

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2663-I

Appeal MA09-135

Town of Aurora

October 27, 2011

Summary: The appellant requested records currently in the possession of the Chief Administrative Officer (CAO) of the Town of Aurora relating to a specific matter. The town located responsive records, however the appellant was not satisfied with the search conducted by the town. The appellant also believed that the individuals making access decisions under the *Act* were not properly authorized to do so. I find that these individuals were properly authorized pursuant to sections 3 and 49(1) of the *Act*. I also find that the scope of the appellant's request must be narrowly construed to include only records "currently in the possession of the CAO." I find further that the town's search for responsive records was not reasonable and have ordered the town to conduct another search and to provide me with an affidavit outlining the steps taken to search for records responsive to the appellant's narrow request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 3, 17, 49(1).

BACKGROUND:

[1] The appellant submitted a request to the Town of Aurora (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

"Village Square" files currently in the possession of the CAO,

[with respect to] the streets of Elderberry Trail, Houdini Way & Springmaple Chase and their development.”

[2] The town responded by informing the appellant that the responsive records were available for his review and requesting that he pay a fee of \$45 for preparation time plus \$0.20 per page if he required a copy of any of these records.

[3] The town issued a supplementary decision a few days later to clarify its position as follows:

The six files pertaining to your request except, for seven (7) documents that will not be released pursuant to Sections 6, 7 and 12 of the *Municipal Freedom of Information and Protection of Privacy Act*, are available for review. ...

[4] The town went on to indicate that a fee of \$45 is required prior to the release of the information.

[5] The town subsequently issued a third decision in which it reiterated its position as stated in the previous two decisions, and advised the appellant that he may appeal the town's decision to this office.

[6] The appellant appealed the town's decision, initially due to the inadequacy of the town's decision, as well as the exemptions claimed and the fee.

[7] This appeal file underwent extensive mediation over a span of approximately 15 months, which resulted in the town issuing a number of supplementary decisions to the appellant and granting additional access to some of the records.

[8] During this time the appellant attended at the town's offices to view some records. The appellant then informed the mediator that there are some additional records mentioned in some of the records that he viewed. He asked that the town conduct another search for these additional records.

[9] The town conducted another search and located some additional records. It then issued a supplementary decision disclosing all of these additional records. The town also disclosed in full to the appellant, the remainder of the records that were originally at issue in the appeal. It later provided an affidavit regarding the search activities done to date, and noted that it was unable to locate some of the records that were mentioned in the records that were disclosed to the appellant.

[10] After further discussions with the mediator and the appellant, the town decided to take the additional step of contacting a third party and was subsequently able to locate additional records and agreed to issue a decision on these records.

[11] At one point in the mediation process, the appellant asserted that the information set out in the affidavit was incomplete, and requested some additional information regarding the searches that were conducted by the town.

[12] The town then provided the mediator with a chart which outlines some of the search information requested by the appellant. With consent from the town, the mediator shared this chart with the appellant.

[13] The appellant advised that he was not satisfied with the affidavit provided by the town and believed that some of the information contained in the chart is inaccurate. He requested that the town provide him with an affidavit from each person who conducted a search and with more information about its search activities. The town indicated that it was not prepared to provide the appellant with another affidavit and more information about its search activities.

[14] The town subsequently issued a decision granting full access to the newly located records and advised that it was not able to locate one record. It later stated that, except for the cost of photocopying, it decided to waive the fees for these records.

[15] The appellant was not satisfied with the town's efforts regarding the reasonableness of the search for the one record which the town could not locate and the reasonableness of the searches conducted to locate all of the records that he requested. The appellant also asserted that the individuals processing his access request were not properly authorized to do so.

[16] As mediation could not resolve all of the issues on appeal, this file was forwarded to the adjudication stage of the appeal process. During the inquiry into this appeal, both the town and the appellant were invited to provide representations, and these were shared between the parties in accordance with *Practice Direction 7* issued by this office.

