Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER MO-2554

## Appeal MA09-33-2

## Town of Iroquois Falls

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

## NATURE OF THE APPEAL:

The Town of Iroquois Falls (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to the town's sale of its shares in two local hydroelectric companies. The requester wrote:

> I would like to review the municipalities (sic) support documentation towards our sale [of] Northern Ontario Wires Inc. (NOW) and Northern Ontario Energy Inc. (NOE) shares. I would like to view all researched facts, administrative recommendations, pertinent correspondence, emails etc. [The town's mayor] claimed "council has done their homework" so I would like to see that homework. …
>
> Furthermore, I would like to view the minutes from the council meeting in 2000 in which council approved the sale [of] its interest of the Iroquois Falls Hydro Electric Commission to Northern Ontario Wire Inc. and Northern Ontario Energy Inc. and I would also like to review the public agreement and details of the sale. …

The town identified 52 pages of records as responsive to the request and issued a decision granting access to them upon payment of a fee. Approximately two months later, the same requester wrote to the town again, asserting that:

> You have not responded to all of my FOI requests [from the original] letter, therefore, I am requesting all documented facts and business case rationale towards the public sale of Northern Ontario Wires Inc. (NOW) and Northern Ontario Energy Inc. (NOE)[1] shares. …
>
> Therefore, please provide all factual information towards its sale including: all administrative recommendations, detailed financial analysis, business rationale with details and specifics, along with all financial and support documentation. Please include all pertinent public communications and emails. Quite simply please supply all documentation and information that was used to justify the proposed sale, along with any other facts that were communicated and presented to council. …

In response to this letter, the town wrote to the requester and merely stated that "the records deemed to be public documents have all been forwarded to you [previously]."

Based on his belief that additional records responsive to his request should exist, the requester appealed the town's decision. This office opened Appeal MA09-33 and appointed a mediator to explore resolution of the issues. In support of his belief that additional responsive records ought to exist, the appellant provided a copy of a local newspaper article in which the town's mayor

[1] For ease of reference, the two identified companies (Northern Ontario Wires Inc. and Northern Ontario Energy Inc.) may be referred to collectively in the singular as "the company" in parts of this order.

was quoted as stating that "Council has done its homework" with respect to the sale of the company's shares.

The town conducted a further search following the filing of the appeal and located additional responsive records beyond the 52 pages identified in the earlier decision. On March 26, 2009, the town issued a supplementary decision letter granting partial access to several hundred pages of newly identified responsive records. Access to other newly identified records, including meeting minutes and email correspondence between town staff, staff from the Town of Cochrane, and their respective legal counsel, was denied pursuant to section 6(1)(b) (closed meeting) and section 12 (solicitor-client privilege). The town also advised that third parties whose interests could be affected by disclosure (the affected parties) had been notified pursuant to section 21 of the *Act* and that a decision respecting disclosure of two of the recently located records would be made following receipt of their comments. The appellant appealed the denial of access. Since the adequacy of the town's search for responsive records was no longer the sole issue, Appeal MA09-33 was closed, and the present appeal (MA09-33-2) was opened to deal with all of the issues concurrently.

The town subsequently received the affected parties' representations and wrote to the appellant, advising him that access would be granted to a consultant's report titled "Assessment of Strategic Options for Ownership of Northern Ontario Wires Inc. *Discussion Draft* (July 2008)"[2] and "Toronto Hydro Networks Inc. Non-binding Expression of Interest" (July 2008), unless the affected parties appealed the town's disclosure decision to this office.

At the expiration of the appeal period, no third party appeal of the town's decision had been submitted to this office. The town issued a second supplementary decision, granting access to the two records described above, in addition to a third set of records consisting of "Auditor's Report and Financial Statements" for both Northern Ontario Wires Inc. and Northern Ontario Energy Inc. Access to the town council minutes for August 13, 2008 was still denied, pursuant to section 6(1)(b) of the *Act*. The town indicated that the records would be released upon payment of the stated fee by the appellant. However, the town offered the appellant the option of viewing the records at the town offices to eliminate the photocopying fees.

