

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3173

Appeal MA10-313-2

Fort Erie Economic Development & Tourism Corporation

March 27, 2015

**Summary:** The appellant made a request to the institution for information relating to the procurement of goods and services exceeding \$5,000. The institution provided three records to the appellant in response. The appellant appealed to this office on the basis that additional responsive records should exist and that the institution had improperly narrowed the scope of her request. Subsequently, the *Act* ceased to apply to the institution. In this order, the adjudicator upholds the institution's search as reasonable and finds that it properly interpreted the scope of the appellant's request.

**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 appellant made three separate requests to the Fort Erie Economic Development & Tourism Corporation (FEEDTC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In general terms, the appellant was seeking access to information related to FEEDTC's procurement policies and practices, but she was also seeking specific information about past tenders. The three requests were as follows:

1. Please provide copies of your policies and guidelines as they relate to purchasing and contract work.

Please provide copies of your conflict of interest policies and guidelines for employees of the [FEEDTC] and Board members.

2. Provide a list of goods and services that were awarded by [FEEDTC] that exceed \$5,000 that were not tendered.
3. Provide information regarding the issuance of RFP's, and requests for quotes for the procurement of goods and services over \$5,000 for the [FEEDTC] from January 2008 to January 2010 and the name of the person/organization the purchase of goods and services was awarded. Please indicate the dollar amount of the goods and services purchased over \$5,000 in the same time period.

[2] The FEEDTC declined to respond to the access requests because it did not consider itself to be an "institution" under the *Act* and it returned the forms and fees to the appellant. The appellant appealed the FEEDTC's decision to this office and Appeal MA10-313 was opened to address the issue of whether the FEEDTC was an "institution" under the *Act*. Following an inquiry conducted by an adjudicator, Order MO-2659 was issued. In Order MO-2659, Adjudicator Daphne Loukidelis found that the FEEDTC is designated an institution under section 1(1)4 of Ontario Regulation 372/91, as contemplated by paragraph (c) of the definition (of institution) in section 2(1) of the *Act*. Adjudicator Loukidelis ordered the FEEDTC to issue an access decision.

[3] In response to Order MO-2659, the FEEDTC sent the following three records to the appellant with no decision letter:

- A letter dated November 16, 2010 from the FEEDTC's chartered accountants to the FEEDTC's general manager, outlining their "understanding of the approved spending limited and procurement process for the [FEEDTC] (one page);"
- A summary of "Conflict of interest policies and guidelines for employees of the [FEEDTC] and Board members, author unknown, updated (one page); and
- A table outlining FEEDTC Expenditures ">\$5000" set out by year (2008, 2009 and 2010)" and "EDTC Budget/Business (Funds provided by the Town) of Fort Erie through Annual Budgeting Process)" and "Partnerships" (one page).

[4] The appellant appealed FEEDTC's decision to this office because she believed that additional records that are responsive to her requests exist. Consequently, this office opened Appeal MA10-313-2 to deal with this issue.

[5] This office was subsequently notified that the FEEDTC had contemporaneously (with sending the records to the appellant) filed a judicial review application respecting Order MO-2659. Consequently, this appeal was put on hold pending the determination of the judicial review application.

[6] In April 2012, Ontario Regulation 372/91 (under which the finding in Order MO-2659 was made) was repealed. Adjudicator Loukidelis initiated a reconsideration pursuant to section 18 of this office's *Code of Procedure*. This resulted in Reconsideration Order MO-2904-R where Adjudicator Loukidelis found that FEEDTC was also "deemed" to be an institution under Ontario Regulation 599/06, made under the *Municipal Act, 2001*.

[7] Subsequently, the Divisional Court released its decision in *Fort Erie Economic Development v. Privacy Commissioner*<sup>1</sup>, upholding Adjudicator Loukidelis' finding in Order MO-2659 that the FEEDTC was designated an institution, under the *Act*, notwithstanding the repeal of Ontario Regulation 372/91.

[8] The current appeal was reactivated to deal with the search issue raised by the appellant. During the mediation stage of the appeal, FEEDTC directed the mediator's attention to the on-line location of their procurement and conflict of interest policies (Request 1). The appellant also reviewed the policies, but subsequently pointed out that the procurement policy is dated February 2011, while her request was for the policy in place from 2008 to 2010. Despite the difference in dates, the appellant noted that she was satisfied with the information set out on FEEDTC's website and regarding the conflict of interest guidelines for this part of her first request. Accordingly, the issue of responsive records for the first part of the appellant's request is no longer within the scope of this appeal.

[9] The FEEDTC took the position that the table provided to the appellant pursuant to Order MO-2659 (described in the third bullet point above) contains all the information that was requested in the appellant's second and third requests. The appellant is not satisfied with the information provided and contends that FEEDTC's interpretation of the requests should have led to additional responsive records being identified. The scope of the requests was, therefore, added as an issue in the appeal.

[10] During the inquiry into this appeal, the adjudicator sought and received representations from the FEEDTC and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

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<sup>1</sup> [2013] O.J. No. 5402.

