

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4240

Appeal MA21-00009

Township of Oro-Medonte

August 18, 2022

Summary: The appellant sought access to records related to previous access requests he had made to the Township of Oro-Medonte (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The township issued an access decision in response, denying access to the responsive emails and spreadsheet, relying on the exclusion in section 52(2.1) (records related to an ongoing prosecution) of the *Act*. The appellant appealed the township's decision.

During mediation of the appeal, the township revised its access decision, disclosing some emails and claiming that the remaining responsive emails were, in the alternative to being excluded from the application of the *Act* by reason of section 52(2.1), exempt by reason of the discretionary solicitor-client privilege exemption in section 12. In the revised access decision, the township also claimed that the spreadsheet was, in fact, not a responsive record.

In this order, the adjudicator finds that the emails are not excluded from the application of the *Act* by reason of section 52(2.1), but she does find that they are exempt by reason of section 12 and she upholds the township's decision to withhold them. She also finds that the spreadsheet is responsive to the request. She orders the township to issue an access decision about it.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 17, 45(1)(b), and 52(2.1).

OVERVIEW:

[1] The appellant sought access to records related to previous access requests he had made.

[2] Specifically, the Township of Oro-Medonte (the township) received a request from the appellant under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for the following:

1. Excluding emails sent by [the appellant] to [a named freedom of information coordinator (the FOIC)] and emails sent by [the FOIC] to [the appellant], I am requesting copies of all emails and or received by [the FOIC] between June 25, 2020 and November 11, 2020 in any way related to MFIPPA request No. [three access request file numbers] as filed by [the appellant] with [the FOIC] on June 25, 2020.
2. Copies of each excel spreadsheet generated by the Oro-Medonte Township IT [information technology] department during their search for potentially responsive emails for each agency and individual noted in item 4 of MFIPPA request No. [first of three file numbers referred to above] as found in the estimated interim decision letter signed by [named FOI coordinator] and dated September 4, 2020.

[3] The township issued a decision in response denying access to the responsive emails (part 1 of the request) and one spreadsheet (part 2 of the request), citing the exclusion in section 52(2.1) (records related to an ongoing prosecution) of the *Act*.

[4] The appellant appealed the township's access decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to attempt a resolution of the appeal.

[5] During the course of mediation, the appellant narrowed his request to the portions of the spreadsheet that lists the emails between the township and Health Canada.

[6] The township then issued a revised decision with regards to the email records (part 1 of the request). Specifically, the township disclosed some emails to the appellant and withheld others based on the prosecution exclusion at section 52(2.1) and the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*.

[7] As to part 2 of the request, the township denied access to the spreadsheet, stating in its revised decision that:

The spreadsheet is part of a program in order to extract the potential responsive emails for the request. It is not a responsive record, but a tool

used to complete the task for the FOI¹ request. The Township maintains the decision to deny this documentation as not a responsive record.

[8] The appellant then told the mediator he wanted to proceed to adjudication to challenge the township's revised decision.

[9] As nothing more could be achieved at mediation, this file moved to adjudication, where an adjudicator may conduct an inquiry.

[10] I decided to conduct an inquiry and sought the township's representations, which were shared with the appellant. The appellant provided representations in response.

[11] In this order, I find that the prosecution exclusion at section 52(2.1) of the *Act* does not apply to the 16 pages of email chains responsive to part 1 of the request. However, I do find that these emails are exempt by reason of the section 12 exemption for solicitor-client privilege and I uphold the township's exercise of discretion in withholding them.

[12] Regarding the spreadsheet, I find that it is responsive to the request and I order the township to issue a decision about it in accordance with the findings in this order about this record.

RECORDS:

[13] There are 16 pages of email chains that are responsive to part 1 of the request and which the township claims are excluded from the application of the *Act* by reason of section 52(2.1). In the alternative, it claims that these email chains are exempt by reason of section 12 (solicitor-client privilege).

