

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3259-I

Appeal MA14-279-2

Town of Amherstburg

October 30, 2015

Summary: The appellant sought access to all correspondence between the town and its insurer relating to the town's transition to the insurer and benefits for employees over the age of 60. The town located a number of responsive records and issued a decision disclosing them in part. The appellant appealed the town's decision on the basis that the town did not conduct a reasonable search for responsive records. The town located additional records during the course of the appeal and disclosed them to the appellant, who maintained that more responsive records ought to exist. The adjudicator finds that the town did not conduct a reasonable search and orders it to conduct another search for responsive records that predate March 2012.

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

BACKGROUND:

[1] The appellant submitted a request to the Town of Amherstburg (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

Correspondence from [the insurer] to [the town's former Human Resources Manager] or any other town hall employee involved in the benefits of the members of the Amherstburg Police Service pertaining to the transition to [the insurer] and coverage for members age 60+.

[2] The town located 14 records that were responsive to the request and issued a decision granting the appellant partial access to them. The town relied on the mandatory personal privacy exemption in section 14(1) of the *Act* to withhold parts of the records. The appellant, unsatisfied with the decision, appealed it to this office.

[3] During mediation, the appellant indicated he believed additional responsive records should exist, thus raising the reasonableness of the town's search as an issue in the appeal. After being advised of the appellant's concern, the town conducted another search and located one additional responsive record. The town disclosed the additional record to the appellant, who continued to maintain that the town had not conducted a reasonable search. The appellant also confirmed that he is not interested in pursuing access to the withheld portions of the records. Accordingly, these records and the section 14(1) exemption are no longer at issue in this appeal.

[4] As a mediated resolution was not possible, the appeal was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. I began my inquiry by inviting the representations of the town on the issue of reasonable search and asking it to address the appellant's assertions that the following additional records should exist:

1. A record that shows the source of the former Human Resource Manager's knowledge in making the statement in the email at page 8 of record 1, that the appellant had not filed any grievances yet but that the town anticipated he might.
2. A copy of the Chief of Police's actual request for a quote, mentioned in the email at page 4 of record 3, since the appellant does not accept the town's claims that the email dated February 27, 2014, and found at page 6 of record 2, is the quote request.
3. Notes of the telephone conversations between the Chief of Police and [a named town employee] who are mentioned in the February 18, 2014 email exchange, regarding the further conversations about the benefit package that the email at page 1 of record 5 indicates were to take place.
4. Notes or minutes of the meeting referred to in an email dated July 17, 2012, found in record 6.
5. Notes or minutes of the meeting referred to in record 7 as "a meeting earlier this month."
6. Records that show how the conversation referring to the "employee in question" in page 1 of record 9 was started.

7. Records of the conversation that is mentioned on page 2 of record 10 in an email dated February 29, 2012, that lists items that appear to have been previously discussed.

[5] During my inquiry, the town provided representations which I shared with the appellant in their entirety. The appellant provided representations in response noting that the town had not included attachments to certain emails in the records. In response to the appellant's concern, the town conducted an additional search for attachments to certain email records and located a number of additional records that it disclosed in full to the appellant.

[6] After reviewing the additional records disclosed by the town, the appellant advised that he remained unsatisfied with the town's search and wished to continue his appeal.

[7] In this interim order, I find that the town's search was not reasonable and I order it to conduct a further search for responsive records.

DISCUSSION:

Did the town conduct a reasonable search for records?

[8] Because the appellant maintains that additional responsive records exist beyond those identified by the town in this appeal, the issue I must decide is whether the town conducted a reasonable search for records as required by section 17 of the *Act*. 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.¹

[9] The *Act* does not require the town to prove with absolute certainty that further records do not exist. However, in order for me to find that its search was reasonable, the town must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.² The appellant, although he may not be in a position to indicate precisely which records the town has not identified, must nonetheless provide me with a reasonable basis for concluding that additional records exist.³

The town's representations

[10] In its representations, the town describes the steps it took in response to the

¹ Orders M-909, PO-2469 and PO-2592.

² Orders P-624, PO-2559 and MO-2185.

