Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2867

Appeal MA12-113

Town of South Bruce Peninsula

April 8, 2013

Summary: The appellant alleged that the town did not conduct a reasonable search for responsive records within its custody or control in relation to records that refer to the appellant "directly or by innuendo". The appellant also alleges that a number of individuals, including the current designated head of the town, were in a conflict of interest. The adjudicator finds that the appellant has failed to establish a conflict of interest and that the town's response to the appellant's request, as well as its search for responsive records within its custody or control, is in compliance with its obligations under the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4, 17.

OVERVIEW:

[1] The Town of South Bruce Peninsula (the town) received a two-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the following:

- email or letter correspondence from the town's staff and/or member(s) of council to a named professional association of engineers "sometime in 2011" that referenced the requester "directly or by innuendo," as well as any responding correspondence from the association to the town or town

staff or any member of council, including the mayor, in any way connected to the requester "directly or by innuendo."

- any other correspondence sent from the town or town staff, or any member of council, including the mayor, to anyone or any organization or any government agency, that refers to the requester "directly or by innuendo, and any responses received about same."

[2] The town identified records responsive to the request and granted partial access to them. The town relied on the exemptions at sections 8(1)(a) (interfere with a law enforcement matter), 8(1)(b) (interfere with law enforcement investigation), 8(1)(d) (disclose identity of confidential source of information), 8(1)(g) (reveal law enforcement intelligence information), 8(2)(a) (disclose law enforcement report) and 8(2)(c) (expose author of record to civil liability) of the *Act* to deny access to the portion it withheld.

[3] In its initial decision letter, the town indicated that with respect to the second part of the request, copies of the town responses to the requester's letters or emails were available for copying, for a fee.

[4] The requester (now the appellant) appealed the town's decision.

[5] During mediation, the town advised that it was no longer relying on the exemptions at sections 8(1)(a),(b), (d), (g) and 8(2)(a) and (c) to withhold access to the records responsive to the first part of the request and issued a supplementary decision letter disclosing those records to the appellant. Accordingly, access to these records and the application of the exemptions for them is no longer at issue in the appeal.

[6] With respect to the second part of the appellant's request, in the course of mediation, the town advised that the appellant would be granted full access to the records in his property file, with the exception of any personal information of individuals previously residing at his address. The appellant was invited to attend at the town office to review his file and choose the records that he wished to copy. The appellant attended the town's office and reviewed his property file and, as confirmed in the town's supplementary decision letter, he was provided with copies of any of the information that he requested. Accordingly, access to the information in those records is also no longer at issue in the appeal.

[7] As a result of the town's disclosure of information and the appellant's review of his property file, the appellant believed that more responsive records should exist. Accordingly, the reasonableness of the town's search for responsive records became the sole remaining issue to be addressed in this appeal.

[8] As mediation did not resolve the appeal it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[9] I invited representations from the town and the appellant. I received their representations and shared them in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

The town's representations

[10] In support of its position, the town relies on affidavits of the town Clerk and other town employees explaining the parameters of the search and describing in detail the steps taken in conducting the search.

[11] With respect to the parameters of the search, the town Clerk deposes that:

> … [It] was impossible for town staff to search for records which contain "innuendo" to a person as not all staff members who compiled documentation are in the employ of the town and a reasonable search would be for documentation which contained [appellant's name], Mr. [appellant's last name] or any reasonable version.

[12] The town Clerk then sets out in detail the steps taken in conducting her search, which included:

- instructing all staff to search their paper files, computer hard drives and network files (both email and documentation flies) for documentation containing the appellant's name within the specified time frame;
- searching her own computer hard drive, emails and computerized correspondence files for any such responsive records;
- searching the Administration (Clerk's department) file system for any such responsive records;
- searching the former Chief Administrative Officer's (CAO) paper files, hard drive, emails and computerized documentation any such responsive records;
- searching the former Manager of Public Work's paper files, hard drive, emails and computerized documentation for any such responsive records;
- searching the property filing system for any responsive paper records; and
- searching the general filing system including election documentation and historical paper documentation from the Clerk's department.

[13] The town clerk states that she placed all the responsive records that were located in the appellant's property file "if copies were not already present in the file". She states that she then reviewed the records with the appellant and provided copies at his request.

[14] The town Clerk also states that in the course of the property file review, the appellant produced documentation that he had received from the Ministry of Municipal Affairs and Housing as a result of a separate access request under the *Act*. She states that those records had not been found during the searches set out above. She deposes that during the course of mediation, the appellant instructed the town to contact the association named in his request and thereby reconstruct the town's records.

