

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-2744-F

Appeal MA09-135

Town of Aurora

May 29, 2012

Summary: The appellant requested records relating to "Village Square". The town located responsive records; however the appellant believed additional records should exist. In Interim Order MO-2663-I the scope of the request was defined to include only records currently in the possession of the CAO. The town's search was found not to be reasonable as insufficient information relating to the steps taken to locate responsive records was provided. The town was ordered to conduct a further search and to provide an affidavit of search to the adjudicator. The town complied. In this order, the subsequent search is found to be reasonable and the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

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 issued a number of decisions regarding access to the records it located both in responding to the appellant's initial request, and during the mediation stage of the appellant's appeal of the town's initial decisions. The background to this appeal is set out in Interim Order MO-2663-I. At the end of the mediation process, two issues remained to be decided: (1) whether the Head's authority under the *Act* had been properly delegated and (2) whether the town had conducted a reasonable search for responsive records.

[3] In Interim Order MO-2663-I, I disposed of the first issue by finding that the Head's decision was properly delegated. Regarding the second issue, I found that the town's representations were insufficient for me to determine whether it had conducted a reasonable search. My specific findings regarding the search issue are set out below:

[T]he 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.

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.

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

[4] Prior to responding to the interim order, the town sought clarification regarding the parameters for search. I wrote to the town and copied the appellant as follows:

As I indicated in the interim order, I have limited the scope of the appellant's request to include only files which are in the possession of the CAO. I do not know how the town maintains its files and have therefore

asked the town to identify where records currently in the possession of the CAO are located.

To answer your question regarding which CAO I am referring to, I note that the appellant did not specify a named CAO. Rather, I interpret his request as referring to the "office" of the CAO. Accordingly, the request would be for files currently in possession of this office, whenever and by whomever they were created. In your letter you mentioned records held in storage. I would assume that if such records are considered within the possession of the office of the CAO, they would fall within the parameters of search.

[5] The town complied with the interim order. I provided the appellant with a complete copy of the town's submissions. The appellant submitted representations in response. After reviewing them, I decided that the town should be given an opportunity to reply. The town submitted representations in reply.

DISCUSSION

[6] In its representations, the town provides some background information¹ relating to the manner in which this request had been dealt with and acknowledges that, at the time of the original request, it should have either simply stated that no records exist, or sought clarification from the appellant. The town states further:

In fairness and I believe in keeping with the spirit and intent of the legislation, staff made a considerable effort to locate responsive records despite the fact that none of these records were in the possession of the [CAO].

The Town has gone to extraordinary efforts over an extended period of time to accommodate the request in question. The Town even went so far as to retrieve records beyond the scope of the request and not in its possession, but subsequently identified by the requester as being of interest. The Town has done everything possible to locate any records responsive to this request despite the fact that had it responded literally to the wording of the initial request no records would have been provided.

[7] The town also provides a sworn affidavit from the current CAO. He states that he searched both his electronic files and his office files for records pertaining to the Village Square development and did not locate any responsive records.

¹ The town refers to this information as "some additional context".

[8] In his submissions, the appellant is very critical of the information provided by the town in its representations. He states:

[The town's] letter attempts to introduce new material to be considered, by providing "some additional context". If this were the case, then certainly [the CAO] could have made the point in his Affidavit – but he does not. This fact speaks for itself. [The town] goes on to state that "currently" there are no records in the possession of the CAO. The fact of the matter is the files were in the CAO's possession at the time of the initial FOI request and moving them out prior to the CAO's Affidavit gives rise to additional questions and concerns. One must question the authority of the Interim Order if all it takes to appear to be compliant, is to remove the files from the CAO's possession. It can be argued that if the CAO allowed the files to be moved, that they would remain under his possession. And simply moving the files out of the CAO's office does not change the scope or reach of the Interim Order.

[9] The appellant also refers to the comments I made in the Interim Order and to the details I ordered the town to provide regarding its search. The appellant also refers to the letter of clarification I sent to the town following the issuance of the interim order and states, "The response was clear that records belonging to the "office" of the CAO were subject to the Interim Order and this included records stored off site."

[10] The appellant takes the position that the affidavit provided by the CAO falls short of that required to comply with the terms of the interim order. He submits that the affidavit lacks detail. He submits further that it was not in compliance with the interim order because the CAO restricted his search to his office and did not search off-site records.

[11] The appellant also queries why files were sent to the CAO's office during the original inquiry and why they were subsequently removed from his office during the adjudication stage of the appeal process. As well, similar to an issue he raised in Interim Order MO-2663-I, the appellant continues to take issue with "the town's practice of using non-employees to search their records [with respect to] FOI requests" and asks "what measures should be taken when confidential information is shared with non-authorized persons."