[14] There is also a spreadsheet that is responsive to part 2 of the request, being a listing of emails related to one of the appellant's three prior access requests. As will be explained below, the spreadsheet contains more than 4,000 entries, but the appellant only seeks access to those entries that involve Health Canada. The township claims that the spreadsheet is not responsive to part 2 of the request. It adds that requested information in the spreadsheet "does not exist", "because it is a tool to complete the task of the FOI request."

ISSUES:

- A. Does the section 52(2.1) exclusion for records relating to an ongoing prosecution apply to the email chains?

¹ Freedom of information.

- B. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the email chains?
- C. Is the spreadsheet responsive to part 2 of the request?

DISCUSSION:

Issue A: Does the section 52(2.1) exclusion for records relating to an ongoing prosecution apply to the email chains?

[15] Section 52(2.1) of the *Act* excludes records relating to an ongoing prosecution from the *Act*. As a result, the *Act's* access scheme does not apply to them.

[16] The purposes of section 52(2.1) include maintaining the integrity of the criminal justice system, ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client privilege and litigation privilege, and controlling the sharing and publication of records relating to an ongoing prosecution.²

[17] Section 52(2.1) states:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

Representations

[18] The township states that the appellant submitted three access requests in 2020 which were all extensive and broad in nature and required narrowing in order to keep costs to the appellant within reason. This process took several months due to the continued narrowing and fine tuning of the scope in each request as well as the amount of information they were going to generate. In the process of this exercise, the township explains that it,

...submitted a court information to the courts which is still pending. The court information was pending, however, due to the pandemic and courts being closed, this process was delayed. This lead [sic] to the request being denied under section 52(2.1).

[19] The township does not elaborate on the nature of the information it laid with the court.

[20] The appellant details in his representations the numerous failed attempts he made to the township to ascertain what the ongoing prosecution is that serves as the reason for the township's reliance on section 52(2.1), including seeking information as

² *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991, March 26, 2010, Tor. Doc. 34/91 (Div. Ct.).

to when was it initiated and how it is ongoing.

Findings

[21] As stated in the Notice of Inquiry (the NOI) I sent to the township, the term “prosecution” in section 52(2.1) means proceedings in respect of a criminal or quasi-criminal charge brought under an Act of Ontario or Canada. A “prosecution” may include prosecuting a regulatory offence that carries “true penal consequences” such as imprisonment or a significant fine.³

[22] As I also explained in the NOI:

The section 52(2.1) exclusion is generally claimed by an institution that is the prosecuting authority. The exclusion has not been limited to the Crown/prosecution brief, and has been found to apply to records in the control of investigating authorities and third parties. The IPC has found, however, that the exclusion does not apply to records in the control of an institution that is the subject of a prosecution.⁴

For the exclusion to apply, there must be “some connection” between the records and the case to be made by the prosecuting authority.⁵

The phrase “in respect of” requires some connection between “a proceeding” and “a prosecution.”⁶ All proceedings in respect of the prosecution have been completed only after any relevant appeal periods have expired. Whether a prosecution has been “completed” depends on the facts of each specific case.⁷

[23] The township was asked in the NOI to explain whether the records relate to a prosecution under an Act of Ontario or Canada. If so, the township was asked to provide representations as to whether all the proceedings in respect of that prosecution have been completed.

[24] The only evidence that the township provided that relates to section 52(2.1) is that it submitted a “court information” to the courts which is still pending. It has not explained the nature of this proceeding, if it is one, or how it constitutes a prosecution within the meaning of the *Act*. The Notice of Inquiry also stated that the township could

³ Order PO-2703.

⁴ Order MO-3919-I.

⁵ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25, and Order MO-3919-I.

⁶ *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, cited above; see also *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 25.

⁷ Order PO-2703.

provide confidential representations, but it did not provide any on this point.

