

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2957

Appeal MA11-229

Town of Penetanguishene

September 30, 2013

Summary: The appellant made an access request for information relating to the *Building Code Act* classification of a commercial property, mostly in the form of questions. The request had two components. The town identified records that it considered to be responsive to the request and, relying on section (8)(2)(a) of the *Act*, denied access to them in full. The appellant appealed the decision and asserted that additional responsive records ought to exist. In this order the adjudicator finds that the records that the town located were not responsive to the request, and orders the town to conduct a further search for records responsive to the first component of the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 1, 2(1), 4(1), 17, 19 and 22, as amended.

Orders Considered: MO-2096, MO-2285.

OVERVIEW:

[1] The Town of Penetanguishene (the town) received the following access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*):

I am requesting all and any information, as requested in my email to both the Chief Building Official and Fire Chief (attached – 3 pages), related to

the present [*Building Code Act*¹] classification of the commercial building at, [a specified address], including, but not limited to, when the use was determined and how long it has been legally established without change.

[2] The attached email requested answers to the following questions:

Could you please tell me what the present classification of use is for the commercial building at [the specified address]?

Is it an E mercantile occupancy, or is this single occupancy still considered an F2, medium hazard occupancy?

From a Building Code perspective, what is the present classification of this buildings use?

Is it an E mercantile occupancy, or is this single occupancy still considered an F2, medium hazard occupancy?

[3] After notifying the property owner, who objected to the disclosure of any information relating to the property, the town identified two records as being responsive to the request and, relying on the discretionary exemption at section 8(2)(a) of the *Act* (law enforcement report), denied access to them, in full.

[4] Addressing the requester's questions, however, the town's decision letter went on to state as follows:

Fire Department Records

Could you please tell me what the present classification of use is for the commercial building at [the specified address]?

Occupancy: Convenience/Variety Store

Is it an E mercantile occupancy, or is this single occupancy still considered an F2, medium hazard occupancy?

OBC Class: E – Mercantile Occupancy

Building Department Records

From a Building Code perspective, what is the present classification of the current use?

¹ *Building Code Act*, 1992, S.O. 1992, c. 23.

Occupancy: Single Tenancy Building

Is it an E mercantile occupancy, or is this single occupancy still considered an F2, medium hazard occupancy?

OBC Class: E – Mercantile Occupancy

[5] The requester (now the appellant) appealed the town's decision and took the position that there are additional records that are responsive to his request.

[6] In the course of mediation, the appellant provided the mediator with correspondence particularizing the additional records that the appellant considered to be responsive to the request. The appellant set out in the correspondence that this list included, but was not limited to:

Final inspection documents associated with [an identified building permit], and the installation of a commercial oven, and its subsequent vent alterations.

Occupancy Permit(s) for the present use.

Zoning Review and Certificate Form or Zoning sign-off documentation associated with [the identified building permit].

Notification from the Planning Department that a zoning review was completed with the issuance of [the identified building permit], as well as the Zoning review.

Documentation associated with commercial oven vent alterations that took place in 2008, following the issuance of [the identified building permit], and the resulting lawyer negotiations.

Documentation which connects the registered owners, [two named individuals], with [the identified building permit].

Records which indicate when, and how, the present Building Code Classification, a single occupancy E Mercantile Variety Store was legally established from its original, long term use, an Automobile Service Garage, or under the Building Code Classification, an F2 Medium Hazard Industrial Use/Occupancy.

[7] In response, the town provided the appellant with a supplementary decision letter. The town maintained its position that the records that it identified as responsive

to the request were exempt under section 8(2)(a). With respect to the two records, the town's decision letter set out that a secondary search and review of the request took place, with the author of the letter advising that:

As the head Freedom of Information Coordinator, I have reviewed the request, conducted a secondary search and spoken to the Fire Chief, Chief Building Official and Director of Planning and Development to obtain further information.

...

I have confirmed with the Fire Chief that the inspection was conducted based on a complaint received by that department, therefore, section 8(2)(a) of the *Act* applies and access to the record is DENIED.

