

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4103

Appeals MA19-00796 and MA19-00707

The Corporation of the Town of Niagara-on-the-Lake

September 22, 2021

Summary: The town received a request under the *Act* for access to records involving a construction project on a particular residential property with focus on information about how the town verified the height of the building being constructed. The town decided to disclose the records at issue, except for certain information that it withheld on the basis of the mandatory personal privacy exemption at section 14(1) of the *Act*.

One affected party who received notice of the town's decision appealed to the IPC, objecting to disclosure of any of the records arguing that disclosure would be an invasion of privacy. The requester did not appeal the town's application of section 14(1) but did appeal on the basis that the town had not conducted a reasonable search.

In this order, the adjudicator dismisses both appeals. She finds that the town conducted a reasonable search. She also finds that as a result of the town's decision to withhold information under section 14(1), the information remaining at issue in the records does not consist of information about an identifiable individual but is rather information about a property, which is not personal information.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2 "personal information," 14(1), 17.

Orders Considered: Orders P-23, MO-3125, MO-2969, MO-2081 and MO-2053.

OVERVIEW:

[1] The Corporation of the Town of Niagara-on-the-Lake (the town) received a

request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records involving a construction project on a particular residential property. The requester sought to review a specified file and noted his interest in, "its plan(s) showing approved dimensions [and] lot coverage, as well as copies/records of any measurements taken by town staff to confirm conformity with its approved dimensions."

[2] Pursuant to section 21(1), the town notified affected parties of the request and sought representations regarding disclosure. The town received representations from two affected parties. Subsequently, it issued a decision granting access except for names and telephone numbers that it withheld on the basis of the mandatory personal privacy exemption at section 14(1) of the *Act*. It notified both affected parties.

[3] One of the affected parties appealed the town's decision to disclose the information relating to them and IPC appeal file MA19-00707 was opened. During the mediation, the requester informed the mediator that they were not taking issue with the town's application of section 14(1). Accordingly, it is only the *remaining* withheld information (that the affected party objects to the town disclosing) that is at issue in appeal MA19-00707 (the affected party's appeal).

[4] However, the requester raised the issue of reasonable search, claiming that the town had not identified records responsive to the request. The town conducted another search and located an additional responsive record, an Excel spreadsheet version of the record identified as 5c, below. The town issued a supplemental decision granting full access to the additional record (referred to as Record 6 below) and so notified the affected party and the requester. Given the affected party's appeal, Record 6 was added to the scope of the affected party's appeal but none of the records at issue have been disclosed under the *Act*.

[5] The requester continued to believe additional records exist and IPC appeal file MA19-00796 was opened (the requester's appeal).

[6] No further mediation was possible and both appeals were transferred to the adjudication stage. An IPC adjudicator conducted written inquiries into the appeals.

[7] Representations were sought and obtained from the town and the requester about reasonable search. The town's and requester's representations were shared with each other in their entirety in accordance with the IPC's *Code of Procedure*.

[8] Representations were sought and obtained from the town and the affected party about the town's application of the personal privacy exemption. The town made no substantive representations about its application of section 14(1).

[9] The appeals were transferred to me to conclude the inquiries. In this order, I dismiss both appeals, finding that the town conducted a reasonable search and that as a result of the town's decision to withhold information under section 14(1), the information remaining at issue does not consist of personal information.

RECORDS:

[10] The records relate to a construction project located at a particular residential property. They are:

- Record 2 - Lot Grading Plan dated July 17, 2019
- Record 3 - Lot Grading Plan dated March 28, 2019
- Record 5a and Record 5b - Inspection Notes (two pages)
- Record 5c - Overall Height Calculation
- Record 6 - Excel (electronic) version of Overall Height Calculation

ISSUES:

- A. Do the records contain personal information?
- B. Did the town conduct a reasonable search for records?

DISCUSSION:

Issue A: Do the records contain personal information?

[11] If the records contain personal information of individuals other than the requester, the town is required to withhold that information because of the personal privacy exemption at section 14(1) of the *Act*.

[12] The town decided to withhold what it considers to be personal information in records 2, 3 and 5a and these withholdings are not at issue in this appeal. As a result, the only issue I must consider is whether the records, excluding the information withheld by the town under section 14(1), contain personal information.

