Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4508

Appeal MA22-00404

Regional Municipality of Niagara

April 12, 2024

Summary: The requester sought access from the Regional Municipality of Niagara (Niagara) under the *Act* to records related to a septic system that the requester's company was installing for a property.

Niagara located responsive records and denied access to them in part under sections 7(1) (advice or recommendations) and 14(1) (personal privacy). The requester appealed this decision and claimed that Niagara's search for responsive records was not reasonable.

In this order, the adjudicator orders Niagara to disclose the information at issue in the records. She also upholds Niagara's search for responsive records as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(1) (definition of personal information), 7(1), and 17.

Orders Considered: Orders MO-2066, MO-3979, and PO-3365.

OVERVIEW:

[1] The requester sought access to records related to a septic system that his company was installing for a property.

[2] He made an access request to the Regional Municipality of Niagara (Niagara) under *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

All information and records including but not limited to:

> Any and all emails, text messages, notes, transcripts, photos, videos, inspection reports, or other internal documents.

Related to the on-site sewage system (septic system) project:

> Undertaken at the address known as [address] or alternatively known as [alternative address] or any combination of such addresses.

Making any mention of [the requester]:

> Including but not limited to any associated tradenames, employees thereof and including any mention of said project or the process by which the project was being undertaken or any comments, opinions or any information related to such project.

Including but not limited to communication involving the following staff of the Region of Niagara:

> [the Director, Infrastructure Planning & Engineering (the director), and two named Niagara inspectors], any other employee of the Region of Niagara not specifically mentioned.

Including but not limited to communications related to the project addressed to:

> [the designer of the septic system (the designer) and the property owner where the septic system was being installed (the owner)] or any other party not specifically mentioned.

Additionally, we seek the following information as it related to the Region of Niagara staff [the director and the two inspectors]:

> A copy of the adopted "code of conduct" as per the Building Code Act, records of training or qualifications as related to The Building Code Act or Part 8 of the Ontario Building Code, including but not limited to records training, courses, or requalification of such training, and records of relevant licensing.

[3] Niagara located responsive records and decided to grant partial access them. Portions of the records were withheld pursuant to sections 7(1) (advice or recommendations) and 14(1) (personal privacy) of the *Act*.

[4] The requester (now the appellant) appealed Niagara's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt

a resolution of this appeal.

[5] During mediation, the appellant indicated he was seeking access to the withheld portions of the records. The appellant also stated that he believes that additional records exist in regard to the training records portion of his request.

[6] The mediator raised the appellant's concerns regarding the training records with Niagara. During mediation, Niagara provided guidance on how the appellant can access public records related to the training records of inspectors. The appellant was not satisfied with the information provided and continues to believe additional records exist.

[7] Further mediation was not possible. The file was moved to adjudication where an adjudicator may conduct an inquiry. I sought representations from Niagara, the appellant,[1] and two affected persons being the designer and the owner. I received representations from Niagara and the appellant but did not receive representations from either of the affected persons.

[8] In this order, I do not uphold Niagara's decision to withhold the information at issue and order Niagara to disclose it to the appellant. I uphold Niagara's search for responsive records as reasonable.

RECORDS:

[9] At issue are the withheld portions of email communications identified as records 20, 21, and 32 to 34, as per the following index:

Record #	Description of Record (Email Subject)	Exemption	Total Pages
20	FW: [address in request]	s.7(1)	5
21	FW: Septic issue	s.14(1)	6
32	RE: [address in request]	s.7(1)[2]	5
33	RE: Septic system Design	s.7(1), s.14(1)	3
34	RE: Septic system Design	s.7(1), s.14(1)	12

[1] I provided the appellant with a copy of Niagara's representations.
[2] Niagara had claimed section 14 for certain email addresses in record 32, however, the appellant is not interested in receiving access to these email addresses.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

B. Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the records?

C. Did Niagara exercise its discretion under section 7(1)? If so, should the IPC uphold the exercise of discretion?

D. Did the Niagara conduct a reasonable search for records?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[10] For section 14(1) of the *Act* to apply, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates.

[11] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[12] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual.[3]

[13] In some situations, even if information relates to an individual in a professional, official, or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[4]

[14] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[5]

[15] Section 2(1) of the *Act* gives a list of examples of personal information:

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> "personal information" means recorded information about an identifiable individual, including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
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> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[16] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[6]

[17] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.[7] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[8]

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[6] Order 11.
[7] Under sections 36(1) and 38 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.
[8] See sections 14(1) and 38(b).