ISSUES:

Issue A: Has the Head's authority under the *Act* been properly delegated?

Issue B: Was the town's search for responsive records reasonable in the circumstances of this appeal?

DISCUSSION:

Issue A: Has the Head's authority under the *Act* been properly delegated?

[17] The appellant takes the position that the Chief Administrative Officer (CAO) had no authority to process enquiries under the *Act*. The appellant attached a copy of an e-

mail sent to him by the CAO in which he invites the appellant to attend at the town's offices to review the records and provides him with a list of exempted records. It appears that the appellant believes that in doing so, the CAO has taken upon himself, if not the role of the Head, at least the delegated authority of the town clerk and deputy clerk.

[18] The appellant also refers to town Bylaws #5089.08H and #5068.08H, which he believes authorize the town clerk and deputy clerk to simply "process inquiries" under the *Act*. The appellant attached copies of these two by-laws to his submissions. He submits that the Head of the corporation has not delegated any powers or duties to the clerk and deputy clerk under the bylaws, and therefore, their delegated powers are limited and would not include decision-making.

[19] The town disagrees with the appellant and indicates that the town clerk and deputy clerk have been properly delegated under the *Act* to conduct all aspects of the town's responsibilities under the *Act*.

Analysis and findings

[20] Sections 3(1) and (3) of the *Act* provides that:

(1) The members of the council of a municipality may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipality for the purposes of this Act.

...

(3) If no person is designated as head under this section, the head shall be,

(a) the council, in the case of a municipality; and

(b) the members elected or appointed to the board, commission or other body in the case of an institution other than a municipality.

[21] Section 49(1) states:

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

[22] By-law Number 5089-08.H sets out the duties and responsibilities of the town clerk.

[23] Paragraph 2 of the By-law states:

The duties and responsibilities of the said office shall be as set forth in Schedule "A" hereto attached.

[24] Paragraph 10 of Schedule "A" provides:

Exercise the powers and duties as delegated by the Head of the Corporation for the processing of inquiries related to the Municipal Freedom of Information and Protection of Privacy Act.

[25] Bylaw 5068-08.H appoints the deputy clerk. Schedule "A" of this by-law specifies those duties to include:

1. To assist the Clerk and carry out all their statutory powers and duties in the Clerk's absence including ...
 - To co-ordinate the processing and inquiries under the [Act].

[26] Based on the wording of the two by-laws referred to above, I am satisfied that the clerk and deputy clerk have been properly delegated to deal with all aspects of the town's responsibilities under the *Act*. Although the by-laws do not set out in detail all of the activities that this would entail, neither do they limit the authority given to these individuals. I find that the broad wording used in the by-laws is sufficient to authorize both the clerk and deputy clerk to undertake the complete processing of inquiries under the *Act*, including the making of access decisions at first instance and during mediation.

[27] From my review of the e-mail sent to the appellant by the CAO, I find nothing improper in the manner in which the CAO provided the appellant with the list of exempted documents and/or in inviting the appellant to attend at the town's offices to review the records. It is very clear from the CAO's letter that his actions are taken in accordance with the decisions made by the clerk and deputy clerk. The CAO's role in this inquiry is not dissimilar from that of an analyst that might be employed by an institution's freedom of information unit, authorized to deal with the administrative matters relating to the inquiry under the ultimate authority of the Head or his or her delegate.

[28] Accordingly, I am satisfied that all actions taken by the town's representatives in this appeal were properly delegated and otherwise authorized.

Issue B: Was the town's search for responsive records reasonable in the circumstances of this appeal?

[29] The remaining issue to be determined in this appeal is whether the town's search for responsive records was reasonable.

[30] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[31] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

[32] 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].

[33] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

[34] 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 [Order MO-2246].

[35] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

[36] It is apparent from a review of this file and background information set out above that there was extensive discussion between the parties regarding the searches that were conducted and the records that were located. It is also apparent that the appellant has found the town's responses to be confusing and perceived them to be inaccurate. Of particular concern to the appellant is his view that the affidavit provided by the Manager of Administration and Acting Deputy Clerk (deputy clerk) for the town contained hearsay and that it did not identify who conducted the searches.