[12] The appellant concludes:

The process that is in place [is that the town] must provide evidence that the searches they conduct are in fact reasonable. They fall considerably short of this benchmark. It appears to me that [the town's] comments clearly show that [it] has not grasped the concept of the FOI process. [It] fails to understand that you cannot have non-employees conduct searches

for records. [It] fails to understand that when records are released with pages removed, the applicant has the right to ask where those pages went. [It] fails to realize that no matter how many records [it] releases in lieu of the severed records; it does not fulfill the request for the missing records.

[13] In responding to the appellant's submissions, the town provides additional information regarding the search that was conducted following the issuance of Interim Order MO-2663-I, in which I limited the scope of the appellant's request to include only files which are currently in the possession of the CAO.

[14] The town explains its record-keeping procedures and the search that was conducted as follows:

[O]nce records are identified as being appropriate for long-term storage the Customer & Legislative Services Department ("CLS"), headed by [a named individual], takes custody of such records and arranges for their long-term storage. I understand that this is fairly standard for most municipalities. In this case, any record that would have been in the possession and control of [the CAO] would have had such possession and control transferred to CLS for storage. Based on the requests of the appellant, records in long-term storage formerly in the possession and control of [the CAO] and his predecessors would have been part of the previous searches which uncovered the records that were disclosed to the appellant. These searches have been completed by employees of the Town. The fact that they may now be former employees of the Town is, respectfully, immaterial to the appellant's request.

Analysis and findings

[15] The appellant has raised several issues, some of which go beyond the reasonableness of the town's search for responsive records. I will address each of these issues in turn before considering the town's submissions regarding the search that was conducted following the issuance of Interim Order MO-2663-I.

[16] The appellant alleges that the town has improperly introduced new material in its representations following the issuance of Interim Order MO-2663-I. I do not agree. The contextual information provided by the town essentially repeats information provided in the representations that were considered in Interim Order MO-2663-I, acknowledges the comments I made in the interim order, and is relevant more generally to the approach taken by the town in responding to the appellant's access request.

[17] The appellant also alleges that the town has improperly moved files out of the CAO's office during the processing of this appeal. He does not explain why he believes that the CAO had possession of the files he seeks at the time of his initial access request. Keeping in mind that at least some of the records the appellant seeks are over 20 years old, I am not persuaded that the town has consciously acted improperly in removing records from the CAO's office or that it has attempted to thwart the access process.

[18] With respect to the appellant's interpretation of the comments I made in Interim Order MO-2663-I and in my subsequent letter of clarification, I find that he has misinterpreted the direction I gave to the town in clarifying the parameters of search. The appellant argues that I clearly indicated that the search must include records stored off-site. To the contrary, I stated that *if* records held in storage are considered within the possession of the CAO, they should also be searched. The distinction is significant, and I will address this issue further below.

[19] The appellant also raises an issue regarding the use of non-employees to search for records. It seems that the town is as confused about this issue as I am. Recognizing that the appellant first made an informal access request in December 2008, the town indicates that some employees have left its employ since that time and some, including the FOIC, have joined the town. There is no indication in the materials before me that the town has hired outside individuals to assist in the search. Even if it did, I am not persuaded that doing so would be improper or that it would result in "confidential information [being] shared with non-authorized persons," as I would assume that the town would ensure that anyone hired by it would be required to comply with the town's obligations under the *Act*.

[20] Finally, the appellant asserts that the CAO's affidavit falls short of complying with the directions I set out in Interim Order MO-2663-I. The appellant is correct that the town did not provide all of the specific information I indicated should be included in the affidavit of search. In the circumstances, however, this does not lead me to conclude that the matter should be returned to the town for further submissions. It must be kept in mind that the representations considered by me in Interim Order MO-2663-I addressed the searches that were conducted prior to the interim order and included searches of locations that, in my view, fell outside the scope of the request. I clearly established the scope of the request in Interim Order MO-2663-I, and the only issue to be addressed as a result of the interim order is whether the search for records "currently in the possession of the CAO" was reasonable.

[21] While the town's representations do not technically comply with all of the directions I gave it in the interim order, I am satisfied that the town has provided me with sufficient information to determine whether its search was reasonable.

[22] In particular, the town has explained that once a record is to be moved into long-term storage, possession and responsibility is transferred from the original holder to the head of the CLS. Accordingly, I am satisfied that the CAO did not retain possession once records were removed from his office to be placed in long-term storage. As a result, it was not necessary for the town to search for records off-site as this would extend the search beyond the scope of the request.

[23] With respect to the search undertaken by the CAO, in his affidavit, the CAO states that he searched both his electronic files and the paper files in the CAO's office, and that the parameters of search included the wording of the request, namely, "Village Square development."

[24] Given the scope of the request as determined in Interim Order MO-2663-I, I am satisfied that the search was conducted by the individual with knowledge of the files retained by his office. As I noted in Interim Order MO-2663-I, 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. I find that the town has conducted a reasonable search for responsive records since the 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.

[25] Accordingly, this appeal is dismissed.

ORDER:

The town's search for responsive records was reasonable and the appeal is dismissed.

Original Signed by:
Laurel Cropley
Adjudicator

May 29, 2012