In response, the appellant took the position that the identified records do not contain the town's rationale for selling the specified companies' shares and he declined to review them. At that point, and as documented in the mediator's notes and her mediator's report, the appellant confirmed that he did not wish to pursue access to any of the other records withheld under the claimed exemptions, including section 12, with the exception of the August 13, 2008 council minutes. Further, as the appellant did not accept that the records identified by the town demonstrated that the town has done "its homework" regarding the sale, the adequacy of the town's search for additional responsive records remained at issue.

No further mediation was possible and the appeal was transferred to adjudication, where it was assigned to me to conduct an inquiry. I started my inquiry by sending a Notice of Inquiry outlining the facts and issues to the town, initially, seeking representations. After receiving the Notice of Inquiry, the town reconsidered its access decision with respect to the August 13, 2008

[2] This record is also referred to interchangeably in this order as "the consultant's report."

council minutes and sent a revised decision letter to the appellant, granting full access to this record. The town subsequently provided an affidavit respecting its search efforts to this office in response to the Notice of Inquiry.

Next, I sent a modified Notice of Inquiry to the appellant in order to seek representations on the sole remaining issue related to the adequacy of the town's search for records responsive to his request. The appellant responded by providing several sets of representations by email. In view of concerns I had with respect to the appellant's expectations regarding this appeal, I had staff from this office contact the appellant to discuss appeals under the *Act*, including the limitations on my jurisdiction. I then sent correspondence to the appellant to confirm the nature of these instructions, the content of which is more fully described in the next section of this order.

I subsequently sought reply representations from the town on several specific issues, and received brief representations in response.

## DISCUSSION:

### LIMITS OF THIS INQUIRY

As stated previously, I became concerned early in this appeal with respect to the appellant's expectations about what relief or remedy this office could offer him to address his stated concerns about the town's sale of its shares in the company. Specifically, my concern flowed from reading the following statement in the appellant's representations:

> The following is not only a specific request for the Town of Iroquois Falls to provide required public information over the sale of Northern Ontario Wires, but to also to (sic) clearly identify their numerous infractions of the Municipal Act, the Municipal Freedom of Information Act [sic] and the Municipal Conflict of Interest Act by this municipal council and administrative staff.

As a result of my concern, and as noted above, I directed staff from this office to speak with the appellant about the limitations of the jurisdiction of this office. I also corresponded with the appellant to confirm this information writing, in part, as follows:

> … I was concerned, upon review of your … representations that you were not aware of the limits of this inquiry and my jurisdiction as regards the town's decision with respect to the … transaction. I must emphasize to you that my jurisdiction is limited to a review of the adequacy of the town's search for records responsive to your request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).[3] I will not be reviewing issues related to the

[3] Section 1 of the *Municipal Freedom of Information and Protection of Privacy Act* establishes that the purposes of the Act are "(a) to provide a right of access to information under the control of institutions in accordance with the principles that, (i) information should be available to the public, (ii) necessary exemptions from the right of access should be limited and specific, and (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and (b) to protect the privacy of individuals with respect to personal

> *Municipal Act*, the *Municipal Conflict of Interest Act*, the *Municipal Statute Law Amendment Act, 2006*, or other statutes referred to in your representations, as I have no authority to do so. I confirm that I asked [staff] to convey to you that I would consider your representations solely as regards the search issue and the possible existence of additional records not already identified by the town in response to your request. …

I also note that the appellant's submissions describe at length his concerns about the town council holding closed meetings. This office has no general authority or mandate to review the propriety of a municipal council holding a meeting in the absence of the public. However, in the limited context of reviewing the denial of access to a record under section 6(1)(b) (closed meeting), an adjudicator will review whether a statute authorizes the holding of the meeting in the absence of the public to determine whether the second requirement of a three part test for the exemption is met. This particular review is unnecessary in the present appeal as the town is no longer denying access to the August 13, 2008 council minutes pursuant to section 6(1)(b).

Accordingly, and for the purposes of this order, I must emphasize that I do not have the power to review any decisions made, or other actions taken, by the town in relation to the transaction that is of concern to the appellant. Moreover, as I have no jurisdiction to make any findings to address the appellant's concerns in the manner requested, I confirm that I will not be reviewing or commenting upon them further in this order (Orders PO-2802-I and PO-2883).