[25] I find that the township has not provided sufficient evidence for me to conclude that section 52(2.1) applies. Despite being specifically asked, it has not explained what the “court information” is or provided evidence to suggest that there is a proceeding in respect of a criminal or quasi-criminal charge brought under an Act of Ontario or Canada.

[26] Instead, the only information the township has provided is that there is a court information that is somehow related to three other access requests the appellant made to the township. The township provided no evidence linking the appellant’s three other requests, or the records at issue, to an ongoing prosecution.

[27] The township has also not provided evidence of any connection between the email chains at issue in this appeal and the case to be made by the prosecuting authority. Based on my review of the 16 pages of email chains at issue in this appeal, in my view, they do not reveal that there is an ongoing prosecution within the meaning of section 52(2.1).

[28] Accordingly, as the township has not provided evidence of an ongoing prosecution within the meaning of section 52(2.1), nor any evidence about how the email chains have some connection to such a prosecution, I find that this exclusion does not apply to exclude the records at issue from the application of the *Act*.

[29] As the email chains at issue are subject to the *Act*, I will now consider whether the records at issue are exempt by reason of section 12 of the *Act*.

Issue B: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the email chains?

[30] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

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

[31] Section 12 contains two different exemptions, referred to in previous IPC decisions as “branches.” The first branch (“subject to solicitor-client privilege”) is based on common law. The second branch (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

Representations

[32] The township reiterates that its initial response to the request was that the emails at issue did not fall under the *Act* due to these emails being part of an ongoing court case, the “court information.” This argument is addressed at Issue A, above. The township then explains that during mediation of the appeal, the responsive emails were once again reviewed by township staff and the township decided to disclose some of the emails. It states that the remaining withheld emails involve legal counsel and comments which were directly related to the “court case” and that, therefore, they are exempt under section 12 of the *Act*.

[33] In response, the appellant states that the township has not proven there was even an ongoing prosecution at the time to claim the section 12 exemption.

Findings

[34] I will consider first whether the common law solicitor-client communication privilege (“subject to solicitor-client privilege”) in branch 1 applies. To establish that information is exempt under section 12, it is only necessary to establish one type of privilege.

[35] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.⁸ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.⁹ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.¹⁰

[36] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.¹¹ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.¹²

[37] I have considered the township’s representations and reviewed the 16 pages of email chains. I make the following findings based on my review of the content of the email chains.

[38] Pages 1 to 14 of the 16 pages of email chains contain emails exchanged between township staff and the township’s external legal counsel. These 14 pages of emails are

⁸ Orders PO-2441, MO-2166 and MO-1925.

⁹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

¹¹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹² *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

direct communications of a confidential nature between a lawyer retained by the township and their client, the township, made for the purpose of obtaining or giving legal advice. They are solicitor-client communication privileged (branch 1) communications and are, therefore, subject to section 12.

[39] Pages 15 and 16 of the records are internal township emails. However, these internal emails contain information that, if disclosed, would reveal the legal advice provided by the external counsel to the township. These pages are, therefore, solicitor-client communication privileged (branch 1) communications and are, therefore, subject to section 12.

[40] In summary, I find that all 16 pages of email chains at issue are subject to section 12 as they contain confidential solicitor-client communication privileged information.

[41] In reaching this conclusion, I also considered the appellant's position that the email chains should not be found to be subject to section 12 because there was no ongoing prosecution within the meaning of section 52(2.1). Whether or not there was an ongoing prosecution does not determine whether the records are exempt under the *Act*. As explained above, solicitor-client communication privilege arises when there are confidential communications between legal counsel and their client – it matters not whether there is an underlying litigation.

[42] The section 12 exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption.

[43] Although asked to specifically to do so in the NOIs sent to each party, the parties did not provide representations on the township's exercise of discretion under section 12. However, based on my review of the township's representations in their entirety, the emails at issue, and the other emails disclosed to the appellant, I find that there is no evidence that the township's decision to withhold the 16 pages of email chains at issue was made in bad faith, for an improper purpose, or taking into account irrelevant considerations.

