



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-2652-I

Appeal MA10-351-2

Township of Madawaska Valley



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NATURE OF THE APPEAL:

This appeal concerns a multi-part request submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Madawaska Valley (the Township) for information relating to a specified road (the road). The Township issued an interim fee decision in response to the request.

The requester (now the appellant) appealed the interim fee decision to the IPC and appeal MA10-351 was opened to address that issue. The fee issue in Appeal MA10-351 was resolved at the mediation stage of the appeal process and the file was, subsequently, closed.

In Appeal MA10-351, the Township granted the appellant access to the November 5, 2007 Council Meeting Minutes (the Council Minutes), a by-law in which the municipality dedicated the specified road as a public road (By-Law 2007-67), two transfer documents, and the application to register the by-law.

During mediation in Appeal MA10-351, the appellant advised that he believes additional records should exist relating to the first part of his request. For greater clarity, the first part of the appellant's request is for the following information:

All documents related to the Township pre-transfer evaluation of [the road]. Also the documents about the procedure used by the Township to "score" [the road] during the transfer process. All documents related to this process and I request all results/minutes of any meetings.

The appellant filed a new appeal with the IPC, on the basis that additional records should exist in response to the first part of his request. Appeal MA10-351-2 was opened.

During mediation for Appeal MA10-351-2, the Township issued a decision stating, in part:

The Township has completed a reasonable search (both electronically and by hard copy) of the Regular Council Meeting minutes, and the Roads, Property and Planning Committee minutes from 2005 to the present. No records were found with regard to the scoring of [the road] during the transfer process.

The Township, subsequently, wrote to the appellant advising him of the nature of the searches it had completed for responsive records, indicating that it had searched all possible places and no further records were located.

The appellant remains of the view that additional records should exist.

The parties were unable to resolve this issue through mediation and the file was transferred to the adjudication stage of the appeal process for an oral inquiry with the sole issue to be determined whether the Township has conducted a reasonable search for responsive records.

On July 27, 2011, I conducted a hearing via teleconference into the reasonable search issue. The appellant attended the hearing and gave oral evidence. Attending and providing oral evidence on behalf of the Township was its Chief Administrative Officer (CAO), Planning and Licensing Officer, Operations Manager and a member of its administrative staff.

DISCUSSION:

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 [Orders P-85, P-221, PO-1954-I]. 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.

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.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Parties' representations

Appellant's representations

The appellant states that in framing his request he was interested in information regarding the assessment process followed by the Township in converting a private portion of the road to a public road. The appellant notes that a portion of the road had been in the public envelope of Township roads for some time but that in 2007 the Township converted a further portion of it from private to public status. The appellant notes that a portion of the road still remains private. The information that interests the appellant concerns the assumption of the private portion of the road into the municipal road system in 2007.

During the inquiry the appellant referred to the Council Minutes that he had received from the Township, which document a meeting that took place on November 5, 2007 regarding the assumption of a private portion of the road. The appellant notes that the Council Minutes confirm that four councillors and the mayor (now the former mayor) met to review this matter. The appellant adds that the Council Minutes confirm that another councillor excused himself

from the meeting due to a conflict of interest. The appellant states that the Council Minutes confirm that the former mayor and the four councillors met briefly to approve the assumption of a private portion of the road. However, the appellant takes the view that there should be additional documentation regarding the assessment process. His view is based on his experience working with another municipality and his familiarity with the road assumption process it followed as well as the fact that the Township had passed a Road Assumption By-Law (By-Law Number 2006-24) (the road assumption by-law) in 2006, which pre-dates the approval of the road assumption in this case and establishes a process for road assumptions.

The appellant advises that he was informed by the Township that it did not follow the road assumption by-law in approving the assumption of the private portion of the road. However, the appellant maintains that whether or not the Township followed the by-law, there should be documentation that demonstrates that minimum standards were followed by Council during the review process, including the proposal to initiate the assumption process, a consultant engineering study, an asset checklist documenting prevailing road characteristics and the criteria considered and applied during the Council meeting. The appellant seeks access to this documentation and is adamant that it should exist.

The appellant also takes the position that the Township should not only be required to search its staff record holdings (through the Planning and Licensing Officer, Operations Manager and administrative staff), but that it be required to search the record-holdings of the elected councillors who were involved in the road assumption process regarding the named road.

Township's representations

The Township led with evidence through its CAO. The CAO confirmed that a full Council meeting took place on November 5, 2007 during which a by-law for the assumption of the private portion of the road was reviewed and approved. The CAO also confirmed that one councillor did excuse himself from the meeting after declaring a conflict of interest and that four councillors and the mayor participated in the meeting. The CAO states that there was a first and second reading of the by-law followed by a third and final reading, after which the by-law (By-Law 2007-67) was passed and the relevant portion of the road was assumed by the Township.

