communications relating to:
    - the number of wells located at and around 1109 Sulphur Springs Road;
    - the location of each well and related infrastructure, including maps, photos, surveys and details of piping and connected buildings;
    - the water quality and rate of water supply of each well;
    - the closure of each well, with reasons; and,
    - title and related legal documents regarding title, as well as related legal opinions and communications with legal counsel.

[7] The HCA conducted a search and located responsive records. It issued a decision granting full access to:

- certain HCA information, including minutes, letters and articles
- various email correspondence;
- lab results from 2005-2008;
- lab results from 2009, with a notation that results for June, July, August, October and November were missing, but referred to in a spreadsheet containing well data;
- lab results from 2017 with a notation that lab results from 2010-2017 had already been disclosed to the requester in response to a previous request; and,
- well data from December 1999-2010.

[8] In total, the HCA disclosed approximately 1,133 pages of records in response to the request. It denied access, however, to 28 records, claiming that they were solicitor-client privileged and therefore exempt from disclosure under section 12 of the *Act* (solicitor-client privilege). The HCA also wrote that it would issue a decision on certain

[2] Ministry of the Environment and Climate Change (as it was then known), and Ministry of Health and Long Term Care.

other records following notification of a third party. Finally, the HCA waived the fee of $900 (which it calculated based on 30 hours of search time at a cost of $30 per hour) on the basis that the records relate to water quality test results and provincial drinking water quality standards and are therefore related to public health.[3]

[9] The requester, now the appellant, appealed the HCA's access decision to this office.

[10] The parties participated in mediation to explore the possibility of resolution. During mediation, the HCA advised that the third party had consented to the release of records relating to correspondence with HPHS about well fencing, the waiver and signage, as well as to two invoices related to the cost of the fencing and card reader system. The HCA disclosed these records to the appellant.

[11] The appellant took the position that additional responsive records exist that were not identified or provided to her, such as records relating to the construction of the fence and lock system; various communications relating to the well, water testing, and restriction of well access; information regarding the classification and regulation of the water source at the well, and an "order" or "directive" from the municipal health unit. The reasonableness of the HCA's search for responsive records was therefore added as an issue to this appeal.

[12] When no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process and I decided to conduct an inquiry. I received representations from the parties that were shared between them in accordance with IPC's *Practice Direction 7*.

[13] In this order, I find that the withheld records are direct communications of a confidential nature between the HCA and its legal counsel, prepared for the purpose of seeking and giving legal advice. I find that they are therefore subject to solicitor-client privilege and exempt from disclosure under section 12 of the *Act.* I uphold the HCA's decision to deny access to the records at issue and I find that the HCA properly exercised its discretion under section 12. I also find that the HCA's search for responsive records was reasonable and dismiss this appeal.

RECORDS:

[14] The records consist of one memorandum and 27 emails.

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[3] Section 45(4)(c) of the *Act* requires an institution to waive the payment of all or part of a payment of a prescribed fee if, in the head's opinion, it is fair and equitable to do so after considering whether dissemination of the record will benefit public health or safety.

ISSUES:

A. Does the discretionary exemption at section 12 (solicitor-client privilege) apply to the records?

B. Did the HCA properly exercise its discretion in withholding the records under section 12?

C. Did the HCA conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 12 apply to the records?

[15] Section 12 of the *Act* allows an institution to 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." The exemption is discretionary, and allows an institution to disclose information even if it is exempt from disclosure under section 12.

[16] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[17] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege.

[18] Branch 2 is a statutory privilege that applies where the records were "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." The statutory and common law privileges, although not identical, exist for similar reasons.

[19] The HCA relies on the common law solicitor-client communication privilege.

Solicitor-client communication privilege

[20] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[4] The rationale for this

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[4] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[5] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[6]

[21] The privilege may also apply to the legal advisor's working papers direction related to seeking, formulating, or giving legal advice.[7]

[22] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[8]

[23] Solicitor-client communication has an important public interest in ensuring that a client may confide in his or her lawyer on a legal matter without reservation.[9] The Supreme Court of Canada has described solicitor-client privilege as a "fundamental civil and legal right" which should not be lightly abrogated, stating that:

> Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of confidentiality.[10]

Loss of privilege: waiver

[24] Solicitor-client privilege may be waived under common law. Waiver may be express or implied.