**DID THE TOWN CONDUCT A "REASONABLE" SEARCH FOR RESPONSIVE RECORDS?**

Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 (Orders P-85, P-221 and PO-1954-I). If I am satisfied by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the town to carry out further searches.

The *Act* does not require the town to prove with absolute certainty that further records do not exist, but the town must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records (Order P-624).

Similarly, 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.

During the mediation stage of this appeal, the appellant advanced the position that "there has to be an email, or report saying 'let's sell the company'." When advised by the mediator that the emails for which the town was claiming section 12 (solicitor-client privilege) address the selling

---

information about themselves held by institutions and to provide individuals with a right of access to that information. R.S.O. 1990, c. M.56, s. 1."

of the company, the appellant stated that he was not interested in the emails, apparently because he had concluded that they would not explain *why* the decision had been made to sell the company in the first place. The town's clerk later advised the mediator that the decision to sell the company had already been made when the lawyers became involved, which was before the creation of the emails subject to the section 12 exemption claim. As previously stated, these emails and the possible application of section 12 are not, therefore, at issue in this appeal.

The town maintains that no internal recommendations exist with respect to the decision to sell the company, and that council made the decision based on a review of the records previously identified as responsive to the request, namely: the consultant's report "Assessment of Strategic Options for Ownership of Northern Ontario Wires Inc. *Discussion Draft* (July 21, 2008)", "Hydro One Networks Inc. Non-binding Expression of Interest" (July 2008) and the "Auditor's Report and Financial Statements." According to the town, it was necessary to seek the advice of an external consultant because neither town staff nor the town council had the expertise to analyze the transaction. The town advises that the consultant's report contains a recommendation to sell the company. However, as stated, the appellant takes the position that the identified records do not contain the town's rationale for selling the company, and he maintains that a document, or documents, containing council's internal recommendations to proceed with the sale ought to exist.

The town's initial representations, provided by the clerk, were brief. The town clerk submits:

- that as clerk, he has "custody and control" of all municipal documentation pertaining to North Ontario Wires Inc. and Northern Ontario Energy Inc. from incorporation year 2000 to present;
- that as clerk administrator for the town, he is responsible for keeping all By-laws and minutes of proceedings of council including those pertaining to the sale of the company;
- that he has conducted a full search of all hard copy files, electronic files, e-mail files, By-law files, resolution files and minute books for the years 2000 to 2009; and
- that to his knowledge, there are no other responsive records in existence in addition to the ones already identified.

The appellant expresses concern about alleged deficiencies with, or even the lack of, note-taking by the town's clerk. Specifically, the appellant submits that there should be further documentation regarding the sale of the company in the form of minutes, notes, and/or Council agenda items for, at the very least, the year 2007 up to August 21, 2008 and even from the time of the company's incorporation up to August 21, 2008, "where [the town] discussed, decided or determined the sale…" The appellant also questions how the town could sell its portion of a multi-million dollar power utility and "not have one file, note or documented piece of information over this matter[?]" Further, the appellant states:

> There is not one written report or document stating 'how it is in the best interest'. The town has never provided any publicly published factual, documented reason or rationale for selling NOW.

With his representations, the appellant sent newspaper articles and editorial commentary respecting the sale transaction. In reference to several of these articles, the appellant submits that there should be "factual back up" in the form of records in the town's custody that have not been disclosed. The appellant alleges that a disparity exists between what the town, its councillors and staff have stated on the public record (i.e. in the newspaper) and the documentation or meeting minutes provided to him to substantiate these claims. The appellant submits that:

> It strongly appears the town has been, or is, withholding public facts and information. Why did the Mayor contravene the [*Act*], by not disclosing the facts? He had an obligation to disclose.[4]

The appellant disputes the town's claim that the consultant's report could constitute the town's "homework" or preparatory work because, in his view, the report was commissioned by the Town of Cochrane, which purchased the company. The appellant is also not satisfied by the explanation that the audited reports and financial statements of the company and the expression of interest document prepared by Hydro One represent town council's "homework."