[15] In her affidavit the town Clerk explains that:

> When municipal employees leave the employ of the town, the email accounts are suspended and reset. This practice eliminates all history within the email account. If emails existed, they were eliminated during the suspension process.
>
> In [specified year], the town experienced the loss of the following employees: CAO and Manager of Public Works. In [the previous year], the town experienced the loss of a Manager of Public Works, Assistant Manager of Public Works and Public Works Administrative Assistant. Emails for those employees were reset.

[16] The town Clerk further states that the town's record retention by-law does not mention emails and there is currently no expectation that staff retain emails. In addition, item 2.7 of the town Technology Acceptable Use Policy D.3.9 provides that if email is not required as a permanent record of the municipality it shall be read and deleted from the system. Alternatively, an electronic copy can be retained in an electronic folder or a copy shall be printed and placed in an appropriate town file prior to the deletion of the email.

[17] The town Clerk deposes:

> Following this policy, staff will only keep an email if it is felt to be a permanent record of the municipality. This would be at the discretion of the staff member.
>
> It is reasonable to believe that records which are being sought may never have existed. It is plausible that telephone conversations took place. The town does not record telephone conversations and thus has no records in that regard.

[18] The affidavits of the other town employees describe the steps they took to conduct their search and set out that any documentation they found was provided to the town Clerk.

[19] The town Clerk states that the town "performed a thorough search of our office for any documentation containing the [name of the appellant, Mr. [name of the appellant] or any version thereof."

The appellant's representations

[20] The appellant agrees that the town conducted a thorough and reasonable "on-site" search, but asserts that the town did not conduct a reasonable "off-site" search by failing to request records from the professional association of engineers named in his request, which records, the appellant asserts, are under "the control" of the town. The appellant also alleges that a number of individuals, including the current designated head[1] of the town were in a conflict of interest and had "a personal interest in seeing" that he did not get the records. He requests that the town appoint a head "who has no conflicting interest regarding the case at hand" to address the matters at issue in the appeal. The balance of the appellant's representations, which included a supporting affidavit, sets out the appellant's view of various interactions between himself and the town, and his view of why the various individuals are in a conflict of interest.

The town's reply representations

[21] In its reply representations the town submits that it is under no obligation to obtain responsive records from the professional association of engineers named in the request, "as those records are outside its custody or control". The town also takes issue with the appellant's allegations regarding his perception of a conflict of interest.

Analysis and findings

Conflict of interest

[22] In Order MO-1285, Adjudicator Laurel Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She wrote:

> Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

[1] Section 3(1) of the *Act* reads: The members of the council of a municipality may by by-law designate from among themselves an individual or a committee of the body to act as head of the municipality for the purposes of this *Act*.

[23] The appellant's representations focus mostly on the town's past head, who issued the initial decision letter. However, that decision letter is no longer at issue in the appeal because the sole issue is that of search, which arose out of a second decision letter issued by the current head. In my view, based on my review of the materials tendered in support of his allegation, the appellant has failed to provide sufficient evidence to establish that when making her decision, the current head had a personal or special interest in the records, and that a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the current head with respect to the appellant's request and/or appeal under the *Act*.

[24] I now turn to the other issue in the appeal.

Reasonable search

[25] Section 4(1) of the *Act* reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[26] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[27] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[2]

[28] The courts and this office have applied a broad and liberal approach to the custody or control question.[3]

[29] 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.[4] 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.

[30] 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.[5]

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[2] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.)]

[3] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.

[4] Orders P-85, P-221 and PO-1954-I.

[5] Orders P-624 and PO-2559.

[31] To be responsive, a record must be "reasonably related" to the request.[6]

[32] 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.[7]

[33] This office has previously stated that government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed.[8]

[34] I am satisfied that the affidavits the town filed in support of its position demonstrate that it made a reasonable effort to address the appellant's request and provided a thorough explanation as to why no further responsive records exist within its custody or under its control. The appellant asserts that the town should require production of records from the professional association of engineers named in his request. I do not agree. In my view, based on the evidence before me the town has conducted a reasonable search for responsive records within its custody or under its control.

[35] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist. In my view, the appellant has not provided a reasonable basis for concluding that responsive records exist. Accordingly, I am satisfied that the town's response to the appellant's request, as well as its search for responsive records within its custody or under its control, is in compliance with its obligations under the *Act*.

ORDER:

1. The town's response to the appellant's request, as well as its search for responsive records within its custody or under its control, is in compliance with its obligations under the *Act*.

2. Accordingly, the appeal is dismissed.

Original signed by: April 8, 2013
Steven Faughnan
Adjudicator

[6] Order PO-2554.
[7] Order MO-2246.
[8] See the postscript to Order M-583. But also see Orders PO-2904 and PO-3100.