[44] The withheld emails at issue appear to reflect a balancing, on the one hand, of the right of the appellant to have access with, on the other hand, the need to protect confidential privileged information. There is no evidence that what has been withheld from the appellant in these records was withheld in bad faith towards him or for an improper or irrelevant purpose. Therefore, I uphold the exercise of discretion by the township and its decision to withhold the 16 pages of email chains at issue on the basis that they are exempt by reason of section 12.

Issue C: Is the spreadsheet responsive to part 2 of the request?

[45] I will now determine whether the spreadsheet sought by the appellant in part 2

of the request is responsive to the request. I will also deal with the township's further argument that this spreadsheet "does not exist."

[46] In part 2 of the appellant's request, the appellant sought access to:

Copies of each excel spread sheet generated by the Oro-Medonte Township IT [information technology] department during their search for potentially responsive emails for each agency and individual noted in item 4 of MFIPPA request No. [first of three file numbers referred to above] as found in the estimated interim decision letter signed by [named FOI coordinator] and dated September 4, 2020.

[47] Initially, the township denied access to the spreadsheet, relying on the exclusion in section 52(2.1). During mediation, the appellant narrowed part 2 of his request, asking for only disclosure of the portions of the spreadsheet listing one entity's emails with the township; those between the township and Health Canada.

[48] The township then denied access to the spreadsheet as clarified at mediation in its revised access decision, indicating that the spreadsheet is not a responsive record, as follows:

... the spreadsheet is part of a program in order to extract the potential responsive emails for the request. It is not a responsive record, but a tool used to complete the task for the FOI request. The township maintains the decision to deny this documentation as not a responsive record.

Representations

[49] The township provided some context about the spreadsheet in its representations. It says that it was created using a tool that is used to locate emails from within the township database using keywords which are related to the request. It states:

This results in a compilation of raw data (particularly over 4,000 emails) due to the contentious nature of the subject. The raw data then requires review and redaction to ensure that it meets the requirements of the request as well and providing privacy to private individuals.

[...] this part of the request was narrowed 3 times during [the appellant's three previous access requests] resulting in different data pulls from IT. The raw data information was then requested through [the request at issue in this appeal].

During the initial file request, this information was compiled involving several government agencies, private individuals, government representatives, legal counsel etc.

During mediation, the appellant further narrowed the request asking for only one (1) entity's emails; those which included Health Canada. IT did not provide individual raw data pull spreadsheet for Health Canada alone.

Due to the above information, the request was denied stating it did not exist. The information would have to be generated in order to provide it, which also is subject to section 52(2.1) due to it being evidence in a current court matter.¹³

The appellant requested copies of the excel spreadsheet. By providing the raw data, the documents are un-redacted, and would provide information that would otherwise be denied under [the mandatory personal privacy exemption in] section 14 of the Act. This is simply a tool used by the township to identify potential responsive documentation, not an actual record of the subject matter.

[50] The appellant claims that the spreadsheet is a record that is responsive to the request.

[51] The appellant states that by initially fully denying the spreadsheet under section 52(2.1), the township admitted the spreadsheet does in fact exist as a "record" under *MFIPPA* and does not form a "program or tool."

[52] The appellant questions how in the process of mediation of this appeal, the township can be allowed to abandon their initial section 52(2.1) full denial of the spreadsheet record requested and suddenly change its mind about the grounds for invoking section 52(2.1) in the first place, stating that the "spreadsheet is a tool used to pull emails" and the spreadsheet does not exist.

Findings

[53] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(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, and specify that the request is being made under this Act;

¹³ As noted below, I am ordering the township to issue an access decision for the portions of the spreadsheet sought by the appellant. In this decision, the township may re-consider whether to claim the application of section 52(2.1).

(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).