[25] An express waiver of privilege will occur where the holder of the privilege knows the existence of the privilege and voluntarily demonstrates an intention to waive it.[11]

[26] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[12]

[27] Although disclosure to outsiders of privileged information generally constitutes a

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[5] Orders PO-2441, MO-2166 and MO-1925.
[6] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[7] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[8] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[9] Order P-1551, at page 5.
[10] *Descôteaux v. Mierzwinski*, [1982] 1 SCR 860, at 875.
[11] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[12] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII); Order MO-2945-I.

waiver of privilege,[13] waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[14]

Representations

The appellant's representations

[28] The appellant does not dispute that the withheld records are communications between the HCA and legal counsel. Rather, she says that there can be no zone of privacy between the HCA and its lawyers because lawyers cannot act as an intermediary between the HCA and the public who funds it.

[29] The appellant argues that the HCA "cannot hide behind a conversation between themselves and lawyers" regarding the well, because the public owns the well and the land. She says that the HCA's claim of privacy through lawyers is designed to create opaqueness and to allow intermediaries to "circumvent the conversation between [the HCA] and the public." She argues that the HCA's claim of privacy through solicitor-client privilege is a false barrier between itself and the public, and that, since the public funds it, the HCA is directly accountable to the public and cannot act through intermediaries such as lawyers and then claim privilege over those communications. She argues that any attempt to hide behind "legality" is "anathema to the constituents."

[30] Finally, the appellant submits that loss of privilege does not apply since there can be no privilege in the first place, because there "are no outsiders" when an agency such as the HCA is publicly funded.

The HCA's representations

[31] The HCA submits that the withheld records are exempt from disclosure under section 12. It says that the emails are direct communications between the HCA and its lawyers, clearly exchanged for the purpose of obtaining and/or giving legal advice, and were intended to be confidential as between the HCA and its lawyers. The HCA says that the memorandum is an internal HCA communication about legal advice provided to the HCA by its lawyers, to which the legal opinion discussed in the memorandum is attached.

[32] The HCA also says that it has never waived privilege over the records, either expressly or impliedly. The HCA submits that the records have not been disclosed to any third party, except to the IPC in the context of this appeal, and that the HCA has consistently confirmed its position that the records are privileged and therefore

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[13] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[14] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

protected from disclosure.

Analysis and findings

[33] There is no dispute that the withheld records are communications between the HCA and legal counsel. As noted above, the appellant herself does not challenge the fact that the withheld communications are between lawyer and client, but argues that the HCA cannot use lawyers as a means to deny access to information.

[34] Having reviewed the records, I find that they contain requests by the HCA directed to its counsel for legal advice and legal opinions. The records also contain responses from legal counsel containing legal advice. The records fit within the following test set out in Orders M-11 and P-1551:

- there was written communication
- the communication was of a confidential nature
- the communication was between a client and a legal advisor; and,
- the communication was directly related to seeking, formulating or giving legal advice.

[35] As a result, I find that the records are privileged communications between the HCA and its legal counsel and are exempt under section 12 of the *Act.*

[36] I do not accept the appellant's argument that because the HCA is a publicly-funded institution any legal advice it obtains must be shared with the public. The appellant's representations directly conflict with long-established and settled principles regarding solicitor-client privilege. Nor do I accept the appellant's submission that solicitor-client privilege is merely a legality designed to act as a buffer between the HCA and the public. As I have already noted, solicitor-client privilege is a cornerstone of our legal system that protects a client's ability to confide in counsel and to obtain candid legal advice.

[37] As discussed above, in *Descôteaux v. Mierzwinski*,[15] the Supreme Court of Canada found solicitor-client privilege to be a fundamental civil and legal right which should not be lightly abrogated. There are no facts before me to suggest that this right should be interfered with. The appellant has provided me with no basis to conclude that the HCA at any time waived privilege over the records, expressly or impliedly.

[38] Accordingly, subject to my review of its exercise of discretion, below, I uphold

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[15] (1982), 141 D.L.R. (3d) 590 (S.C.C.).

the HCA's decision to withhold the records as exempt under section 12 of the *Act*.

Issue B: Did the HCA properly exercise its discretion in withholding the records under section 12?

[39] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[40] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[41] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[16] The IPC may not, however, substitute its own discretion for that of the institution.[17]

[42] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[18]

- the purposes of the *Act*, including the principles that information should be available to the public and that exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- whether disclosure will increase public confidence in the operation of the institution

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[16] Order MO-1573.
[17] Section 43(2).
[18] Orders P-344 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester, or any affected person.

Representations

The appellant's representations

[43] The appellant has not specifically addressed the HCA's exercise of discretion, except to the extent that she argues that the withholding of any records related to public lands is founded in improper considerations such as collusion, corruption and conspiracy.

