

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-3562

Appeal MA16-692-2

Essex Region Conservation Authority

February 14, 2018

**Summary:** The Essex Region Conservation Authority (ERCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to an identified housing development. The ERCA located records responsive to the request and granted access to them. The requester appealed the decision on the basis that additional records responsive to his request should exist. Accordingly, the sole issue to be determined in this appeal is whether the ERCA conducted a reasonable search for records responsive to the request. In this order, the adjudicator upholds the ERCA's search as 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, section 24.

### OVERVIEW:

[1] The Essex Region Conservation Authority (ERCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

Complete file on the Southpoint development that ERCA has in their possession. Copy of agreement with Southpoint association and the township of Colchester south that ERCA agreed to certify the amount of fill added for each lot for a fee of \$525.00, in accordance with ERCA Eng. Letter dated April 21, 1997 to the OMB [Ontario Municipal Board]. And the Mayor explanation on the minutes of special meeting, a copy of where that \$525.00 was disbursed.

[2] The ERCA issued an access decision, granting partial access to a copy of the complete file on the Southpoint development. Personal information of identifiable individuals was severed pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act*. The ERCA granted full access to a copy of the agreement with Southpoint association, noting that the agreement is the requester's own document. The ERCA also advised that it was granting full access to a letter, previously provided to the appellant, which it deemed to be responsive to the portion of the request seeking records illustrating where a fee of \$525.00 was disbursed. The ERCA noted in its decision that no records exist with respect to the portion of the request seeking access to the Mayor's "explanation on the minutes of special meeting."

[3] The requester, now the appellant, appealed the decision.

[4] During mediation, the appellant advised that having reviewed the copies of the records and portions of records which were disclosed to him, he believes that additional records responsive to his request should exist. He confirmed that this is the sole issue of concern to him and that he does not dispute the ERCA's application of section 14(1) to sever the personal information of other identifiable individuals.

[5] The ERCA advised that it provided all of the responsive records to the appellant and that no additional records exist.

[6] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage for an adjudicator to conduct an inquiry. During the course of my inquiry into this appeal, representations were sought and received by both parties. The ERCA's representations were shared pursuant to the principles set out in *Practice Direction Number 7*. I determined that it was not necessary to share the appellant's brief representations with the ERCA.

[7] The sole issue to be determined in this appeal is whether the ERCA has conducted a reasonable search for responsive records. In this order, I uphold the ERCA's search for responsive records. My reasons follow.

## **DISCUSSION:**

### **Did the ERCA conduct a reasonable search for responsive records?**

[8] The ERCA asserts that it has located all records that are responsive to the request and that the appellant has not provided a reasonable basis to conclude that additional records exist. The appellant takes the position that additional responsive records should exist. 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 24.<sup>1</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.

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

[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.<sup>2</sup> To be responsive, a record must be “reasonably related” to the request.<sup>3</sup>

[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.<sup>4</sup> 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>5</sup>

[11] 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>6</sup>

### ***Representations***

[12] The ERCA submits that it has conducted a reasonable search for the records responsive to the request and that it has fully discharged its duties under the *Act*. It submits that the appellant has been provided with a copy of the entire Southpoint development file that has been redacted only to remove personal information. It also submits that the ERCA never had custody or control over any records that might be responsive to the portion of the request which addresses the Mayor’s explanation on the minutes of a special meeting “which may never have existed in any event.”

[13] To support its position, the ERCA has enclosed an affidavit sworn by the General Manager/Secretary-Treasurer for the ERCA, who is also its Freedom of Information and Privacy Coordinator (FOIC). In the affidavit, the FOIC attests to the efforts undertaken by him and others, on behalf of the ERCA, to locate records responsive to the request.

[14] The FOIC submits that upon receipt of the request, which was one of several requests for records submitted by the appellant regarding the Southpoint development, staff from the ERCA spoke to the appellant in an attempt to clarify the specific records that he seeks. He submits that with respect to the request that is at issue in this appeal, together with the Director of Watershed Management Services and the Regulations Coordinator, he met with the appellant. He explains that the appellant has made numerous requests for seemingly the same record but is never satisfied that he has been granted access to the record he is looking for. He submits that as a result, they asked the appellant to identify exactly what record or type of record he is looking for so that they could locate such record.