Representations

[18] Niagara submits that the records contain the personal information of the affected persons. It states that the records contain their personal email addresses and the emails sent from these addresses express their views and opinions about a matter outside of a business capacity. It submits that disclosure of the withheld information would fundamentally identify them and their opinions related to the matter.

[19] In his representations, the appellant advises that he does not seek access to the affected persons' email addresses. As a result, access to these email addresses are not at issue in this appeal.

[20] Concerning the contents of the affected persons' emails that remain at issue, the appellant submits that they do not contain personal information and that in sending these emails, the affected persons' email addresses were used in a business capacity, for communications all related to the project. The appellant submits that the affected persons should not be able to conduct themselves in a professional, official, or business capacity but hide that information by using their personal email addresses.

Findings

[21] Niagara has claimed that the personal privacy exemption at section 14(1) applies to portions of records 21, 33, and 34. For that exemption to apply, the records must contain personal information. I find that none of the records 21, 33 or 34 contain information that qualifies as personal information within the meaning of the definition of that term in section 2(1).

[22] Records 33 and 34, which are both email chains, contain emails sent from the designer to the owner. From my review, both records contain information that clearly concerns the designer's business dealings with the owner and do not contain any personal information. The information contained in these emails are about a business financial transaction about the project that is the subject matter of the request. In my view, in sending these emails, the designer was clearly acting in his business capacity. It does not reveal something personal about him. Records 33 and 34 therefore contain business information not personal information.

[23] I also find that record 21, which is an internal Niagara email between Niagara staff, does not contain personal information. It is a discussion related to the logistics of a business meeting. From my review, I also find that it is information exchanged between Niagara staff in their business capacity and cannot be said to reveal anything personal about them.

[24] As the information in records 21, 33 and 34 is not personal information, the personal privacy exemption in section 14(1) cannot apply to it. As no other exemptions apply, I will order the city to disclose to the appellant the severances in records 21, 33 and 34 for which section 14(1) has been claimed.

Issue B: Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the records?

[25] Section 7(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policymaking.[9]

Section 7(1) states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[26] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[27] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[10]

[28] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[29] Section 7(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[11]

[30] The relevant time for assessing the application of section 7(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 7(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy

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[9] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[10] See above at paras. 26 and 47.
[11] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

development, whether by a public servant or consultant.[12]

Representations

[31] Niagara states that a portion of the records are emails containing exchanges between its staff and the designer (who it identifies as a consultant) which amount to advice and recommendations about the original approved design plans provided by the designer for the septic system. It states that the advice and recommendations provided includes the intent of the design with respect to the installation of the septic system, as well as if the septic system was being constructed as per the approved design plan on which the permit was issued. It submits:

> It is normal practice and the role of a designer of the septic system to provide the design, information, and recommendations in support of an application for a septic permit which are in accordance and compliance with the [*Building Code Act, 1992* (the *BCA*)][13] and the Ontario Building Code. It is the role of the builder to ensure that the construction of the septic system is in accordance with the approved permit. A condition of the septic permit was that the sewage system must be constructed as proposed by the approved plan and design.
>
> As these emails provided information and recommendations regarding if the construction of the septic system was in accordance with their approved design, they therefore qualify as advice or recommendations.

[32] Niagara submits that a consultant does not need to be paid in order to be "retained" by the institution if part of the function of the consultant impacts the role of the institution.

[33] Niagara relies on Orders MO-2066 and MO-3979 in support of its submission that a consultant does not need to be paid in order to be "retained" by the institution if part of the function of the consultant impacts the role of the institution.

[34] The appellant submits that the relevant time for assessing the application of section 7(1) is the point when the public servant or consultant prepared the advice or recommendations. He states that the designer for the septic system was hired by the owner of the property, who was the appellant's customer, and was not at the relevant time an officer or employee or public servant of Niagara or a consultant retained by Niagara.

[35] The appellant submits that Niagara did not procure the designer's services through official or professional means, rather through past personal relationships, in a nonprofessional context and that this is clear in the communication between the designer

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[12] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[13] *Building Code Act, 1992*, S.O. 1992, c. 23.

and the director.

[36] The appellant submits that the director did not ask the designer to be a consultant. He states that the records reflect the director's very casual and unofficial questioning of the designer about his opinion about an employee of the appellant's company.

[37] Additionally, the appellant points out that Niagara never provided the requested proof to him that the designer was brought on by Niagara as an official consultant.