³ Order MO-2246.

request. It states that the requested records would be in the custody of its Human Resources Department. It adds that its current Manager of Human Resources completed the initial search in this appeal and located the original 14 records totaling 66 pages, which were partially disclosed to the appellant. The town states that the same Manager of Human Resources located the additional record during the mediation stage of the appeal; it then disclosed the additional record to the appellant even though the record was outside the scope of the request. In addition to this record relating to the town's benefits consultant (which is independent from the insurer), it disclosed correspondence from the Chief of the Amherstburg Police Service, even though the correspondence was outside the scope of the request. The town argues that its inclusion of these records which were beyond the scope of the request, demonstrates that it conducted a reasonable search. It adds that it went beyond the limited scope of the request to provide a full picture of the issue and all the relevant records in its possession.

[11] The town asserts that there is no basis for the appellant's claim that it did not conduct a reasonable search. It argues that the appellant has not specified how its search could have reasonably been improved; instead he has made speculative assertions. In response to the appellant's seven specific points regarding the records which are noted in paragraph 4 above, the town states:

1. It has no record to show the source of the speculative comment of its previous Manager of Human Resources about the likelihood of a grievance by the appellant. If the appellant were to grieve, the grievance would be between the Amherstburg Police Service and the Amherstburg Police Association; it would not be a party to the grievance.
2. The Chief of Police is not its employee; he is an employee of another institution, the Amherstburg Police Service. It has no record of the Chief's actual request for a quote, and even if it did, the record would not fall within the scope of the appellant's request.
3. Its Manager of Human Resources does not have any notes of these telephone conversations. The two named individuals are not its employees and thus it does not maintain any records that may have been created by them.
4. It does not have any notes of this meeting. The email appears to be a summary of a meeting created by an individual who is not employed by it or by the insurer. It does not maintain minutes of such meetings and there is no indication that its previous Human Resources Manager placed any notes of the meeting in its files.
5. Identical response as item 4 above.

6. Its previous Human Resources Manager did not leave any record of how the conversation was started. Furthermore, the conversation is not with an employee of the insurer.
7. This email appears to be a contemporaneous record of the telephone conversation that occurred that same day. Its searches did not disclose the existence of any additional records of this conversation.

[12] The town states that the responsive records were mostly emails, which tend to be contemporaneous with the events; therefore, notes and minutes are unlikely to exist outside the email text. It asserts that the fact that its searches did not uncover the documents noted in the appellant's seven points is not evidence of an unreasonable search; rather it reflects the fact that no such records exist.

[13] The town also provides an affidavit sworn by its Manager of Human Resources which states:

- The provision of benefits and correspondence with the insurer would be within the records maintained by the Human Resources Department.
- She has conducted a complete search of the town's Human Resources Department records and has not found any other records related to correspondence between town employees and the insurer.
- She has conducted a search of all email correspondence from March 2012. The town's Freedom of Information Coordinator, who is responsible for dealing with access requests under the *Act*, witnessed her search of all emails. The records disclosed by the town include all the emails related to the subject of the request.
- Based on her searches, she confirms that no other responsive records exist.

The appellant's representations

[14] The appellant asserts that the town's representations are inaccurate and misleading. He explains that the statement by the former Human Resources Manager about a grievance is not speculation, but a confirmation of the fact that "he has not filed any grievances yet." He adds that a limited search of email correspondence would not have revealed minutes of meetings and other documents responsive to his request.

[15] The appellant states that the previous Human Resources Manager provided a report to the town Council in October 2011 recommending that the town change its insurance provider to the insurer and he includes a copy of this Council Report dated October 26, 2011, with his representations. He also states that the town Council approved the recommendation and the transition began shortly thereafter with the new insurance contract officially commencing in February 2012. In light of these facts, the appellant argues that additional correspondence from the insurer must exist pertaining

to the transition to the insurer's coverage, including: detailed information on the actual transition; a contract; quotes; costs; coverage for employees; coverage for police officers; the age 60 eligibility requirement; documents referred to in emails; documents to support claims in emails and the transition to the insurer that commenced in November 2011. The appellant questions why none of these records were disclosed. He adds that according to the Amherstburg Police Association and the Amherstburg Chief of Police, the town has additional records. The appellant notes that the town did not forward or transfer his request to another institution, such as the Amherstburg Police Service, the Amherstburg Police Services Board, the insurer or the benefits consultant. He concludes by asserting that the town did not conduct a reasonable search because it did not locate a number of responsive records that exist and that are reasonably related to his request.

The town's reply representations

[16] In response to the appellant's representations, the town states that it is not obligated to go to third parties to seek documents in their possession, and to the extent that those third parties are institutions under the *Act*, the appellant should direct his request to them. The town states that the third parties that are not institutions are not required to comply with the *Act*.

