

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3524

Appeal MA16-490

The Corporation of the Municipality of Central Elgin

November 21, 2017

Summary: The municipality received an access request for records relating to the Elgin County Shoreline Management Plan. It granted access to the responsive records, in full. The appellant appeals the municipality's search for responsive records. In this order, the adjudicator upholds the municipality's search as reasonable.

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

Orders and Investigation Reports Considered: Orders MO-3500, MO-3408, MO-3462, and MO-3287.

BACKGROUND:

[1] A request was submitted to the Corporation of the Municipality of Central Elgin (the municipality) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All, briefs, correspondence (email, regular mail, faxes), memoranda, notes, staff reports, filings of:

Deputy Mayor [named individual] including and/or related to:

Elgin County Shoreline Management Plan, [named company], Technical Advisory Committee, Steering Committee Elgin County Council meetings in November 2015 and June 2016, Lake Erie North Shore Landowners Association, Long Point Region CA deferral of Shoreline Management Plan.

Items on any and/or all of the above involving: Central Elgin Mayor [named individual], [named CAO], Catfish Creek GM [named individual], Kettle Creek CA Chair [named individual], GM [named individual], Director of Operations [named individual], Long Point Region CA Chair [named individual], GM [named individual], Lower Thames Valley Chair [named individual], GM [named individual], ANY Ministry of Natural Resources and Forestry (MNRF) Minister, Minister's staff, and/or personnel, and ANY personnel at Conservation Ontario.

In addition, any communications/correspondence from/to:

Any board member or staff of Catfish Creek, Kettle Creek, Long Point Region, Lower Thames Valley conservation authorities related to Catfish Creek Conservation Authority full authority meetings in April, May, and June 2016. These[s] requests extend to any personal email accounts maintained by [named Deputy Mayor] in accordance with the compliance requirements on same as issued by the Information and Privacy Commissioner of Ontario related to public business communicated via private communications accounts, servers, means, etc., of any of the individuals listed above.

- [2] The municipality granted access to the responsive records.
- [3] The requester, now the appellant, appealed the municipality's decision.
- [4] During the course of mediation, the appellant advised the mediator that he believes that additional responsive records should exist, including emails involving a named councillor. The municipality advised the mediator that it produced all of the responsive records.
- [5] As mediation was unable to resolve the issue, the appeal was moved to the next stage, where an adjudicator conducts an inquiry under the *Act*. Representations, reply representations and sur-reply representations were received and shared with the other party in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.
- [6] In this order, I uphold the municipality's search as reasonable.

DISCUSSION:

[7] The only issue in this appeal is whether the municipality conducted a reasonable search.

[8] 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 17.¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the municipality's decision. If I am not satisfied, I may order further searches.

[9] 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.² To be responsive, a record must be "reasonably related" to the request.³

[10] 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.⁴

[11] A further search will be ordered if the municipality 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.⁵

[12] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶

Parties' representations

[13] In its representations, the municipality asserts that it conducted a reasonable search. It points out that seven municipality staff, including the Mayor and the Deputy Mayor, searched their files for responsive records. The municipality also provided sworn affidavits from the Chief Administrative Officer (CAO)/Clerk, the Deputy Mayor, and the municipal intern confirming that the CAO/Clerk and the Deputy Mayor conducted a search. In his affidavit, the CAO stated that he had ordered and personally participated in an extensive search of all municipal records which could be responsive to the request. In her affidavit, the Deputy Mayor stated that she searched her personal email account for any emails received or sent which would be responsive to the request.

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

[14] The municipality also asserts that emails held by the Deputy Mayor which may have been deleted through the regular process are no longer accessible, and refers to the materials provided to it by municipal staff and the internet service provider which support this position.⁷

[15] In his representations, the appellant asserts that the municipality has not conducted a reasonable search. He asserts that the municipality did not provide substantive detail in its representations of its conduct and execution of the search for responsive records. He points out that the municipality simply listed the employees asked to undertake searches for responsive records, but did not provide quantification of its approach and methodology. The appellant also points out that, in the CAO's affidavit, the CAO did not provide any statement to the effect that parties knowledgeable in searching the main frame of the municipality's servers and electronic storage infrastructure did so. He further points out that his access request specifically named 10 individuals, including the named Mayor, but the municipality's representations and affidavits make no mention of the named Mayor and his compliance.