[38] Therefore, the appellant submits that not only should be redacted information be disclosed as the designer was not an official consultant, but should the IPC find that he was, any of the section 7(1) redactions that do not expressly suggest a course of action, should also be disclosed.

[39] The appellant submits that any factual or background information in the records does not qualify as advice or recommendations. He also submits that in Order MO-2066 (relied upon by Niagara) the adjudicator found that any cautions or views do not qualify as advice or recommendations under section 7(1).

[40] The appellant disagrees with Niagara's characterization of the designer's role and relies on section 1.1(2)(a) of the *BCA*, which reads:

> It is the role of a designer,
>
> > if the designer's designs are to be submitted in support of an application for a permit under this Act, to provide designs which are in accordance with this Act and the building code and to provide documentation that is sufficiently detailed to permit the design to be assessed for compliance with this Act and the building code and to allow a builder to carry out the work in accordance with the design, this Act and the building code.

[41] The appellant submits that, by reason of the *BCA*, it is clear that the role of the designer is not to provide advice to Niagara, but to provide sufficiently detailed documentation to Niagara to obtain a permit for the septic system and to allow the builder of the septic system to carry out his work.

[42] The appellant states that the IPC has previously found with respect to unpaid consultants that there existed documentation to prove the consultation relationship. He submits that this is not the case here, as no official retainment documentation has been provided to the appellant despite being requested, and it is the appellant's belief that such documentation does not exist.

Findings

[43] The information at issue for which section 7(1) has been claimed is found in

records 20, 32, 33, and 34.

[44] Record 20 is an internal Niagara email chain between staff. At issue in that email chain is an email proposed to be sent to the appellant in response to an email from him. Niagara has not provided representations on the information at issue in this record. Although a copy of this email was sent to another Niagara staff member, from my review of record 20, the sender did not seek the advice or recommendations of the recipient nor did the recipient provide any in response.

[45] I have not been provided with evidence that the redacted email in record 20 is a draft email, or that the sender of this internal email was seeking, or providing, advice or recommendations from or to the recipient about the email he was planning to send to the appellant. As a result, I find that section 7(1) does not apply to exempt the information at issue in record 20. As no other exemptions have been claimed for this information, I will order it disclosed.

[46] The remaining information at issue for which section 7(1) has been claimed in records 32 to 34, which are email chains, is contained in emails within those chains exchanged between the designer and the director or the designer and the owner. Niagara's position is that the designer was an unpaid consultant retained by it and, therefore, the designer was providing advice or recommendations to it about the septic system.

[47] In applying section 7(1),[14] the IPC has found that in certain circumstances unpaid consultants can be retained by an institution within the meaning of that exemption. For example, in Order PO-3365, the adjudicator found that each member of an expert panel was specifically and directly convened by the Ministry of Finance (through an independent agency FSCO)[15] to make recommendations on a certain subject matter, fell within the scope of the words "a consultant retained by an institution". This was because the expert panel members had been engaged or "retained" to provide their expert services to the ministry.

[48] In Order PO-3365, the adjudicator found that the expert panel members each fell within the scope of the words "a consultant retained by an institution" appearing in section 13(1) of *FIPPA* (the equivalent to section 7(1) of *MFIPPA*). She did so because the ministry had convened these experts for their expertise to provide FSCO with advice and recommendations on a certain subject matter. She found that it was inconsequential that the members of the expert panel were unpaid volunteers.

[49] In this appeal, it is clear from the records that the designer was retained by the property owner to provide the septic system design. He was not retained by Niagara. In the records, the designer is providing information to Niagara on behalf of his client, the

[14] Or its equivalent in the provincial statute, section 13(1) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).
[15] The Financial Services Commission of Ontario.

owner of the property, to allow Niagara to assess the information to decide on whether to issue a building permit. This building permit was required under section 1.1(2)(a) of the *BCA* to allow the appellant's company to build the septic system on the owner's property, as required under this section of the *BCA*.

[50] In this appeal, unlike the case in Order PO-3365, Niagara did not:

- directly convene the designer to provide advice and recommendations on a certain subject matter,
- select the designer to design the septic system,
- require the designer to sign a nondisclosure agreement prior to commencing work,
- require the designer to not retain copies of the records, and
- enter into a confidentiality agreement with the designer that stipulated that Niagara maintains control over information that the designer provides to it.[16]

[51] Instead, the designer was providing the statutorily required information under the *BCA* to Niagara to demonstrate compliance with the permit issuance requirements. Any extraneous comments by the designer to Niagara providing his views regarding the appellant or his company, does not render the designer a consultant retained by Niagara.

