

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2934

Appeal MA11-123

Town of Penetanguishene

August 23, 2013

Summary: The appellant requested access to information relating to an investigation undertaken by an identified town Municipal Law Enforcement Officer. A number of matters were resolved at mediation and in the course of adjudication, leaving the reasonableness of the town's search for records responsive to the appellant's request for "the completed bylaw complaint form" as the sole issue to be addressed in the appeal. The order upholds the reasonableness of the town's search, and dismisses the appeal

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

OVERVIEW:

[1] The Town of Penetanguishene (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (the Act)* for access to all materials related to an investigation undertaken by an identified town Municipal Law Enforcement Officer (the MLEO) on a specified date. In particular, the requester sought access to:

- the completed bylaw complaint form
- any written or computer correspondence "that captures (other than [an identified individual]) the 'town's' position

which [the identified MLEO]] clearly indicates in her January 8th, 2010 letter”

- notes indicating who was interviewed
- the Occurrence Report
- any other materials filed in support of the town’s position identified in the MLEO’s January 8, 2010 letter

[2] In its first decision letter, the town relied on sections 8(2)(a), (b) and (c) of the *Act* (law enforcement) to deny access to the records that it identified as responsive to the request. With respect to the request for access to “the completed bylaw complaint form”, the town’s decision letter stated:

... please be advised that there is no such record. A By-law complaint form was not completed in reference to the noted investigation on [specified date].

[3] The requester (now the appellant) appealed the town’s decision.

[4] During mediation, the town advised that it was no longer relying on sections 8(2)(a), (b) and/or (c) of the *Act* to deny access to the responsive records. As a result, those sections are no longer at issue in the appeal. The town also issued a supplementary decision letter, accompanied by an Index of Records. The town granted access, in part or in full, to the records listed from 1 to 8 in the index, which the town indicated were responsive to items two to five of the request. The town withheld information that it viewed as non-responsive to the request from records 1, 3, 4 and 5. With respect to the request for access to “the completed bylaw complaint form”, the town’s supplementary decision letter reiterated that no responsive record exists and further stated that:

As per the Town’s Municipal Law Enforcement Policy and Procedure Manual:

The MLEO may initiative (sic) an investigation when an alleged by-law enforcement matter is brought to their attention in the course of their duties or witnessed by an Officer when on patrol.

[5] The appellant advised the mediator that he was not disputing the town’s position that the withheld portions of records 3, 4 and 5 are not responsive to the request. Accordingly, that information is no longer at issue in the appeal. However, the appellant took the position that the withheld portion of record 1, being identified in the Index of Records as an occurrence report, was responsive to the request. The appellant also disputed the town’s position that there are no records responsive to his request for access to “the completed bylaw complaint form”. Accordingly, at the close of mediation

only the responsiveness of the withheld portion of record 1, and the reasonableness of the town's search for records responsive to the appellant's request for access to "the completed bylaw complaint form", remained at issue in the appeal.

[6] As mediation did not resolve the appeal it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to conduct the adjudication commenced her inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the town, which provided representations in response. A Notice of Inquiry accompanied by the town's non-confidential representations was then sent to the appellant. This was followed by a letter to the appellant enclosing an amended version of the second page of the Notice of Inquiry. Shortly thereafter, this office received a copy of a further supplementary decision letter disclosing an unsevered copy of Record 1 (identified in the Index of Records as an occurrence report) to the appellant. Accordingly, the issue of the responsiveness of the withheld portions of that record is no longer at issue in the appeal.

[7] Instead of providing representations in response to the Notice of Inquiry, the appellant forwarded correspondence to this office expressing his concerns about the manner in which the town conducted itself in this appeal, as well as its interactions with him. The appellant also expressed concerns about the appeal process, and sought on a number of occasions to adjourn the inquiry or to place it on hold, all of which, except for the last occasion, were granted. In correspondence to the appellant, the adjudicator assigned to the appeal addressed certain of his concerns¹, advised him that he may raise additional factors that he may feel are relevant to the appeal in any representations he provides², and refused to further delay the inquiry³. The appellant did not provide any representations that addressed the issue of reasonable search.

[8] The file was subsequently transferred to me to complete the adjudication. The only remaining issue in this appeal is the reasonableness of the town's search for records responsive to his request for access to "the completed bylaw complaint form".

DISCUSSION:

[9] 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.

¹ In a letter to the appellant dated July 31, 2012.

² In a letter to the appellant dated September 4, 2012.

³ In a letter to the appellant dated September 13, 2012.

⁴ Orders P-85, P-221 and PO-1954-I.

[10] 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

[11] 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

[12] The town states in its representations that bylaw complaint forms are received by mail, in person, by fax and occasionally by email. The town submits:

The front reception staff receives all town correspondence that is received by mail, in person and by fax. The correspondence is date stamped and then distributed to the appropriate member of staff. In reference to complaint forms, completed forms are placed on the Municipal Law Enforcement Officers (MLEO) desk in a blue folder marked "Confidential". Once received by the MLEO, they are processed as noted below.

Complaints received by email are received directly by the MLEO and printed.

...

Once a complaint form is received, it is logged in accordance with the established policy and procedures.

[13] The town provided a copy of its Municipal Law Enforcement Policy and Procedure Manual in support of its position. The Manual sets out the town's complaint processes and procedures as well as its records retention schedule.

[14] The town submits that upon receipt of the appellant's request:

... the town Clerk and MLEO conducted a search for a completed complaint form by searching the P01 By-law Enforcement file, cabinet and computer log and the MLEO email. No such form was located. During the appeal process, a secondary search was conducted by the same individuals in the same locations. No such form was located. It should be noted that the file cabinet, computer log and MLEO email are secure in nature (locked or password protected) with limited access.

[15] The town further submits that based on its record retention schedule, it is not possible that the record existed but no longer exists.

⁵ Orders P-624 and PO-2559.

⁶ Order MO-2246.

[16] The issue before me is whether the search carried out by the town for records responsive to the appellant's request for access to "the completed bylaw complaint form" was reasonable in the circumstances. As set out above, the *Act* does not require the town to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. In my view, based on the evidence before me, the town has conducted a reasonable search for any responsive record pertaining to the appellant's request for access to "the completed bylaw complaint form". 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 this case the appellant has failed to do so. Accordingly, I am satisfied that the town's search for records that are responsive to the appellant's request for "the completed bylaw complaint form", is in compliance with its obligations under the *Act*.

ORDER:

1. The town's search for records that are responsive to the appellant's request for "the completed bylaw complaint form", is in compliance with its obligations under the *Act*.
2. Accordingly, the appeal is dismissed.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ August 23, 2013