

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3553-F

Appeal MA15-617

Township of Uxbridge

January 29, 2018

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to a business, including records that involve a site plan application and by-law complaints. In Interim Order MO-3515-I, the adjudicator ordered the township to conduct further searches for specific records. In this order, the adjudicator finds that the township's further search for responsive records is reasonable and dismisses the appeal.

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

OVERVIEW:

[1] The appellant, on behalf of a community organization, submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to a business, including records that involve a site plan application and by-law complaints. The township granted partial access to the records. The appellant appealed the application of exemptions and raised questions about the reasonableness of the township's search.

[2] In Interim Order MO-3515-I, I upheld the township's decision to withhold portions of the records under sections 12 (solicitor-client) and 14(1) (personal privacy). However, I ordered the township to conduct a further search for specific records.

[3] The township conducted a further search and located additional records. The

township issued a subsequent access decision granting the appellant partial access to the additional records. The township withheld the email addresses of some individuals pursuant to the mandatory personal privacy exemption under section 14(1). The appellant did not appeal the township's application of the personal privacy provision but confirmed that he continues to believe that additional records should exist.

[4] In this order, I find that the township's further search for responsive records is reasonable and dismiss the appeal.

DISCUSSION:

Submissions of the parties

[5] The further search I ordered the township to conduct in Interim Order MO-3515-I was confined to the following four categories of records:

- records detailing communications with external agencies regarding the Bobolink species, fuel containment and the proposed site plan, including any environmental assessments;
- revised and amended site development plans showing any proposed changes to the fence, picnic shelter or storage containers;
- the promotional binder the property owner provided the township; and
- records responsive to part 3 of the request in the By-Law Manager's record holdings.

[6] The township submits that it conducted further searches for the above-referenced records. The township advises that it sent emails to its Manager of Municipal Law Enforcement, the Chief Building Official, Planning Technician and its external consultant to locate further records. However, most of the further searches conducted did not yield additional records.

[7] The township indicates that two site development plans were located and provided copies to the appellant. Also located were a series of emails between the Manager of By-Law Services, Director of Legislative Services/ Clerk, Chief Building Official and a councillor, which were also provided to the appellant but for the portions the township identified exempt under section 14(1).

[8] The township advises that its Deputy Clerk conducted a search for the promotional binder in question, which the appellant claimed was distributed during a council meeting and that he could not locate any copies. The township advises that agenda materials are generally retained for the "current-year + 1" and that it "no longer [has] paper copies of the promotional material that the Township may or may not have received". In support of its position, the township provided a copy of its Records Retention By-Law with its submissions.

[9] As noted above, a copy of the township's submissions was provided to the appellant. The appellant responded that he did not take issue with the township's further search efforts for records with external agencies. However, the appellant submits that additional records regarding the revised or amended site development plans along with records in the By-Law Manager's record holdings should exist. The appellant also took the position that a further search for the promotional binder in question should be ordered.

[10] In support of his position, the appellant provided some background of the complaints and issues the community organization has brought to the township about a specified business. The appellant voiced the same concerns in Order MO-3515-I, in which he questioned "governance" and "integrity" issues relating to the town's decision making processes.

[11] The appellant now submits that the promotional binder in question should exist, given its significance in the planning and approval process. The appellant also takes the position that it is unlikely that all copies of the binder were destroyed. In support of this position, the appellant provided a copy of the Council meeting minutes which confirm that the business owner in question "provided a history of [the business] as well as an event update".

Decision and Analysis

[12] 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 institution's decision. If I am not satisfied, I may order further searches.

[13] 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

[14] 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

[15] 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.⁵

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.

[16] 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

[17] In Interim Order MO-3515-I, the basis for my decision to order further searches was my determination that the township provided insufficient evidence to demonstrate that it made a reasonable effort to identify and locate the four category of records identified earlier in this order. In Interim Order MO-3515-I, I stated:

Though I am satisfied that the searches were directed and conducted by experienced employees, knowledgeable in the subject matter of the request, the township's submissions did not provide a written summary of all the steps taken in response of the request other than the steps it took in its further search during mediation. Given the absence of contrary evidence, I find that there is a reasonable basis to conclude that the following additional records may exist.

[18] Based on the township's evidence, provided in compliance with the interim order, I am satisfied that further searches were directed and conducted by an experienced employee, knowledgeable in the subject matter of the request. In particular, the city's Deputy Clerk conducted a search of the township's record holdings and directed its Manager of Municipal Law Enforcement, the Chief Building Official, Planning Technician and external consultant to conduct further searches. In addition, though it appears that the promotional materials the appellant claimed the business owner presented during the council meeting would respond to the request, I am satisfied that the township's search to locate these materials is reasonable.

[19] Finally, I considered the appellant's evidence regarding his concerns about the township's decision-making and record-holding practices. In my view, the appellant's evidence repeats similar arguments already considered in Interim Order MO-3515-I. In that order, I stated:

In my view, much of the appellant's evidence is speculative in nature. Throughout his submissions, the appellant questions how the township handled matters related to the subject property. For instance, the appellant raised numerous concerns about whether the township discharged its responsibilities with respect to the site plan application and questions how it managed the complaints it received. In addition, the appellant takes the position that a greater number of records than what was located should have been generated given his and his lawyer's involvement in the matter. It appears that the appellant takes the position that the township's record keeping practices should include documenting phone calls, meetings and discussions between staff and council members. However, I am not aware of any requirement that such discussions or meetings would have to be documented. Similarly, there

⁶ Order MO-2246.

would appear to be no requirement that the township's lawyer communicate his legal opinions to the township in writing. In my view the township's failure to locate records documenting such discussions does not establish a reasonable basis for concluding that additional records must exist.

[20] For the reasons stated above, I find that the township's further search remedied the deficiencies outlined in Interim Order MO-3515-I. As stated above, the *Act* does not require the township to prove with absolute certainty that these records can be located even in cases where its retention policy indicates that the records' retention life has not expired. Instead, the township must provide sufficient evidence to show that it has made a reasonable effort to identify and locate the responsive records.

[21] Having regard to the above, I find that the township's further search remedied the deficiencies set out in Interim Order MO-3515-I.

ORDER:

I find that the township's further search for responsive records is reasonable and dismiss this appeal.

Original Signed By _____
Jennifer James
Adjudicator

January 29, 2018