...

In reference to the record of the Inspection Notes and Photos completed by Building Inspector ..., this inspection was also not a routine inspection, but rather was in reference to a Planning Department application that was filed by the property owner, therefore section 8(2)(a) of the *Act* applies and access to the record is DENIED.

[Emphasis in original]

[8] With respect to the appellant's list of potential additional records, the town's supplementary decision letter further advised that:

The additional records you have noted in your fax (points 1 to 6) are not believed to be responsive to the content of your original request. [The identified building permit] was issued for the installation of a commercial oven, not a change of use permit, therefore, [it] is not responsive in reference to the matter at hand.

[9] With respect to the seventh point in the list, however, the town advised:

Further to the initial [access to information request] which asked, "When was the use determined and how long has it been legally established without change", I have conducted a secondary search and reviewed the property file for [the specified address] and spoken at length with the Chief Building Official.

Prior to 1990, "change-of-use" Building Permits were not required when a new business was opened in an existing business location. There are no records pertaining to any changes of use for this property. Therefore, it

can reasonably be presumed that the E mercantile occupancy has existed at this location for many years, if not always.

I also wanted to note that building and fire code provisions differ from that of the town's Zoning By-law and should not be confused as there are different provisions under these [statutes].

The present classification of use as determined by the Fire Department is Occupancy: Convenience/Variety Store.

The present classification of use as determined by the Building Department under the *Ontario Building Code* is a Group E - Mercantile, Major Occupancy with no subsidiary occupancies.

From both Departments, the building is rated as an OBC Class: E - Mercantile Occupancy.

1.4.1.2 Defined Terms (Div. A - Part 1 of the OBC) - "Mercantile Occupancy means the occupancy or use of a building or part of a building displaying or selling of retail goods, wares or merchandise"

The zoning of the property is COMMERCIAL GENERAL "CG". I have attached an excerpt from the Town's Zoning By-law 2000-02 as amended which outlines the permitted uses of this property.

In closing, to summarize:

PRIOR TO 1990, where no construction was proposed, a person was not required to obtain a Building Permit to permit a "Change of Use" provided the proposed use was listed in the Zoning By-law.

After 1990, if no construction is proposed, a building permit is not required to permit "change-of-tenancy" provided the proposed use remains, in this case, classified as Group E - Mercantile Occupancy, or complies with at least one of several other exemptions to "Change of Use" provision under the *Ontario Building Code*, and provided the proposed use was listed as a permitted use in the Zoning By-law.

[10] The appellant took issue with the application of the section 8(2)(a) exemption to the records the town identified as responsive to the request, and maintained his position that further additional records ought to exist.

[11] 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 representations, with the name of the property owner of the commercial building at the specified address severed, was then sent to the appellant.

[12] 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 in 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.

[13] In correspondence to the appellant, the adjudicator assigned to the appeal addressed certain of his concerns², advised him that he may raise additional factors that he may feel are relevant to the appeal in any representations he provides³, and refused to further delay the inquiry⁴. The appellant did not provide any representations that addressed the matters at issue in this appeal.

[14] The file was subsequently transferred to me to complete the adjudication.

RECORDS:

[15] At issue in this appeal are two records, described in the Notice of Inquiry as a Fire Captain's Inspection Report and a Building Inspector's Inspection diagram/notes and photos.

DISCUSSION

[16] The town submits that the scope of the request was clearly defined and, addressing the letter that the appellant provided to the mediator, states that:

It is the opinion of the Head, that the additional records noted (points 1 to 6) were not believed to be responsive to the content of the original request. Should the requester wish to receive the records pertaining to [the identified Building Permit], it is felt that a separate [access to information] request should be filed.

[17] The town further submits that in a specified year the appellant filed three separate requests for access to information pertaining to the identified building permit.

² In a letter to the appellant dated July 31, 2012.

³ In a letter to the appellant dated September 4, 2012.

⁴ In a letter to the appellant dated September 13, 2012.

They submit that one of the requests was appealed to this office and “settled”. The town submits that “[r]eopening this matter may conflict with the previous decision made by the IPC”.