[13] "Personal information" is defined in section 2(1) of the *Act* and means "recorded information about an identifiable individual." The *Act* contains a non-exhaustive list of examples of the types of personal information, such as information relating to an individual's family status, financial transactions in which the individual has been involved, identifying numbers assigned to an individual, an individual's address or an individual's name if it appears with other personal information relating to the

individual.¹ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[14] The records at issue in this appeal relate to a construction project on residential property. Following Order P-23, several IPC adjudicators have held that there is a distinction between information *about an individual*, which may be personal information and information *about a building or a property*, which may not be personal information.³ Each case must be assessed on its own circumstances and there are situations where information regarding properties has been found to consist of personal information.

Representations

[15] In this inquiry, the town confirms its view that only certain parts of the records contain personal information that if disclosed would be exempt under section 14(1). It has accordingly severed that information from the records and determined that the remaining information is not exempt from disclosure.

[16] The affected party argues that disclosure of the information relating to them would be an invasion of privacy. Inherent in that argument is that the records contain personal information.⁴ The affected party has also raised concerns about what the requester will do with the records if disclosed.

Analysis and finding

[17] I have reviewed the records and made the following determinations about whether they contain personal information of identifiable individuals.

[18] The remaining information in records 2 and 3 are plans or diagrams of the property at issue. In my view, consistent with prior orders of the IPC plans or diagrams of a property is *information about a property*, not *about an identifiable individual* and it is therefore not personal information under the *Act*.⁵

[19] The remaining information in records 5a and 5b consists of typed inspection

¹ Sections 2(2.1) and (2.2) also relate to the definition of personal information and clarify that personal information does not include the name, title, contact information or designation of individuals in their business or official capacity.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

³ See Orders MO-3125, MO-2969, MO-2081 and MO-2053 for examples and a discussion of this distinction.

⁴ The affected party also argues that other third parties do not consent to disclosure of the records. These parties were notified of the town's decision to disclose and the only appeal filed is that of the affected party.

⁵ See footnote 3, above.

notes, which are summaries of the town's inspection activities and outcomes at the property. In my view, this is summary information about the inspection activities of town staff at or in relation to the property and is not about an identifiable individual. It is therefore not personal information.

[20] Records 5c is a chart titled "Overall Height Calculation" that relates to the building being constructed; Record 6 is the source Excel file for this chart. Neither version of this information contain any information that could be considered *about an identifiable individual* but is, rather, information about the building. Records 5c and 6 do not contain personal information.

[21] In summary, I have found that the remaining information is not personal information. It is therefore not necessary to consider the possible application of section 14(1). As there are no other exemption claims raised by the town, I will order those pages to be disclosed to the requester.

[22] In reaching this conclusion, I have carefully considered the appellant's arguments. However, when I consider the consistent approach taken by the IPC in relation to information about buildings or properties and the content of the records, I am unable to conclude that any further information qualifies as personal information.

Issue B: Did the town conduct a reasonable search for records?

Further context

[23] Some additional context will assist before I turn to my discussion about whether the town conducted a reasonable search.

[24] The access request was to review a Building Services file relating to a particular property, "and its plan(s) showing approved dimensions [and] lot coverage, as well as copies/records of any measurements taken by town staff to confirm conformity with its approved dimensions."⁶

[25] Shortly after the request was filed, the requester met with town staff and was provided with two documents, one of which is Record 5c.⁷ Record 5c is a table titled, "Overall Height Calculation" and consists of measurements of the building at issue, comparing those measurements to "average grade."

[26] In the requester's view, Record 5c is:

⁶ The particular file at issue was clarified in discussions between town staff and the requester (Town letter dated August 8, 2019).

⁷ It has been the town's position that this record was provided to the requester outside of the context of the *Act*.

inadequate/non-responsive since quite clearly it is a summary document (presumably prepared specifically to respond to my request). It is not a copy of an original document, evidencing the measurements of the home at issue. Further, it has no date, nor name of the individual who presumably undertook the work.

[27] Generally speaking, the requester has maintained this position throughout the appeal and it is the focus of his arguments about why the town has not conducted a reasonable search.

Reasonable search

[28] 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 17.⁸ 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.⁹ To be responsive, a record must be "reasonably related" to the request.¹⁰

[29] 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.¹¹ A further search may 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.¹²

[30] 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.¹³

Representations

[31] In support of its position that it conducted a reasonable search, the town provided an affidavit sworn by the Deputy Chief Building Official (the DCBO) to explain the steps it took to locate records. The DCBO states that he was responsible for conducting the search for records. He says that he searched the physical building permit file, as well as the building permit database.

⁸ Orders P-85, P-221 and PO-1954-I.

⁹ Orders P-624 and PO-2559.