The appellant takes issue with the town's revised access decision respecting some of the records, and asks, "how does the town, or the clerk, have the authority to change provincial legislation, or did they not properly allow access to information in the beginning?"[5]

Subsequent to the initial set of representations submitted by the appellant, he sent additional correspondence on several occasions in support of his previously expressed concerns about the transaction and the alleged inadequacy of the information available to the public respecting it. The appellant provided a copy of an email exchange between town staff and staff of the Town of Cochrane dating back to 2004. The appellant also later provided this office with copies of council minutes for the Town of Cochrane that refer to the transaction, or the Town of Cochrane's expression of interest in acquiring the company, apparently to bolster the assertion that the town should also have similar records. When asked for a response, the town clerk stated that "what council members in Cochrane choose to report at their council meetings is up to them. As for Iroquois Falls' minutes, I can only record what my council members report and discuss at my council meetings."

I wrote to the town to seek reply representations that addressed certain points raised by the appellant, including: the possible existence of responsive email, or other records, dated prior to (approximately) 2008[6]; and further documentation regarding the sale of NOW and NOE in the

---

[4] Following this quote, the appellant sets out section 5(1) of the *Act*, which reads, "Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public." In my view, this provision is inapplicable in the circumstances of this appeal, and I will not refer to it again.

[5] This part of the appellant's representations, and several others, makes reference to the findings of an investigator appointed by the town to review its August 13, 2008 closed meeting. As this investigation is unrelated to my inquiry under the *Act*, I will not refer to it further.

[6] In reference to the email submitted by the appellant, I noted that "the appellant questions why this record was not identified as responsive by the town in response to his request. A copy of this record is enclosed. On my own review

form of minutes, notes, and/or Council agenda items for the years 2000 to August 21, 2008. I asked the town to provide a copy of its record maintenance and/or retention schedules or policies, if these exist, and/or an explanation of same. Finally, I sought clarification from the town regarding a reference to a "confidential memo" received from the Town of Cochrane in the August 13, 2008 council minutes that were disclosed to the appellant during adjudication.

In responding to my request for further representations, the town clarified that its understanding of the scope of the request was that the appellant was interested in access to any and all records related to the *sale* of the company. The town states that:

> while there are other emails and other records respecting then-pending general operation comments of NOW and NOE on an ongoing basis … I did not consider such to be relevant or responsive to the request of the appellant for any and all documentation respecting the sale of those two corporations [NOW and NOE]…

The town reiterates its position that, apart from the records already identified and provided to the appellant or for which access was authorized, all records in the town's custody or control that are responsive to the request have been identified and disclosed. The town also provided further information about the searches conducted, as follows:

> In the course of my search, … I reviewed all records of the municipality which may contain material that could be considered "reasonably related" to the request of the appellant. A new folder is created for Northern Ontario Wires Inc. and Northern [Ontario] Energy Inc. each year in which all hard copy documents are filed and I have searched all of the nine folders created between 2000 and 2008. I have also searched all my e-mail documents stored in one e-mail folder named NOW. In addition, Microsoft Outlook, our e-mail software, is equipped with a search feature which I used to search my entire e-mail data base for documents that may have unintentionally been filed elsewhere. All of Council's minutes and By-law records are stored in properly indexed electronic form as well as hard copy. In addition to searching the hard copies, my administrative assistant conducted additional electronic file searches of our server's data bank, via a search engine built-in to our software, for documents that may have inadvertently been misfiled. In conclusion, all three forms of document storage (hard copy, electronic copy and e-mail copy) have been search[ed].

The town states that it does not have a records retention policy of its own but advises that it maintains and preserves records in accordance with the provisions of the *Municipal Act*. The town also states that the "confidential memo" referred to in the August 13, 2008 council minutes was disclosed to the appellant. According to the town, the memo reviewed certain terms that were to be considered in the transaction and "all or part of the contents of this memo are incorporated into the Share Purchase Agreement between the Corporation of the Town of

---

of the records sent to this office by the town, including the emails identified as responsive (but apparently not at issue), these appear to be dated from the years 2008 and 2009 only. The July 16, 2004 email provided by the appellant is not among those emails. Please see paragraph 4 of your September 23, 2009 affidavit which refers to a search of email records for the years 2000 to 2009."