[16] In its reply, the municipality submits that it has undertaken a reasonable search for responsive records. It submits that the CAO conducted searches on Laserfiche, its digital record management system, for responsive records. The municipality also submits that staff (including the Mayor, Deputy Mayor and Director of Physical services) who were likely to have emails and other documents related to the access request were requested to search their Outlook e-mail application for any records related to the requested documents.

[17] In his sur-reply, the appellant asserts that the municipality continues to demonstrate wilful non-compliance with the provisions of the *Act*. He submits that it has failed to adduce or satisfy that it has adhered to its obligations related to: (1) records retention and security; (2) conducting a reasonable search to secure responsive records; and (3) that known computers, devices, hard drives, electronic storage remain unscrutinised and have not been searched by the municipality. He points out that technology personnel and other members of its council should have been on the list of staff who were requested to search their Outlook e-mail. The appellant also, at that point, stated that he is aware of correspondence originating from residents of the municipality both to staff and members of council including the Mayor and the Deputy Mayor having been transmitted via electronic means.

[18] Upon receiving that information in his sur-reply representations, for clarification purposes, I asked the appellant to provide further details on the character of these emails, and whether he had further evidence of their existence. In his response, he

⁷ The municipality confirms that as of January 3, 2017, council members use only their municipality email addresses, and have been directed not to dispose of any correspondence, including email.

stated the following:

I am aware of correspondence directly specifically to [named person] as Deputy Mayor of the Municipality and as Chair of the Catfish Creek Conservation Authority that have not been declared as found in the search for responsive records. I do assert that these emails were not discovered during the Municipality's search for responsive records to my access request.⁸

Analysis and findings

[19] From my review of the parties' representations, including the affidavits filed, I find that the search was conducted by employees experienced in the subject matter of the request and that these individuals expended reasonable efforts to locate responsive records. These employees included the CAO/Clerk, Director of Physical Services, Chief Building Inspector, Planner and Deputy Clerk. Searches were also conducted of the named Mayor and named Deputy Mayor's Outlook email account and files. I also note that the Deputy Mayor searched her personal email account for responsive records.

[20] I acknowledge that the appellant's request named 11 individuals. However, two of these individuals (the Mayor and the Deputy Mayor) are on council while one other individual is the named CAO/Clerk. I note that a number of individuals named are employed with other institutions, i.e. Catfish Creek Conservation Authority and Kettle Creek Conservation Authority. (Separate appeal files were opened to address the appellant's appeal with respect to those institutions.) I also acknowledge that the named Mayor did not provide a sworn affidavit, but, in my view, it is not necessary as the named CAO/Clerk stated, in his affidavit, that he conducted a search. Although his affidavit did not list the individuals involved in the search, his submissions did, which included the named Mayor.

[21] As noted above, a requester is rarely in a position to indicate precisely which records the institution has not identified, but he must still provide a reasonable basis for concluding that such records exist. In this case, the appellant stated that he believed further records exist and referred to correspondence sent to the Deputy Mayor as Chair of the Catfish Creek Conservation Authority and as Deputy Mayor.

[22] In the appellant's response to my request for clarification, he did not provide any further evidence of the existence of these emails except to assert that he is aware of correspondence addressed to the named Deputy Mayor. I note that he did not provide any specific details about these emails, such as the nature of the emails (except to state that they are "matters of public policy as they relate to the operations and consideration of regulations, planning, and permits" and "questions related to the position(s) of board member(s) as they relate to resolutions considered, discussed, and

⁸ Page 2 of the appellant's correspondence dated October 13, 2017.

passed by the board of directors of local conservation authorities”), name of the sender(s) (except to state that they are residents of the municipality), and date(s) of the emails. I also note that in his representations regarding records that he argues may exist, he refers to the Deputy Mayor’s role as Chair of the Catfish Creek Conservation Authority, which is a separate institution under the *Act* and to which the appellant has made a separate request. Thus, I do not find that his response provided sufficient details or evidence for there to be a reasonable basis to conclude that the searches conducted by the municipality were not reasonable.

[23] Accordingly, I find, based on my review of all the evidence and the parties’ submissions, that the municipality conducted a reasonable search.

ORDER:

1. I uphold the municipality’s search as reasonable, and dismiss the appeal.

Original Signed by: _____
Lan An
Adjudicator

November 21, 2017