Analysis and Finding

[18] The town provided no further submissions in support of its position that “[r]eopening this matter may conflict with the previous decision made by the IPC”. Accordingly, I am unable to determine whether, for example, this request is moot or that adjudicating this appeal would be an abuse of process.⁵ As a result, the town’s submission with respect to the appellant filing three separate requests for access to information pertaining to the identified building permit is no impediment to my considering, and adjudicating upon, the scope of the request at issue in this appeal.

[19] In that regard, the request at issue can be considered to have two separate components. The first component is a request for information relating to the “present [*Building Code Act*] classification” of the commercial building at the specified address, which includes the information sought in the questions set out in the email attached to the request. The second component of the request seeks records that would respond to a further question, namely “when the use was determined and how long it has been legally established without change”.

[20] In its initial decision letter, the town provided answers to the questions set out in the email attached to the request and identified two records as responsive to the first component of the request. In its supplementary decision letter, the town explained why there aren’t any records that are responsive to the second component of the request.

[21] On my review of the request and the two records that the town identified as responsive to it, it is not clear to me how the town came to the determination that the two records are responsive to the request. That being said, the two records may relate to one or more of the categories of additional records that the appellant considered to be responsive to the request, as set out in his correspondence provided to the mediator.

[22] Several sections of the *Act* deal with the formalities of making, and responding to, an access request.

[23] Section 1 of the *Act* sets out that the purposes of the *Act* are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,

⁵ See in this regard, Order PO-3184.

- (i) information should be available to the public,
- (ii) necessary exemptions from the right of access should be limited and specific, and
- (iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[24] Section 4(1) of the *Act* sets out a person's general right of access to records:

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,

- (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious

[25] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

.

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[26] Section 19 of the *Act* provides that:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

[27] Section 22 of the *Act* describes the content of a notice of refusal under section 19. Section 22 reads:

- (1) Notice of refusal to give access to a record or a part thereof under section 19 shall set out,
 - (a) where there is no such record,
 - (i) that there is no such record, and
 - (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
 - (b) where there is such a record,
 - (i) the specific provision of this *Act* under which access is refused,
 - (ii) the reason the provision applies to the record,
 - (iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

[28] Section 2(1) of the *Act* specifically defines a "record" as follows:

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[29] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁶

[30] Furthermore, previous orders of this office have established that to be considered responsive to the request, records must "reasonably relate" to the request.⁷

[31] That said, parties to a request or appeal may agree to alter the scope of the request and the appeal at the request stage, during mediation or in the course of adjudication.

[32] 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 17.⁸ 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.

⁶ Orders P-134 and P-880.

⁷ Order P-880.

⁸ Orders P-85, P-221 and PO-1954-I.

[33] 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.⁹

[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.¹⁰

[35] Generally speaking, an institution is not required to create a new record in response to a request under the *Act*.¹¹

[36] Several previous orders have dealt with requests in the form of questions.

[37] In Order MO-2285, former Senior Adjudicator John Higgins wrote:

In Order 17, former Commissioner Sidney B. Linden commented on this issue as follows:

At page 241 (Volume 2) of the [*Williams Commission Report*], the author addresses the question of to which kinds of information or documents access should be given:

"A common feature of the freedom of information schemes in place in other jurisdictions is that the type of "information" to which access is given is material which is already recorded in the custody or control of the government institution. **Thus, a right to "information" does not embrace the right to require the government institution to provide an answer to a specific question; rather, it is generally interpreted as requiring that access be given to an existing document on which information has been recorded.** This is not to say, of course, that the government should feel no obligation to answer questions from the public. Indeed, as we have indicated in an earlier chapter [13], the government of Ontario has committed substantial resources to establishing citizen's inquiry services with this specific objective in view. It would be quite unworkable, however, to grant a legally binding right of access to anything other than information contained in existing documents or records.

⁹ Orders P-624 and PO-2559.

¹⁰ Order MO-2246.

¹¹ See Order MO-1989 upheld in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

...