¹⁰ Order PO-2554.

¹¹ Orders M-909, PO-2469 and PO-2592.

¹² Order MO-2185.

¹³ Order MO-2246.

[32] Aware that the focus of the requester's appeal is the calculations, the DCBO states that the information in document 5c (Overall Height Calculation) was "completed electronically in an Excel document in the [b]uilding [p]ermit database."

[33] The DCBO also explains that according to the bylaws of the town, all building permit files are to be retained permanently. By stating this, I understand the town to be saying that no records were destroyed.

[34] In response, the requester questions the source of, and the methodology used to determine, the measurements included in Record 5c. He asks whether town staff actually surveyed the property to ascertain the measurements and the following three questions about Record 5c: who prepared it; when was it prepared; and what instrumentation was used to prepare it.

[35] In reply, the town explains the source and methodology of the measurements and how they were inputted into Record 6 (the Excel spreadsheet, the source of Record 5c). The town says, "The actual height of the building was measured on site during a site visit. The truss height measurement was taken directly from the truss drawings. The remaining heights (wall heights and floor system heights), from the underside of the trusses to the top of the foundation wall, were taken by a measuring tape."

[36] The town also provides additional information about Record 5c, stating that it was prepared by the DCBO. Using meta-data contained in Record 6, the town discloses the date that the Excel file was created and then modified, which it says correlates with the town's inspection notes (contained in Record 5a, yet to be disclosed due to the affected party's appeal) about a visit to the property for purpose of taking measurements. It states that the "instruments used to determine the overall building height were the truss drawings, a measuring tape, and the proposed lot grading plan." The town says that it did not engage a surveyor to determine the measurements.

[37] In sur-reply, the requester states that in his view, the town has not responded to his questions and that on that basis, he assumes that the measurements were not taken by a town employee. He explains additional concerns that he has with the methodology used by the town to take the measurements.

[38] The requester also explains that residents approached him (at first, at a time when he was an elected official for the town) to raise concerns about the height of the building and whether it had been properly verified as compliant by town staff. The requester candidly notes that some of his concerns are outside of the jurisdiction of the IPC; however, he maintains his interest in obtaining access and information about how the measurements were taken and by whom.

[39] Lastly, the requester details the responses given by the town to his questions and he explains how the responses given are deficient, in his view.

[40] In sur-sur reply representations, the town attempts to address the requester's questions. It states that the only measurements taken from drawings were for the truss

height (prepared by the truss manufacturer) and the measurement from the top of the foundation wall to the average grade (taken from the lot grading plan prepared by a civil engineer). The town explains that the owner of the property was responsible for providing the lot grading plan and, consequently, hiring an engineer to prepare the plan.

[41] The town confirms, again, that it did not arrange for a survey to measure the building height. However, it confirms that a building inspector verified the measurements collected by on-site measurements and drawings.

Analysis and finding

[42] For the reasons that follow, I find that the town conducted a reasonable search.

[43] As may be clear from the summary of the parties' positions, the main dispute between the town and the requester is whether the methodology used by the town was sufficient to properly verify whether the height of the building is compliant. The town has explained how it verified the measurements and it decided to disclose to the appellant all of the records in its possession that may assist with his understanding, although these records have not yet been disclosed to him because of the affected party's appeal.

[44] Resolving the dispute about the adequacy of the measurement methodology is outside of the jurisdiction of the IPC. To the extent the requesters' questions raise concerns about the sufficiency *of the search*, I am satisfied that an experienced and knowledge employee – the DCBO – carried out the search and that the town understood what the requester is seeking and has tried, through this inquiry, to offer an explanation.

[45] In my view, the questions posed by the requester in his representations in this inquiry do not give rise to any reasonable basis for me to conclude that there are additional records. The town has explained that there was no survey performed and as a result of this order and my findings at Issue B, above, it will be disclosing to the requester the inspection notes that will likely shed some additional light on the town's methodology.

[46] I uphold the town's search as reasonable.

ORDER:

1. I dismiss the requester's appeal and uphold the town's search as reasonable.
2. I dismiss the affected party's appeal and uphold the town's decision to partially-disclose the records.
3. By **October 27, 2021** but not before **October 22, 2021**, I order the town to disclose the records except for the information withheld on the basis of section

14(1) to the requester. For clarity, I expect the town to provide the requester with an electronic version of Record 6 (e.g. an ".xlsx" file).

Original Signed By: _____

Valerie Jepson
Adjudicator

September 22, 2021 _____