[17] The town continues that the appellant, as a member of the Amherstburg Police Association, was entitled to receive information from the Association. It also notes that the appellant has not provided any representations from the Association that additional records exist; he just asserts without any proof that the Association and the Chief of Police have stated that other records exist.

[18] The town asserts that its Manager of Human Resources is an experienced employee who expended reasonable efforts in conducting her searches. It states that it is entitled to reply to the request made; it need not conduct searches for records not contemplated by the request. The town concludes by stating that the appellant's assertion about the grievance statement in the records is unfounded and is indicative of his ulterior motive for making his request.

Additional records located

[19] After receiving the town's reply representations, I specifically asked the town to address the issue of attachments to the records, none of which appeared to have been identified as responsive records. The town conducted a search for these attachments and located six additional responsive records. The town disclosed these additional six records to the appellant in their entirety; however, the appellant maintained his position that the town's search was not reasonable.

Analysis and findings

[20] Having considered the wording of the request, all of the responsive records

located at the time of the request, and the additional records located by the town during the mediation and inquiry stages of the appeal, along with the parties' representations, I agree with the appellant that there is a reasonable basis for his belief that additional responsive records exist.

[21] In determining whether the town's search was reasonable, I am guided by the appellant's request which is for correspondence between the insurer and any town employee involved in the benefits of the members of the Amherstburg Police Services Board, relating to the town's transition to the insurer and coverage for members over the age of 60. The request is broad in scope and encompasses all correspondence between the town's employees and the insurer regarding the town's transition from its previous insurance provider to the insurer.

[22] In support of his position, the appellant provides a copy of a Council Report from the town's previous Human Resources Manager dated October 26, 2011, and addressed to the town's Mayor and Members of Council. The Council Report deals with a report regarding insurance benefits which is dated October 17, 2011, and listed as an attachment. The Council Report also refers to a briefing note, a marketing exercise in which the town participated, and the names of individuals under the heading "Consultations." The Council Report and the documents mentioned in it, all relate to the town's transition to the insurer, which the appellant says was approved by Council at the October 26, 2011, meeting. The Council Report establishes that prior to October 26, 2011, the town, either through its former Human Resources Manager or through other employees, had already obtained – presumably from the insurer – information on the advantages of moving its insurance benefits business to the insurer. In light of the fact that on October 26, 2011, the former Manager reported to Council the benefits of changing insurers and the timeline for transitioning to the insurer, and Council, in turn, approved the transition to the insurer, it is reasonable to expect that some records were generated prior to October 26, 2011, that would inform the former Manager's position and report. However, the town has not located any such records. The records that the town has located and included as responsive to the request range in date from February 2012 to March 2014.

[23] I also note that although the town asserts that no further responsive records exist and it provides affidavit evidence from its Human Resources Manager to support this assertion, the affidavit confirms that the town did not conduct a search of its emails (within the Human Resources Department or elsewhere) that predate March 2012. Considering the town's submission that responsive records are mostly emails that are contemporaneous with the events, the appellant's evidence on what the town's former Human Resources Manager reported to Council in October 2011, and the reality that email correspondence was the most likely means of communications between its employees and the insurer, the town's failure to search for emails that predate February/March 2012 is significant.

[24] The appellant's request does not contain a specified time period, and there is no

indication that the appellant wanted records that predate February/March 2012 to be excluded from the scope of his request. The town has not addressed why it chose to limit the appellant's request to email correspondence created in February/March 2012 and later despite the appellant's broad request for "correspondence."

[25] On the basis of the Council Report submitted by the appellant, the affidavit evidence of the town's Human Resources Manager, and the plain wording of the request, I find that the town unreasonably limited the scope of the request by only searching for email correspondence from February/March 2012 on. I further find that there is a reasonable basis to believe that additional records exist, specifically, records that predate February 2012. In light of my findings, I will order the town to conduct further searches for responsive records.

INTERIM ORDER:

1. I order the town to search for emails and/or other correspondence between any of its employees and the insurer that predate March 2012 and are responsive to the request. If the town locates additional records as a result of its search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act* treating the date of this order as the date of the request.
2. I remain seized of this appeal in order to deal with any outstanding issues arising from this order.

Original Signed by: _____
Stella Ball
Adjudicator

October 30, 2015 _____