In Order M-493, the appellant had requested information about probationary secondary school teachers. The Hamilton Board of Education had argued that the request was not a proper one because it was in the form of a question. I stated:

... even if I agreed with the Board that the request is, for the most part, in the form of questions, I would not agree that, on this basis, the request is not a proper one under the *Act*. The Board has not provided any authority to substantiate this argument. Moreover, it would be contrary to the spirit of the *Act* to exclude a request on such a technical basis.

In my view, when such a request is received, the Board is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section 17 of the *Act*, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", then the Board may have recourse to the clarification provisions of section 17(2).

In their representations, the Police attempt to distinguish Order M-493 by pointing to the possible public interest in its subject matter. This is not a relevant basis for distinguishing that appeal from the one before me. The form of a request is a fundamental issue, and in my view, is not impacted by the nature of the requested information. Where a request is framed as a question or series of questions, the institution must determine whether its record holdings contain information that would answer the question(s) asked.

...

[38] In Order MO-2096, Adjudicator Laurel Cropley wrote the following concerning an institution's obligation to respond to questions posed by a requester, albeit in the context of questions that arose a result of records they received:

Although the documents that the appellant received may raise questions in her mind to which she thinks there should be answers, this does not necessarily mean that answers exist in the documents that she received or in other documents.... [T]here is no requirement under the *Act* that an institution answer the questions that the contents of records might raise.

The issue is whether there are records in existence that might provide an answer to these questions. As I noted in Order PO-1655:

Previous orders of this office have considered the circumstances in which requests for information are set out in the form of questions (Orders M-493, M-530 and P-995). In two of these cases, it was determined that the questions could be interpreted as requests for records. In my view, this is not the case here. Based on my reading of part 7 and the Ministry's explanation, I agree that the appellant has asked a question of the Ministry and is seeking an answer rather than seeking information or records which would respond to it.

In PO-1655, I concluded that the institution had no obligation to simply answer questions or provide explanations of information contained in the records.

[39] What can be distilled from the above quoted authorities is that a right to "information" does not embrace the right to require the institution to provide an answer to a specific question. However, an institution is obligated to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked in a request.

[40] I have considered the original request as worded and all the circumstances of this appeal. I do not consider the records that the town identified in this appeal as being responsive to the original request. Furthermore, without further information, I also find that the records listed by the appellant in the first six items of his correspondence to the mediator, which relate to a specific building permit, are not encompassed in the first component of the request. Should the appellant continue to seek access to those records, he is at liberty to make a request for them.

[41] I am also satisfied that the town has provided a thorough explanation as to why no records exist within its custody or control that are responsive to the second component of the request and the seventh point in the list of records the appellant provided to the mediator. In that regard, I am satisfied that the town conducted a reasonable search for records responsive to that component of the request.

[42] That said, while it is laudable that the town provided answers to the questions posed by the appellant with respect to the first component of his original request, this did not, in my view, satisfy its obligations under the *Act*. In that regard the town is obliged to consider what records in its possession might, in whole or in part, contain information which would be responsive to the first component of the request. Based on the materials before me it is not clear that this took place.

[43] Accordingly, I conclude that the town has not conducted a reasonable search for records responsive to the first component of the appellant's request and I will order it to conduct additional searches for records responsive to the first component of the request and to provide the appellant with a description of the nature and extent, as well as the results of those searches, in accordance with the determinations in this order.

[44] As a result of my conclusions above, at this stage, without further information with respect to how these records may, in some fashion, be responsive to the first component of the original request, I will make no determination about access to the two records described in the Notice of Inquiry as a Fire Captain's Inspection Report and a Building Inspector's Inspection diagram/notes and photos.

ORDER:

1. I order the town to conduct a further search for records responsive to the first component of the request as I have described it above and to provide the appellant with a description of the nature and extent, as well as the results of those searches, in accordance with the determinations in this order on or before **October 23, 2013**.
2. If, as a result of the further searches, records responsive to the request are identified, I order the town to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*.
3. In all other respects, I uphold the decision of the town.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ September 30, 2013