

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2869

Appeal MA12-73

Nottawasaga Valley Conservation Authority

April 16, 2013

Summary: The appellant submitted a request for information related to an identified property. The Nottawasaga Valley Conservation Authority (the conservation authority) located responsive records and granted partial access to them, severing them pursuant to section 14(1) (personal privacy) of the *Act*. The appellant advised that she was not appealing the conservation authority's application of the exemption to the records but that she believed additional records responsive to her request exist. Accordingly, the issue of whether the conservation authority conducted a reasonable search is the sole issue to be determined on appeal. This order finds that the conservation authority's search for responsive records was reasonable and was conducted in compliance with its obligations under the *Act*. The conservation authority's search is upheld.

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

Orders and Investigation Reports Considered: Order MO-2285.

OVERVIEW:

1. The Nottawasaga Valley Conservation Authority (the conservation authority) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to a specific address in Tottenham, in the Town of New Tecumseh.

2. The conservation authority located responsive records and issued a decision letter granting access, in part, claiming the application of the mandatory exemption at section 14(1) (personal privacy) of the *Act* and setting out the applicable fee. The requester paid the fee and the conservation authority disclosed the records, in part.

3. The appellant appealed the conservation authority's decision to this office.

4. During mediation, the appellant advised that she was not appealing the exemption claimed by the conservation authority but that she was of the view that additional records that are responsive to her request should exist. She provided a list of 24 concerns and questions she had with the conservation authority's search that she identified as "search issues." Some of these issues further specified the type of information that she was seeking through her request while others asked questions about the information to which she was given access.

5. The conservation authority provided a response to some of the appellant's questions and in many circumstances responded with the generic statement that "no additional records exist." The appellant was not satisfied with the responses provided by the conservation authority and stated that she continues to believe that additional records responsive to her request exist.

6. As the appeal could not be resolved during mediation, it was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to this appeal began the inquiry by sending a notice of inquiry setting out the facts and issues, to the conservation authority, initially, and then to the appellant, seeking representations. Both parties provided representations, in turn, which were shared in accordance with the practices of this office. Reply representations were sought from and provided by the conservation authority in response to the appellant's representations.

7. The appeal was transferred to me to complete the inquiry. The sole issue to be determined is whether the conservation authority's search for responsive records was reasonable. For the reasons that follow, I uphold the conservation authority's search and dismiss the appeal.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

8. 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 17.¹ 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.

Representations

9. The conservation authority submits that following its receipt of the appellant's request, it did not contact the appellant for further clarification on the records being sought as the request was clear. It submits that a thorough search for responsive records was conducted by planning and engineering staff and one file regarding the identified property was located. It further submits that any records regarding the subject property would be found in the planning file.

10. The conservation authority explains that a search for responsive records was conducted by its Senior Environmental Officer who is experienced in searching for records. The Senior Environmental Officer provided an affidavit attesting to the search that she conducted. In her affidavit she states that:

- She has been employed by the conservation authority for over 10 years and is very familiar with the importance of conducting a thorough search of records in accordance with freedom of information requests.
- She conducted a thorough search for information through both electronic and paper files. All files pertaining to the subject property are kept within the confines of the conservations authority's administration building. She provided all responsive records that were found in the property file to the Freedom of Information Coordinator (FOIC).
- No records regarding the subject property would have been purged from their files as their retention schedule dictates a "permanent (held)" status for permits."

11. The conservation authority also provided an affidavit sworn by its Water Resource Engineer who also conducted a search for responsive records. In her affidavit she states:

- She has been employed by the conservation authority for over 4 years and is very familiar with requests pertaining to their records.
- She conducted a thorough search for information through both electronic and paper files. All files pertaining to the subject property are kept within the confines of the conservations authority's administration building. She

¹ Orders P-85, P-221 and PO-1954-I.

located records pertaining to the subject property including "emails and internal memorandum that [she] confirmed were in the possession of the Planning Department, in the property file."

- If records existed for the subject property regarding a permit application, those records would still be retained by the conservation authority as its "retention schedule dictates a 'permanent (held)' status for permits."

12. The conservation authority's FOIC also provided an affidavit attesting to her role in the search for responsive records. She stated the following:

- She forwarded the request to the Directors of Planning and Engineering and Technical Services and received the file containing the records regarding the property in question from the Senior Environmental Officer.
- She reviewed the file and compiled the records for which access was to be granted, and severed the personal information of individuals other than the appellant pursuant to section 14(1) of the *Act*. With the exception of the personal information that was severed regarding the owner of the property and any other personal information in the records, no records were withheld. She estimates the degree of disclosure was 99%.

13. In her representations, the appellant states that she was not contacted by the conservation authority for any clarification of the records being sought but that she believes that her request was "quite clear in that it asked for ALL records."

14. As noted above, during mediation, the appellant provided a list of 24 "search issues" which consist of questions and concerns she has regarding the conservation authority's search. Many of her issues ask specific questions about the property named in the request or the content of the records themselves. Others ask the conservation authority to provide explanations of or clarifications to the information contained in the records that have been provided to her, including why certain notes or information have been added or omitted or why something was prepared in a certain way. In some instances, she requests the name of the conservation authority staff who prepared the record and the dates on which they were prepared. In the majority of the issues however, the appellant requests the "release of" additional records or specific types of information that she believes might exist that would help to explain the content of the records released to her or that might explain why information related to the property identified in her request was not provided to her.