The HCA's representations

[44] The HCA submits that it properly exercised its discretion under section 12 in withholding privileged records from disclosure.

[45] The HCA submits that the appellant has made numerous requests for access to information regarding the well, and that it has been open and transparent in its efforts to both respond appropriately to the demand to keep the Ancaster Well open and to process the appellant's requests for access to information related to the well, including the request in this appeal. In arguing that it has been cooperative and comprehensive in its response to the appellant's various requests, the HCA says that it has:

- allowed the appellant to participate in meetings of its Board of Directors on the topic of the well;

- arranged a meeting with the appellant and others in 2017 to respond to questions about the Ancaster Well;

- attended and spoke at community town hall meetings organized by a community group that supported keeping the well open;

- disclosed 240 pages of water test records for the Ancaster Well at no cost and without an *MFIPPA* request; and,

- waived the cost of two *MFIPPA* searches totalling approximately $1,600 and which resulted in disclosure of 1,787 pages of records to the appellant (1,133 of which were disclosed in response to this request).

[46] In exercising its discretion under section 12, the HCA submits that it withheld only very limited records and that, in doing so, it considered the importance of solicitor-client privilege to the proper functioning of the legal system and the need for lawyers

and their counsel to be able to communicate freely. The HCA says it has consistently done everything within its control to accommodate the appellant's requests, has expended a great number of hours, produced approximately 1,700 pages of records[19] and waived considerable fees in doing so.

[47] The HCA says there are no other relevant considerations that would support an exercise of discretion in favour of disclosure of records that are solicitor-client privileged. It notes that the appellant is not seeking access to her own personal information, for example. It also considered whether disclosure is necessary to increase public confidence in the HCA, but decided that it is not.

Analysis and findings

[48] As I have noted above, I can only consider whether the HCA did, in fact, properly undertake an exercise of its discretion, but I cannot substitute my own discretion for that of the HCA. Section 43(2) of the *Act* states that:

> (2) If the Commissioner upholds a decision of a head that the head may refuse to disclose a record or part of a record, the Commissioner shall not order the head to disclose the record or part.

[49] In this case, I find that the HCA did not take improper considerations into account in the exercise of its discretion and that it exercised its discretion in good faith.

[50] The HCA considered that changes to access to a public well and to drinking water standards were matters both of public health and interest to the local community. In disclosing in excess of 1,100 pages, while withholding a relatively minimal number of records, I am satisfied that the HCA gave a comprehensive response to the request and exercised its discretion properly and in good faith. I am satisfied that the HCA considered the importance of the well to the requester and to the community of well users, the right of the community to transparency regarding changes to the safety standards of drinking water and the reasons behind the changes in access to a resource previously available for drinking water. I find that the HCA balanced these considerations in good faith with its own right to confide in its lawyer without reservation.[20]

[51] I therefore uphold the HCA's exercise of discretion to withhold the records at issue under section 12.

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[19] 1,133 in response to the current request, and 554 pages previously, according to its representations.
[20] Order P-1551.

Issue C: Did the HCA conduct a reasonable search for responsive records?

[52] Because the appellant claims that additional records exist beyond those identified by the HCA, I must determine whether the HCA conducted a reasonable search for records responsive to the appellant's request, as required by section 17 of the *Act*.

[53] 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 that are reasonably related to the request.[21] 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.

Representations

The appellant's representations

[54] The appellant's representations do not specifically address the reasonableness of the HCA's search for responsive records, nor does she submit that the HCA's search was unreasonable. The appellant has not set out in her representations the types of records she believes may exist but that have not been disclosed. Instead, the appellant submits that a conspiracy, collusion and/or corruption may be behind what she says is the HCA's failure to disclose two "health orders" relating to arsenic in the well and access changes (fencing and the requirement of what she calls a "pay to play swipe card"). The appellant writes that these orders "simply do not exist," but says that they are nonetheless being cited by the HCA to block access to the well.

[55] The appellant claims that "critical information" has been withheld and that she wants access to "ALL communications," not just communications from 2017. She also makes a "further request" for access to items that are not part of her original request but are part of what she describes in her representations as an "extended request" for access to records about water bottling initiatives and geologic and environmental research studies undertaken by the HCA with certain other cities.

The HCA's representations

[56] The HCA submits that it conducted extensive searches and made voluminous disclosure to the appellant. It argues that it has given broad access to information about the Ancaster Well and that it has to date disclosed approximately 1,700 pages of records to the appellant relating to the well.