The CAO states that the Planning and Licensing Officer searched the Township's Planning and Licensing Office, which is where all Township by-laws are kept. The CAO submits that the Planning and Licensing Officer searched both hard and electronic copies of all by-laws and related files. The CAO states that aside from what was disclosed, the Planning and Licensing Officer did not find any further responsive records in that office. The Planning and Licensing Officer also provided evidence regarding his search efforts that was consistent with the CAO's evidence.

The CAO also states that the Operations Manager, who is essentially the Township's "roads manager", searched his office for any hard copy notes or files relating to the road. The Operations Manager submits that he searched the following four files: the road assumption file, the road standards file, the named road claim file and the named road file – general file. The

Operations Manager states that he located four records which were provided to the appellant. The Operations Manager reported no further record findings.

The CAO also submits that the Township searched its two vaults as well as all minutes of meetings from 2005 up to the date of the appellant's request and found no further responsive records. The CAO states that she personally searched the basement vault for responsive records.

The administrative staff person states that she personally searched the electronic copies of all Council meeting minutes dating back to 2005 and found no records responsive to the appellant's request.

The CAO states that the Township did not search the record holdings of individually elected councillors since this information would have been maintained by each councillor privately in their respective homes and that, accordingly, it is the Township's view that the councillors' record holdings were not in its custody or control. With respect to the former mayor, the CAO states that while this individual maintained an office at the Township for use as a meeting room, no files were stored in this meeting room. Any documentation the former mayor would have received at meetings would have been taken home by this individual. The CAO states that it did not search the former mayor's office because there are no files or documents stored in that space and, furthermore, that individual is no longer serving as the mayor.

With regard to the Township's record retention schedule, the CAO states it has a records retention by-law, which requires that legal documents be retained for seven years.

The CAO acknowledges that the road assumption by-law was in existence at the time the road assumption process that is the subject of this appeal took place. However, the CAO states that she "believes that Council has the right" and "legislative authority" to take on a road when it chooses to do so "irrespective of the existence of the road assumption by-law." The CAO adds that, in this case, the Township was "already maintaining a portion of the road and Council made the choice to take on a further portion of the road irrespective of the existence of the road assumption by-law." In giving effect to the assumption of a private portion of the road the CAO reiterates that the Township passed By-Law 2007-67 at the Council meeting on November 5, 2007.

Analysis and findings

Having carefully considered the parties' representations, I find that the Township has not conducted a reasonable search for records in the circumstances of this case. While I am satisfied with some aspects of the Township's search efforts, my conclusion is based on the Township's failure to consider the record-holdings of the four councillors and the former mayor that were involved in the assumption of the private portion of the road in 2007.

As stated above, in cases of this nature the institution is required to demonstrate that it conducted a "reasonable" search for responsive records. In meeting this standard the *Act* does not require the institution to prove with "absolute certainty" that further records do not exist.

The appellant stated in his evidence that in 2006 the Township passed the road assumption by-law that sets out a process that Township Council is required to follow in reviewing a proposal to have a private road assumed by the Township into the municipal road system. As already noted, the Township acknowledged the existence of this by-law.

During the course of the hearing I reviewed the road assumption by-law to confirm its contents. I am satisfied that Schedule A of this by-law sets out a process that Council is required to follow to ensure that a road assumption proposal best serves the Township and its residents. Schedule A lists several criteria to assist Council in determining whether a road to be assumed is in the public interest and the minimum standard of road construction for the assumption of a private road by the Township.

In my view, there is no dispute that the road assumption by-law exists and that it establishes a process and criteria pursuant to which road assumption proposals are to be reviewed by Council. The appellant relies on the existence of the road assumption by-law as a basis for concluding that records should exist in response to the process that Council would have followed in this case in reviewing the road assumption proposal for the road.

I acknowledge the appellant's viewpoint. Had Council followed the road assumption by-law, it would be reasonable to conclude that records would exist that address the road assumption process followed. However, in this case, the Township admitted in its evidence that it did not follow the process under the by-law to complete the road assumption process for the road and, as a consequence, records that might have been produced do not exist. Instead, Township submits that it exercised its discretion to assume a private portion of the road without following the process set out in the road assumption by-law.

The question of whether Council had the jurisdiction to exercise its discretion in this manner, without following the process in the road assumption by-law, is not the issue before me in this inquiry. The sole issue I must determine is whether the Township conducted a reasonable search for records responsive to the appellant's request.

I heard from the Township's CAO, Planning and Licensing Officer, Operations Manager and an administrative staff person regarding their respective search efforts, and I am satisfied that these individuals are appropriate and experienced Township employees to perform searches for responsive records and I find their searches on the Township's premises were reasonable.

However, I acknowledge the appellant's interest in having the Township investigate the record-holdings of the elected councillors and former mayor who were involved in the road assumption process in this case, and it is on this aspect of the search that I find the Township deficient in its efforts. I understand that the Township takes the position that records in the hands of the councillors and the mayor are not in its custody or control and, therefore, not subject to search by the Township. I disagree.

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

This section reads, in part:

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...