[11] This appeal was then assigned to me to complete the order. In this decision, I find the FEEDTC's search to be reasonable and uphold the FEEDTC's interpretation of the scope of the appellant's request.

## **ISSUES:**

- A. What is the scope of the request?
- B. Did the FEEDTC conduct a reasonable search for records?

## **DISCUSSION:**

### **A. What is the scope of the request?**

[12] Both parties were asked to consider the scope of the appellant's third request which states as follows:

Provide information regarding the issuance of RFP's, and requests for quotes for the procurement of goods and services over \$5,000 for the [FEEDTC] from January 2008 to January 2010 and the name of the person/organization the purchase of goods and services was awarded. Please indicate the dollar amount of the goods and services purchased over \$5,000 in the same time period.

[13] The appellant also submits that the FEEDTC narrowed the scope of her second request which states:

Provide a list of goods and services that were awarded by [FEEDTC] that exceed \$5,000 that were not tendered.

[14] 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;

...

- (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).

[15] 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.<sup>2</sup>

[16] To be considered responsive to the request, records must "reasonably relate" to the request.<sup>3</sup>

[17] The FEEDTC was asked to provide representations on what it considered to be the scope of the appellant's request. The FEEDTC submits that it interpreted the appellant's request number 3 to mean that the appellant was seeking a list of goods and services procured over \$5000.00 for the period January 2008 to January 2010 with the names of the providers and the dollar amounts. The FEEDTC states that it expanded the meaning of "awarded" to include procurement by whatever means. The FEEDTC submits that the appellant's request was neither ambiguous nor vague and it was unnecessary for them to seek clarification from the appellant. Finally, the FEEDTC attached, to its representations, a table (Exhibit A) with following information:

- A list of RFT's and RFQ's over \$5000 for the periods requested
- The name of the person/organization with whom the arrangement for the purchase of goods and services was made
- The dollar amount of these good and services

[18] The FEEDTC indicates that the table attached with its representations should contain all the information responsive to both the second and third of the appellant's requests. I note that a copy of the table was provided to the appellant during the inquiry process.

[19] The appellant submits that the footnotes on the FEEDTC's table indicate that there are additional records which were not identified by the FEEDTC's table as responsive to her requests and is evidence that the FEEDTC unilaterally narrowed the scope of her request. The appellant also submits that the FEEDTC's table of information indicates that the FEEDTC narrowed her request to include those goods and services that were procured by the FEEDTC using funding received by the Town of Fort Erie only. The appellant submits that her request did not exclude funding received from partnerships or other entities. She states:

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<sup>2</sup> Orders P-134 and P-880.

<sup>3</sup> Orders P-880 and PO-2661.

Also, in the recent submission by the [FEEDTC]...comments are made that these are not [the FEEDTC] funds, or that the [FEEDTC] was working in an administrative and financial management position for another organization/partnership. In my [access request], I do not limit my request to [FEEDTC] funds provided by the Town of Fort Erie or exclude any expenditure relegated to the [FEEDTC] including partnerships with other organizations. If the [FEEDTC] was the entity that awarded, executed, purchased, tendered or quoted the goods and services that information is included in my [request] and should be included in their response to my request.

[20] Finally, the appellant submits that her request also included the records associated with the goods and services that were purchased. For example, the appellant notes that the FEEDTC did not provide her with information regarding what was tendered or purchased. The appellant notes that she also did not receive information on the solicitation and responses to bids.

[21] The FEEDTC was given an opportunity to respond to the appellant's representations about the scope of her request, but chose to reiterate its original position.

[22] As stated above, this office has held in past orders that in questions involving the scope of an appellant's request, an institution should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Furthermore, ambiguity in the request should be resolved in the requester's favour.

[23] Based on the representations of the parties and the information that FEEDTC has identified as responsive to the appellant's request, I find that the FEEDTC did not improperly narrow the scope of the appellant's request. The appellant submits that her request could have been interpreted to include:

- Information about the procurement of goods and services that were procured using funds not received by the FEEDTC from the Town of Fort Erie; and
- Records relating to the bids and tenders of the goods and services procured.

[24] While I do not disagree with the appellant's assertion that her request could have been interpreted to include that information, I find that the appellant's request was unambiguous and clear. It is not evident to me that the FEEDTC would have needed to seek clarification from the appellant as whether her request included the type of information identified in her representations. I find that the information identified by the appellant goes beyond a liberal interpretation of her request and would be better characterized as the subject of a new request. However, as the FEEDTC is no

longer an institution under the *Act*, the appellant is precluded from making a new request for this information.

[25] I find the FEEDTC's interpretation of the scope of the appellant's request to be reasonable and the information which it has identified in the table attached with its representations reasonably relates to the appellant's second and third requests for information.

[26] Accordingly, I uphold FEEDTC's determination of the scope of the appellant's request and dismiss this part of the appeal.