[37] I note that the appellant contacted the town and requested clarification of the information set out in the affidavit, namely, the names of the people conducting the searches, and the dates and locations that the searches were conducted.

[38] The appellant also notes that during a conversation he had with staff from the town, he was told that some records might be in storage, and queries whether a search was conducted for responsive records in this location. I have kept these concerns in mind while assessing the information provided by the parties in their representations.

[39] The town describes the circumstances relating to this appeal, and the searches that were conducted as follows:

- The appellant initially made an informal request to the town treasurer in December, 2008, at which time town staff searched for records responsive to the informal request.
- The appellant subsequently submitted an access request several months later and a search "was conducted at the time by experienced town staff members who had knowledge of the records being sought."
- The town takes the position that throughout the mediation process the appellant has "revised the scope of the request and asked for, and has been provided, records that were not part of the original request."
- The town indicates that from the time the appellant made his access request it has communicated with him in order "to clarify his request and respond to his questions and concerns."
- The town notes that it was not able to locate a letter dated August 15, 1990 from its external lawyer which had been referred to in other records disclosed to the appellant; nor was the external lawyer able to locate it within his offices. Noting that the record is over 20 years old, the town does not believe that additional searches would be productive.
- The town refers to documentation provided to this office during mediation regarding the searches that were conducted and submits that these searches, combined with the age of the records, the efforts made by it to obtain records from its external counsel, and the publicly available records located at the land registry office demonstrate that its search was reasonable in the circumstances.

[40] During mediation, the town provided an affidavit sworn by its deputy clerk. She indicates that:

- She is responsible for overseeing and maintaining the corporate records of the town;
- She has been advised by staff in the Building and By-law Services Department, the Infrastructure and Engineering Services Department and the Planning and Development Services Department "that they have conducted reasonable

searches in their respective Departments and provided me with copies of all relevant records pertaining to the Appeal.”

- She “has personally searched the electronic records systems...”
- She has personally searched five specifically named files and could not locate the missing records.

[41] The appellant initially objects to many of the comments made by the town in its submissions regarding the nature of his request and whether or not he revised his request, as well as references made by the town to its effort to clarify his request. Essentially, the appellant takes the position that his request has not changed since he originally submitted it. Rather, he is seeking records that he believes should exist and which he only became aware of as a result of the disclosures that were made in response to his initial request. He submits that this should not be viewed as a change in the scope of his request. He also believes that the attachments to documents he was provided with should not be missing as they pertained to a matter of importance to the town.

[42] The appellant acknowledges that his access request was based on the original informal request he made to the town. He states that upon review of the records disclosed in response to his formal access request, “it was apparent that attachments to a letter dated October 3, 1990 had been removed.”

[43] The appellant’s representations on the town’s search for responsive records raise two specific concerns:

[44] The first relates to the affidavit provided by the deputy clerk, and to a “reference” chart that was prepared by the town in response to a request for clarification from the appellant after reviewing the affidavit. In an e-mail to the town, the appellant asked for clarification regarding the searches referred to in the affidavit, namely, the dates of searches, who conducted the searches and where the searches took place. In response, he was provided with a chart that set out the department, the name(s) of the individuals who conducted the searches, whether searches were conducted off-site, where the search was done and whether electronic records were searched.

[45] With respect to this documentation provided to the appellant, he notes that the “reference” chart identifies two former staff members who have not worked for the town for a number of years. He queries why current staff did not conduct the search, noting that if only the former staffs’ personal files were searched, information that had been refiled, moved, stored electronically or destroyed might not be captured. In essence, he questions the validity of the information contained in the “reference” chart.

[46] The appellant also questions whether the deputy clerk was involved in preparing the “reference” chart even though it apparently reflected the details that were missing in her affidavit.

[47] The appellant also believes that affidavits should have been provided by those individuals who conducted the search.