Under section 2 of the *Act*, an “institution” is defined as:

- (a) a municipality,
- (b) a school board, municipal service board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts,
- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;

While the wording under the *Act* does not specifically refer to elected offices, such as a municipal councillor or mayor, as falling within the definition of “institution”, past decisions of this office have established that the record-holdings of the mayor of a municipality, in the performance of their official role as an “officer” of that municipality, are within the custody or control of the institution [see Orders M-813, MO-1403 and MO-1967]. The status of municipal councillors under the *Act* is more complicated to the extent that they perform both “constituency” functions and official responsibilities as members of municipal council. When performing constituency work, past decisions have established that councillors are not “officers” and, accordingly, record-holdings related to their constituency work is not in the custody or control of the institution [see again Orders M-813, MO-1403 and MO-1967]. However, where the records in question relate to the councillor’s “official responsibilities as a member of council or some aspect of council’s mandate” those records would be viewed as being within the institution’s custody or control and subject to the *Act* [see MO-2610].

In Order MO-2610, Adjudicator Stephanie Haly ordered the City of Toronto to conduct a further search for records in the hands of both a councillor and his assistant relating to a proposed development project. In ordering the further search, Adjudicator Haly states:

Lastly, I find that the city’s search for the councillor and the councillor assistant’s records to be inadequate. I agree with the appellant’s representations that the city’s search for the records in its custody and control relating to these individuals was not reasonable. The appellant’s request is for records related to a named address. I find that the councillor or his assistant’s records relating to this named address would relate to the councillor’s official responsibilities as a member of council or some aspect of council’s mandate such that these records would be subject to the *Act*. The city’s decision that councillors’ records are not covered by the *Act* without further explanation of the search conducted for councillor’s

records within its custody and control, leads me to conclude that the search for records of this nature was never conducted and thus not reasonable. Accordingly, I will order that the city conduct a search for records of the named councillor and his assistant that may exist within the city's custody and control. In particular, the city's search should include correspondence, emails and letters sent to or from city staff to the councillor and his assistant about the specified address.

I find Adjudicator Haly's analysis and determination in Order MO-2610 relevant and applicable to the circumstances of this case. I also note that a purposive approach must be taken to "custody or control" questions under section 4(1). That is, questions of custody or control must be interpreted in keeping with the underlying purpose of the *Act* of providing access to government information. [Orders MO-1237 and MO-1251; *City of Ottawa v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835, [2010] O.J. No. 5502 (Div. Ct.); leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.)].

It is clear, on the evidence provided by the Township, that the discussion relating to the road assumption issue that took place at the Council meeting on November 5, 2007 was municipal business, and that the councillors and the former mayor who participated in the meeting did so in their official capacities as members of Council. In my view, the road assumption discussion was not constituency business for the councillors or personal business for the former mayor. Unfortunately, in stating that the record holdings of both the councillors and the former mayor are not within the Township's custody or control and deciding not to search their record-holdings, the Township appears to have misinterpreted the official nature of these discussions and the underlying purpose of the *Act* of providing access to government information.

To conclude, I find that the record-holdings of both the councillors and the former mayor, relating to the events surrounding the road assumption process of the private portion of the road, are within the Township's custody or control and subject to the access provisions of the *Act*. Accordingly, I will order the Township to conduct a search of the record-holdings of both the four councillors and the former mayor relating to the road assumption matter.

ORDER:

1. I order the Township to conduct a further search for records responsive to the appellant's request regarding the road assumption review and approval process that took place at the November 5, 2007 Council meeting, with specific focus on the record-holdings of the four councillors and the former mayor in attendance at that Council meeting. In completing its search, the Township is requested to make its best efforts to consult with the four councillors and the former mayor regarding their record-holdings relating to the road assumption review and approval process that is the subject of this appeal. Without limiting the scope of the Township's further search efforts, responsive records would include:
 - the proposal to initiate the road assumption process
 - all consultant engineering studies reviewed

- all asset checklists documenting prevailing road characteristics
 - the standards considered by Council during the review process
 - the criteria considered and applied during the Council meeting by the councillors and the former mayor in approving the road assumption of the road
 - any notes taken by the mayor and the councillors leading up to, during and following the Council meeting about this matter
2. With regard to Provision 1, I order the CAO of the Township to prepare and submit an affidavit by **September 15, 2011** setting out the details of all further searches completed, including the following:
- a) information about all employee(s) who conducted searches, describing their qualifications, position and responsibilities;
 - b) a statement describing each employee's knowledge and understanding of the subject matter of the request;
 - c) the date(s) each employee conducted his or her search and the names and positions of any individuals who were consulted;
 - d) information about the type of files searched, the nature and location of the searches, and the steps taken in conducting each search;
 - e) the results of each search;
 - f) if as a result of these searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
3. If further responsive records are located as a result of the searches referred to in Provision 1, I order the Township to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
4. The affidavit referred to in Provision 2 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*, which is available on our website.

5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Original Signed By: _____ August 31, 2011
Bernard Morrow
Adjudicator