15. In her representations, the appellant takes issue with the fact that the conservation authority has responded that "no additional records exist" to a significant number of the questions on her list of search issues. She states that, by her reading of that response "this presumes that some record existed for each of those requests, and that those records had already been released."

16. The appellant goes through a number of the issues and makes submissions on why she believes that the conservation authority's response to those specific issues is not satisfactory. For example, where the conservation authority has stated "no additional records exist" she frequently asks which of the records that have been disclosed to her is considered responsive to that question. In some circumstances she states simply that she believes that the type of information she requested must exist.

17. The appellant concludes her representations by stating that because of the deficiencies in the conservation authority's response as outlined in her submissions, she believes that "a complete and thorough further search needs to be conducted by [conservation authority] staff to address [her] search issues ..., rather than a cursory 'no additional records exist' response which does not unequivocally state that records do or do not exist." She states that she needs to know definitively either that records exist and have been released in their entirety or redacted or that no responsive records exist.

18. On reply, the conservation authority states that it has reviewed the appellant's representations and has considered her concerns. It submits that when providing information in accordance with the *Act*, "it is not [its] practice to alter records to explain notes/comments/symbols on maps, etc.." It also states that the records are copies as they are within their files. The FOIC states:

I have reviewed my response to the appellant's letter...and the issues raised regarding "no additional records" as well as other concerns regarding access to information.

I have reviewed my response ... to the appellant and revisited and reviewed the property file in question, and must advise that all records in accordance with the request...from the appellant for "all records related to [identified address], Tottenham, Town of New Tecumseth," have been released with the exception of identifiable information.

19. The conservation authority further states in its reply representations that it "will not, and does not, refrain from sharing accessible information through an FOI request in accordance with the [*Act*]."

Analysis and finding

20. 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.² To be responsive, a record must be "reasonably related" to the request.³

21. 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.⁴

22. 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.⁵

23. Based on the conservation authority's representations and the affidavits sworn by members of its staff, I accept that the various searches conducted for records responsive to the request were conducted by experienced employees who are knowledgeable in the subject matter of the request and that those individuals expended a reasonable effort to locate responsive records. I accept that it is reasonable that there is a file held by the planning department that contains all the information relevant to the property identified in the request and that the relevant file was disclosed to the appellant. Accordingly, I am satisfied that the conservation authority provided sufficient evidence to demonstrate that it made a reasonable effort to address the appellant's request and locate all records reasonably related to the request.

24. 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.⁶ In my view, the appellant has not done so in this appeal.

25. It is clear that the appellant is not satisfied with the answers that she received from the conservation authority in response to her letter identifying 24 issues that she has with the search. Her argument that additional responsive records should exist is predicated on the conservation authority's use of the phrase "no additional records exist" in response to her issues. She takes the position that by making this statement the conservation authority is implying that it has already disclosed records responsive to that issue. In other circumstances, she states that "no additional records exist" is not an appropriate response to the identified issue. However, despite her statement, neither in

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469, PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

her representations, nor in her letter identifying the 24 issues, does she provide sufficient evidence to suggest a reasonable basis upon which to conclude that the information that she requests might exist.

26. Moreover, I accept that when the appellant requests, as she does in many of the 24 issues, that certain specified information be “released” to her, the conservation authority’s response that “no additional records exist” is not necessarily indicative that records responsive to that question originally existed. In the absence of concrete evidence to suggest that additional records might exist, in my view, “no additional records exist” can be taken to mean that its position is that there are no responsive records other than those that may have already been disclosed to her in response to her original request.

27. From my review of the appellant’s letter that identifies the 24 issues, I acknowledge that the conservation authority’s responses are not always completely congruent to the request made in the specific issues. This is often the case where the appellant asks for explanations about the content and significance of the records that have already been disclosed to her, including explanations of what certain things in the records mean, why certain graphics or notes may have been added and by whom, or the date and the name of the staff member who prepared the record. However, the conservation authority is not required by the *Act* to answer questions with respect to the content of records disclosed through access to information requests unless such information already exists in a recorded form. In the absence of existing recorded information, the *Act* does not require the conservation authority to create a new record.⁷

28. The conservation authority’s position is clear; it has released to the appellant all records that are responsive to her request for information related to an identified property. As previously noted, the conservation authority is not required to establish with absolute certainty that further records do not exist, only that its search for responsive records is reasonable. Based on my reasoning outlined above, I am satisfied that it is.

29. Accordingly, in the circumstances, I find that the conservation authority has provided sufficient evidence to establish that it has conducted a reasonable search for responsive records. I am therefore satisfied that the conservation authority’s response to the appellant’s request, as well as its search for responsive records, is in compliance with its obligations under the *Act*.

⁷ Orders 17, MO-2285.

ORDER:

I uphold the conservation authority's search and dismiss the appeal.

Catherine Corban
Adjudicator

April 16, 2013