[48] The appellant notes that the town's external lawyers who had been retained at the time of the transaction in question provided the town with over 50 pages of records and raises certain questions regarding that issue.

[49] The appellant's second concern relates to the locations that were searched. The appellant indicates that in response to his informal request, he was told that files needed to be brought from storage. However, he points out that in the "reference" chart, it indicates that files were not retrieved from storage. The appellant believes that there may well be files containing responsive records that are held in storage, and which have not been searched.

Analysis and findings

[50] This appeal has become very complicated, due, in part, to the extent to which the town has attempted to provide information to the appellant, which is commendable, but also due to what appears to me to be a confused approach to a very specific access request. In my view, the appellant has added to the confusion by the manner in which he has presented his position throughout mediation and in his representations. I have reviewed the file, including the numerous decision letters, the affidavit provided by the deputy clerk and the "reference" chart, as well as the extensive log of telephone conversations between the mediator and the parties, and I remain confused as to the extent of what is at issue in this appeal. Accordingly, I will refer back to the wording of the appellant's initial request:

"Village Square" files **currently in the possession of the CAO**, [with respect to] the streets of Elderberry Trail, Houdini Way & Springmaple Chase and their development."

[51] The first step to determining the search issue in this appeal is to identify the scope of the appellant's request. Despite the willingness of the town to approach its former legal counsel for copies of records in his custody and the various locations in which the town searched for records, I will only review whether a proper search was conducted for records "currently in the possession of the CAO" keeping in mind that these records would date back at least 20 years.

[52] In my view, vague assertions by the town that reasonable searches were conducted fall short of the type of information required to satisfy me that the search was indeed reasonable. Similarly, although the deputy clerk indicates that six files were searched, she does not indicate where these files were located, why they were chosen to be searched, and who conducted that specific search. She indicates that she searched electronic files, but does not give any specific information regarding the

parameters of her search or the search words she used. The town does not specify which files are "currently in the possession of the CAO", and where these files might be located.

[53] Accordingly, I agree with the appellant that the deputy clerk's affidavit is lacking in the information that it provides. I find that although the "reference" chart outlines who searched which departments, it does not provide any details of those searches and does not explain why the individuals who conducted the search looked only in their own files. Nor does the chart explain what relation these files have to records in the possession of the CAO.

[54] To recap, the request is specific to only files relating to Village Square currently in the possession of the CAO. I find that the town's search for these records was not reasonable because its explanations of the steps taken to search for responsive records are vague and incomplete. Accordingly, I will order the town to conduct a further search for responsive records, that is, records currently in the possession of the CAO that pertain to Village Square as detailed in the appellant's request.

[55] I will also order the town to provide me with an affidavit of the steps taken to do so. In this affidavit, the town will identify where records currently in possession of the CAO are located, what files were searched and by whom. If electronic records are searched, the town will outline the parameters of the search, including any search terms or phrases used to conduct the search. If responsive records are located, the town will review them to determine that all attachments have been accounted for, and if not, to identify those that are missing and to provide an explanation for their absence in the files searched. If the town conducts any further searches in an attempt to locate missing records that should reasonably have been in the CAO's possession, it should outline the steps taken in those searches as well.

[56] If more than one individual is involved in searching for responsive records, I will require an affidavit from each individual.

[57] I acknowledge that the appellant may not be satisfied with my decision to limit the scope of his request. However, if he continues to seek additional records held in other locations, he is not precluded from making a new access request to the town for this information.

ORDER:

1. The town's representatives have been properly authorized pursuant to sections 3 and 49(1) of the *Act* to make access decisions and take all necessary actions in processing requests under the *Act*.

2. The town's search for records responsive to the appellant's specifically worded request was not reasonable.
3. I order the town to conduct a further search for responsive records in accordance with the directions set out above and to provide me with an affidavit of search(es) within 30 days of the receipt of this decision.
4. I remain seized of the issues in this appeal.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ October 27, 2011