[54] To be considered responsive to the request, records must “reasonably relate” to the request.¹⁴ Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester’s favour.¹⁵

[55] Initially, in response to part 2 of the appellant’s request, the township created a spreadsheet, which it says lists over 4,000 emails. In its initial access decision, it acknowledged the existence of this record and denied access to it, relying on the exclusion in section 52(2.1) (records related to an ongoing prosecution).

[56] The township also admitted the existence of the spreadsheet record in its representations by stating:

The raw data [in the spreadsheet] then requires review and redaction to ensure that it meets the requirements of the request as well and providing privacy to private individuals.

[57] During the course of mediation of this appeal, the appellant narrowed his request for the information in the spreadsheet listing the emails between the township and Health Canada.

[58] In response to this clarification at mediation, the township did not alter the spreadsheet to include only the information about emails between the township and Health Canada. Instead, it took a new position, deciding to deny access to this spreadsheet explaining in its revised decision that the spreadsheet is not a responsive record, but a tool used to complete the task for the FOI request.

[59] I find that the spreadsheet initially created by the township is a responsive record and it does exist. Because the appellant narrowed his request, only portions of the spreadsheet remain at issue in this appeal – that is, entries that involve Health Canada. Considering the wording of the request, and giving it a broad reading, there is no question that the spreadsheet is reasonably related to the appellant’s request.

¹⁴ Orders P-880 and PO-2661.

¹⁵ Orders P-134 and P-880.

[60] In these circumstances, I do not agree with the township's argument that the requested information does not exist "because it is a tool to complete the task of the FOI request." This is, in fact, the very information that the appellant seeks. In any event, the township has admitted in its access decision letters, particularly in its initial access decision, and in its representations, that this record exists.

[61] I also do not agree with the township that the record does not exist because it contains "raw data" or is unredacted and would require review and redaction to ensure that it meets the requirements of the request as well as providing privacy to private individuals.

[62] To the extent that the township is arguing that the source of the information in the spreadsheet is not a record under the *Act*, an argument that it does not expressly make, I note that the definition of record in section 2(1) of the *Act* includes any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

[63] Starting with Order P-50, the IPC has recognized that the *Act* requires institutions to produce responsive records from a machine-readable record, subject to the regulations.¹⁶

[64] I find that the spreadsheet is a record. Although it contains more information than the appellant now seeks in his request as narrowed during mediation of this appeal, and may contain information that may be subject to an exemption or an exclusion, the township can redact such information from the spreadsheet record.

[65] Section 45(1)(b) of *MFIPPA* allows an institution to charge fees for preparing a record for disclosure. This section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

the costs of preparing the record for disclosure;

[66] Under section 45(1)(b) and Regulation 823, the township can charge for time spent severing (redacting) the spreadsheet.¹⁷ The IPC has generally accepted that it takes two minutes to sever a page that requires multiple severances.¹⁸

[67] Based on my review of the township's access decisions and its representations, I find that the requested spreadsheet exists and that it is responsive to part 2 of the appellant's request. Even though it exists in a form that lists information that is not

¹⁶ See Order PO-4283 for a discussion about this obligation.

¹⁷ Order P-4.

¹⁸ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

responsive to the appellant's request, this record can be severed to list only those emails between the township and Health Canada.

[68] Accordingly, I will order the township to issue an access decision to the appellant about the responsive portions of the spreadsheet as clarified during the mediation of this appeal.

ORDER:

1. I do not uphold the township's decision that the 16 pages of email chains responsive to part 1 of the request are excluded from the application of the *Act* by reason of section 52(2.1).
2. I uphold the township's decision to withhold these 16 pages of email chains by reason of section 12.
3. I order the township to issue an access decision on the responsive portions of the spreadsheet, in accordance with the findings in this order about this record, treating the date of this order as the date of the request.

Original Signed by: _____

Diane Smith
Adjudicator

August 18, 2022 _____