[52] Therefore, I find that in this case, the designer was not a "consultant retained by" Niagara in accordance with section 7(1) and the exemption does not apply to the information provided by the designer that Niagara has redacted from the records.

[53] As the designer was not a consultant within the meaning of section 7(1), the information in records 32 to 34, which is information in emails from the designer to Niagara, is not exempt under that section. As no other exemptions have been claimed, I will order Niagara to disclose this information to the appellant.

[54] In making this finding regarding the information at issue in records 32 to 34, I have considered the two orders relied upon by Niagara: Orders MO-2066 and MO-3979.

[55] Order MO-2066 considered two letters from a consultant retained by a municipality. In that order, the adjudicator found that these letters contain advice or recommendations put forward by this consultant.

[56] Order MO-3979 considered email correspondence and their attachments, hand-written notes, and other miscellaneous documents concerning a particular property in a township. In that order, the adjudicator found that certain information for which section 7(1) was claimed was exempt under that section as it revealed advice from a consultant

[16] See Order PO-3720.

retained by the township.

[57] In both these orders, unlike the case here, the consultant referred to in the records was found to have been retained by the institution. In this appeal, it is clear from the records that the designer was retained by the owner and, although he provided information to Niagara, he was retained by and reported to the owner. This is unlike the case in Orders MO-2066 and MO-3979, where the arrangements between the parties made it clear that that consultants in those appeals were retained by the institutions.

[58] Therefore, as I have found that the designer was not a consultant retained by Niagara, I find that the information for which section 7(1) has been claimed in records 32 to 34 is not advice or recommendations within the meaning of section 7(1) and I will order it disclosed.

Issue D: Did Niagara conduct a reasonable search for records?

[59] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[17] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[60] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[18]

[61] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[19] that is, records that are "reasonably related" to the request.[20]

[62] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[21] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[22]

Representations

[63] Niagara submits that it provided a copy of its request to its director to search

[17] Orders P-85, P-221 and PO-1954-I.
[18] Order MO-2246.
[19] Orders P-624 and PO-2559.
[20] Order PO-2554.
[21] Orders M-909, PO-2469 and PO-2592.
[22] Order MO-2185.

Niagara's record holdings. It states that, in response, the director conducted a search and 44 responsive records (including duplicates) were found, consisting of 287 pages. Niagara decided to grant partial access to these records, subject to the application of the exemptions at sections 7(1) and 14(1) for certain information on 18 pages of records.

[64] Niagara states that there are no additional records of texts, phone calls or meetings that have not already been located.

[65] The appellant states that Niagara has not produced training records for its employees. He also states that there should be text messages between a Niagara inspector to an employee of the appellant's company.

Findings

[66] From my review of the parties' representations and the records, I find that Niagara conducted a reasonable search for responsive records in which an experienced employee knowledgeable in the subject matter of the request made a reasonable effort to locate records that are reasonably related to the request.

[67] Based on my review of the parties' representations, I find that the appellant has not provided sufficient evidence to establish a reasonable basis that additional responsive records exist in response to his request.

[68] The appellant pointed to two types of records he believes should have been located by Niagara in it search for responsive records.

[69] Firstly, the appellant submits that training records should have been located. During mediation, Niagara provided the appellant with information describing how he can access the publicly available training records of Niagara employees. The appellant has not indicated that he has attempted to access this publicly available information about training records or advised that the training information that he believes should have been identified in Niagara's search is missing from these public records.

[70] Secondly, the appellant submits that there should be text messages between a named Niagara inspector and an employee of the appellant's company. The appellant is in possession of text messages between these individuals but has not provided them to me. Nor has he indicated what text messages are missing from the text messages that he already has.

[71] I find that I do not have a reasonable basis for concluding that additional responsive records exist. Accordingly, I uphold Niagara's search as reasonable.

ORDER:

1. I order Niagara to disclose to the appellant the information at issue in the records less the withheld email addresses of the affected persons **by May 17, 2024** but not before **May 10, 2024**.

2. I uphold Niagara's search for responsive records as reasonable.

3. In order to ensure Niagara's compliance with order provision 1, I reserve the right to require that Niagara provide me with a copy of the information disclosed to the appellant in accordance with that order provision.

Original Signed By: April 12, 2024

Diane Smith
Adjudicator