[57] The HCA says it is not a large institution with extensive document management systems and has a limited budget. It says that three experienced and knowledgeable

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[21] Orders M-909, PO-2469 and PO-2592.

employees made an extensive search of all relevant records available, and disclosed 1,133 pages of records to the appellant in response to the current request alone. The HCA submits that it is the appellant's review of the records disclosed to her that is not reasonable or diligent, and not the HCA's search, because the appellant continued to follow up with the HCA after receiving the records alleging that records were missing that had, in fact, been disclosed.

[58] Supported by an affidavit sworn by its chief administrative officer, the HCA submits that the request that is the subject of this appeal is not the appellant's first request for records from the HCA in relation to the Ancaster Well. The HCA submits that the appellant has made previous requests (and expanded her requests) for records relating to the well, including seven years' worth of water testing records (from 2010-2017) which resulted in substantial disclosure.

[59] In any event, the HCA says that it made every effort to locate responsive records in this case, as it says it has with each of the appellant's requests. The HCA described its record retention policies and says that three employees with knowledge of the matter of the Ancaster Well (an administrative assistant, an executive assistant, and the chief administrative officer) each conducted an expansive and exhaustive search. According to the HCA, this included searches of:

- all board of directors, conservation advisory board and other advisory board meeting minutes
- all relevant project files
- land acquisition files
- staff email accounts and electronic records
- all lab results (provided by the City of Hamilton)
- all printed email correspondence
- all other correspondence, including searches for correspondence with the City of Hamilton Public Health Services, the City of Hamilton (including the prior Regional Municipality), and the Ontario Ministry of the Environment and Climate Change.

[60] The HCA says that no steps were taken to narrow the scope of the request. It says that, in total, approximately 30 hours were spent searching for and retrieving records. It says it spent additional time after disclosure responding to the appellant's various questions, follow-up requests, and helping the appellant find records she alleged were missing in the records disclosed. The HCA says that it also made inquiries with a third party, HPHS, directly, to seek its consent to disclose records that involved correspondence between the HCA and public health services, sparing the appellant the

task of a separate request for access to those records.

[61] Finally, the HCA submits that no orders were issued against it: since it was advised by HPHS before the effective date of the new drinking water standards that it would need to take steps to comply, it removed the well from classification as a small drinking water system and was therefore never out of compliance with the new requirements.[22]

Analysis and findings

[62] Having considered the evidence before me, I am satisfied that the HCA conducted a reasonable search for records responsive to the appellant's request. I find that the HCA's representations demonstrate that an experienced employee – three, in this case – knowledgeable in records related to the subject matter of the request, made reasonable efforts to locate all responsive records.

[63] As noted above, although an appellant will rarely be in a position to indicate which records an institution has failed to identify, they must still provide a reasonable basis for concluding that such records exist.[23] As also noted, the appellant has not specifically alleged that the HCA's search was not reasonable. Rather, her representations focus on her concerns about the decision to restrict access to the well and the alleged corruption and conspiracy she says are behind it.

[64] With its representations, the HCA has attached copies of the extensive records disclosed to the appellant. These records include information regarding items the appellant submits have not been disclosed, including but not limited to, records describing the reasons for fencing the well and restricting access, costs associated with the fence and lock system, years of water testing results, and information regarding the classification and regulation of the Ancaster Well. The records date back to 1999, and are not limited to "the fall of 2017," as the appellant writes in her representations.

[65] Finally, as the appellant herself admits that the health orders regarding arsenic to which she seeks access do not exist, I find that this also does not provide a reasonable basis for any belief that such records may exist.

[66] In the circumstances, I find that the appellant has not provided me with a reasonable basis to conclude that additional responsive records exist that have not been

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[22] The HPA also says that it granted full access to records identified in the appellant's representations relating to a historical water bottling initiative, and that no tests or reports with the other cities mentioned by the appellant in her representations exist. As I have already noted, these items are part of what the appellant described as an "extended request" made in her representations and are not within the scope of this appeal.

[23] Order MO-2246.

disclosed. For the reasons set out above, I uphold HCA's search for responsive records as reasonable.

Conclusion:

[67] For the reasons set out above, I find that the withheld records are exempt under section 12 of the *Act*, that the HCA properly exercised its discretion to withhold them, that its search for responsive records was reasonable, and I dismiss this appeal.

ORDER:

This appeal is dismissed.

Original signed by
Jessica Kowalski
Adjudicator

January 27, 2021