**B. Did the FEEDTC conduct a reasonable search for records?**

[27] The appellant submits that there should be additional responsive records relating to her requests including information and/or records about: untendered goods and services that were awarded by the FEEDTC and exceed \$5000; tendered goods and services including the recipients and dollar figures.

[28] 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.<sup>4</sup> 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.

[29] 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.<sup>5</sup> To be responsive, a record must be "reasonably related" to the request.<sup>6</sup>

[30] 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.<sup>7</sup>

[31] 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.<sup>8</sup>

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<sup>4</sup> Orders P-85, P-221 and PO-1954-I.

<sup>5</sup> Orders P-624 and PO-2559.

<sup>6</sup> Order PO-2554.

<sup>7</sup> Orders M-909, PO-2469, PO-2592.

<sup>8</sup> Order MO-2185.

[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.<sup>9</sup>

[33] The FEEDTC was required to provide a written summary of all steps taken in response to the requests. In response, it states:

The FEEDTC does not regularly issue RFP's and RFQ's for goods and services and this is for a number of reasons: 1) the [FEEDTC] does not normally tender or request proposals or quotations for goods and services obtained. 2) most expenditures are repeated from year to year and the payment of costs for such goods and services are generally based on a comparison with prior periods making reasonable allowances for any increase due to inflation, enhanced service or increase costs of the goods or service to the suppliers/contractors. 3) the RFP/RFQ process is labour intensive, time-consuming and expensive and any saving generated by lower-cost of the process are usually eaten up in staff time and materials to a net gain of zero.

In fact, in the years 2008 to 2010, only one RFP was issued and filled and that was the [named project] for the purpose of providing a media and communications workshop in 2009 which is reported and recorded on the list provided ("Schedule A") as item number 12 with an explanation on the 2<sup>nd</sup> page.

[34] The FEEDTC also provided an affidavit from its senior Economic Development Officer who performed the search and compiled the lists provided to the appellant. The affiant swore the following:

- In connection with the [Notice of Inquiry], I collated data and prepared tables for delivery to the requester and the charts are attached hereto and marked as "Exhibit A" to this my affidavit.
- In order to prepare the tables I did an extensive search of the [FEEDTC] records for the years 2008, 2009, 2010 and used all available data for the tables.
- I searched all available records, both paper and electronic, in the possession of the [FEEDTC] and relevant to the items raised on the FOI requests.

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<sup>9</sup> Order MO-2246.



[35] Finally, the affiant indicates that the information on the tables is exhaustive and there are no additional records responsive to the request.

[36] The appellant submits that the FEEDTC's policies and procedures indicate that board approval is required for expenditures beyond \$5,000 that relate to the board approved budget regardless of whether or not the expenditure was tendered or quoted. Further, the appellant asserts that for expenses of \$10,000 or more, if the expenditure was not tendered or subject to an RFP then there needs to be some "sound business reason why the item was not subject" to the tender process. The appellant submits that the FEEDTC's policies and procedures indicate that there should be minutes, emails or correspondence requesting a vote or resolution to approve expenditures or records containing information relating to the board's waiver of the RFP or tender requirement.

[37] Within the context of their arguments on the FEEDTC's search, the parties argued about whether certain information should be disclosed to the appellant. In particular, I refer the parties to their discussions about Item 23 on the FEEDTC's table. In response to the appellant's argument that this information should have been provided to her, the FEEDTC states:

The other items, #23 et. seq. relate to an ongoing project in which the [FEEDTC] is involved as a partner and participant. In that project there is an umbrella organization [providing] all the fiscal and administrative oversight. A significant proportion of the members of the umbrella organization are private enterprise entities whose business affairs are confidential to them and who communicate with the [FEEDTC] in a client-professional adviser relationship. Accordingly much of the information is privileged to them as well as being irrelevant to the request and should not be disclosed.

[38] While I accept the FEEDTC's position that information relating to this "umbrella organization" is not responsive to the appellant's request, I wish to remind the FEEDTC that its position on the confidentiality of records is more appropriately dealt with by the claim of an exemption under the *Act*, and not with a decision that the records are not responsive.

[39] The appellant's belief that additional responsive records should exist is premised on her position that the FEEDTC should have defined the scope of her request more broadly than it did. In my finding above, I dismiss the appellant's appeal regarding the FEEDTC's definition of the scope of her request.

[40] Based on my review of the FEEDTC's representations on its search, I find that its search for responsive information relating to the appellant's request was reasonable in the circumstances. Due to the nature of the appellant's request, I find the FEEDTC searched for responsive records and compiled the information requested. I further

accept the FEEDTC's reason for the lack of records relating to the issuance of RFP's. As stated above, 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 reasonably relate to the request. I am satisfied that the affiant who prepared the table of information, and who was experienced and knowledgeable in the subject matter of the appellant's request and in the responsive records, conducted a reasonable search for information responsive to the request. I uphold the FEEDTC's search and dismiss this part of the appeal.

**ORDER:**

I uphold the institution's decision with respect to the scope of the request and the search for responsive records and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ March 27, 2015