[15] The FOIC submits that the appellant only expressed he wanted all original

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<sup>2</sup> Orders P-624 and PO-2559.

<sup>3</sup> Order PO-2554.

<sup>4</sup> Orders M-909, PO-2469 and PO-2592.

<sup>5</sup> Order MO-2185.

<sup>6</sup> Order MO-2246.

records, however, from the conversation during that meeting, it became clear that he is seeking "a formal/certified/stamped type document that he believes exists for all properties that ERCA is involved in." The FOIC states that they explained to the appellant that ERCA prepared Grade/Fill Control Plan Reports and associated letters of compliance/certification/permits for dwellings built in Southpoint Lane to certify that dwellings satisfied all necessary conditions of the engineering studies and showed the appellant copies of these records. He further states that they advised the appellant that partial access to the report and all existing letters have already been provided to him in response to an earlier request, at which time he was advised that additional records of certification beyond what was provided, do not exist.

[16] The FOIC states:

The Southpoint development has been the subject of an OMB [Ontario Municipal Board] hearing; civil litigation; a Superior Court appeal and decision; and several requests for records by the appellant. As a result, all records pertaining to the development have been kept in one banker's box in our offices, including copies of any emails relevant to the development. This was the source of my search in response to the request for records at issue in this appeal and disclosure of the records.

[17] With respect to the portion of the request which addresses the "Mayor's explanation on the minutes of special meeting" the FOIC states that "to the best of his knowledge the ERCA has never had control or custody of such a record if such a record ever existed or was created."

[18] The ERCA reiterates that while the appellant continues to insist that there is some formal/certified/stamped type document that exists for all properties that ERCA is involved in but no such document exists or has ever existed. It submits that the appellant has not provided a reasonable basis for concluding that such records exist.

[19] The appellant provided brief representations stating that additional letters "of compliance certification that certify dwellings are built in accordance to conditions set out in the MMM Eng. Water Management Report" should exist.

### ***Analysis and findings***

[20] Having carefully reviewed the evidence that is before me, I am satisfied that the search conducted by the ERCA for records responsive to the appellant's request was reasonable and is in compliance with its obligations under the *Act*.

[21] As previously explained, 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 that are reasonably related to the request. In the circumstances of this appeal, I find that the ERCA has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and to locate responsive records within its custody or control. I accept that the searches were conducted by an experienced

employee, who was knowledgeable in the subject matter and consulted with other individuals to confirm the accuracy of his findings. I accept that the effort that he expended to locate responsive records was reasonable and in accordance with the ERCA's obligations under the *Act*.

[22] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding such records exist. In the circumstances of this appeal, I do not accept that the appellant has provided me with sufficient evidence to establish a reasonable basis to support a conclusion that additional records responsive to his request exist.

[23] I acknowledge that the appellant believes that additional letters of compliance or certification exist beyond those that have been provided to him by the ERCA, however, he has not provided a reasonable basis for why additional records should exist despite the fact that the ERCA has repeatedly advised him that all responsive records have been provided to him. Similarly, with respect to any records that contain the Mayor's "explanation on the minutes of special meeting," I find that the appellant has not provided me with sufficient evidence to support a reasonable basis for why such records should exist.

[24] Furthermore, even if additional records exist or were to have existed at one point in time, I reiterate the principle outlined above that the *Act* does not require the ERCA to prove with absolute certainty that further records do not exist. Rather, the ERCA's obligation under the *Act* is contained to being required to demonstrate that it has made a reasonable effort to identify and locate responsive records. I accept that it has done so.

[25] In conclusion, in the circumstances of this appeal, I am of the view that the ERCA has discharged its onus and has provided sufficient evidence to support its position that it has made a reasonable effort to identify and locate records responsive to the request. On that basis, I uphold its search and dismiss the appeal.

**ORDER:**

I uphold the ERCA's search for responsive records as reasonable and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

February 14, 2018 \_\_\_\_\_