Cochrane and the Corporation of the Town of Iroquois Falls, a public document the appellant has in his possession."

**Analysis and Findings**

In my view, it would be helpful to clarify the scope of the appellant's request as a preliminary step in order to provide proper context for reviewing the adequacy of the searches conducted by the town. 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;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (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).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour (Orders P-134 and P-880).

In its reply representations, the town advised me that its understanding of the scope of the request was that the appellant was interested in access to any and all records related to the *sale* of the company. I agree. In my view, the wording of the appellant's initial request letter and the follow-up correspondence of several months later, as set out on the first page of this order, are quite clear. Accordingly, I find that the scope of the appellant's request was for all records related to, and providing justification for, the town's sale of the company. In this context, therefore, the town is correct that emails, such as the 2004 one submitted by the appellant as evidence in support of his claims of inadequate searches by town, would not be responsive to the request.

As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided (Orders P-624, PO-2388 and MO-2076).

It is important to remark, in my view, that the *Act* does not require an institution to prove with absolute certainty that records or further records do not exist (Order PO-1954). 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 (Orders M-909, PO-2469, PO-2592 and PO-2831-F).

Indeed, the expectation created by the wording of section 17 of the *Act* is that the individual conducting the search must be familiar with the subject matter to which the records relate and have a detailed knowledge of the institution's information management systems. In saying this, I note that there is no particular, or corresponding, requirement that the staff member or members conducting the search be knowledgeable in the *Act* or even in access to information matters more generally (see Order PO-2592). In this context, therefore, I would like to assure the appellant that there is nothing inappropriate about the town reconsidering its initial denial of access to the August 13, 2008 council minutes and granting access to the record, notwithstanding his expressed concern about that action. Contrary to the appellant's assertion, the town's revised access decision did not signal any attempt to change the legislation, but was, in my view, a perfectly valid re-exercise of the town's decision-making discretion respecting access to a record. Therefore, in my view, the fact that the town reconsidered its access decision does not lend support for the appellant's belief that additional responsive records ought to exist.

The appellant's representations make frequent reference to his concerns about how the town could sell its portion of a "multi-million dollar power utility" and "not have one file, note or documented piece of information over this matter[?]" The appellant also wonders how there could not be "one written report or document stating 'how it is in the best interest' of the town to sell NOW." However, the town has identified a number of records that it submits contain the economic rationale and provide the basis of the town's decision to sell the company. The town has granted the appellant access to these records. The appellant has apparently chosen not to view these records because he rejects the town's claim that they represent the town's "homework," arguing, for example, that the consultant's report was commissioned by the purchaser of the company, the Town of Cochrane. However, it appears from my review of the information in the file that this consultant's report (a discussion draft) was actually jointly commissioned by the two municipalities. Further, in my view, the fact that the appellant may not accept the explanation provided to him about the rationale or basis of the town's decision-making does not, by itself, render his belief that additional records responsive to his request should exist a reasonable one.

Furthermore, the council minutes for the Town of Cochrane submitted by the appellant that allude to the transaction or to that town's expression of interest in purchasing the company, do not assist the appellant in establishing a reasonable basis for his belief that additional records should exist in the custody or control of the Town of Iroquois Falls. It should be emphasized at this point that in a review of the adequacy of the town's search under the *Act*, my jurisdiction does not extend to a review of record-keeping practices or record maintenance procedures (Order PO-1943).

Based on the town's representations, I am satisfied that it has made a reasonable effort to identify and locate any existing records within its record-holdings. I accept that relevant town staff, and

the town clerk in particular, were knowledgeable about the subject matter of the request and conducted searches aware of the possible types of records that would be responsive to the appellant's request, at least in part because the appellant provided detailed explanations of his interest in this regard. In my view, town staff made adequate and reasonable efforts to locate records that would be responsive to the appellant's request. Accordingly, I find that the town's search for responsive records was reasonable in the circumstances, and I dismiss the appeal.

## ORDER:

I uphold the town's search for records responsive to the appellant's request.

Original signed by: October 8, 2010
Daphne Loukidelis
Adjudicator