Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3586

Appeal MA17-189

Town of Goderich

April 6, 2018

Summary: The appellant made an access request to the Town of Goderich (the town) for a DVD copy of his deputation to town council on a particular date. The town advised that it no longer retains video recordings of council meetings in accordance with its by-law on this topic. The appellant alleges that responsive records exist, potentially in the form of deleted files recoverable from the computer hard drives of the town or the telecommunication companies that broadcast council meetings. In this order, the adjudicator upholds the reasonableness of the town's search. She 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.

Orders and Investigation Reports Considered: PO-3050, PO-3304.

OVERVIEW:

[1] The appellant made a request to the Town of Goderich (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a DVD copy of his deputation to town council on a particular date in 2016, and council's related discussion and decision.

[2] The town issued a decision advising that the record does not exist. In its decision letter, the town referred to its previous responses to the appellant in respect of this same request. In particular, the town noted that it had advised the appellant that the town does not retain copies of video recordings of town council meetings in accordance with its By-Law 123 of 2013, passed in January 2014. By-Law 123 addresses the town's

retention policy on video recordings of town council meetings. It states, in part:

> … Whereas it is now desirable based on reports and information provided by staff, to consider a different policy with regards to the public being provided video recordings of Goderich Town Council meetings;
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> ... And whereas various telecommunication companies including [three named companies] provide video recordings of Council meetings following Council sessions; ...
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> Now therefore the Council of the Corporation of the Town of Goderich enacts as follows: ...
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> 1. That if a record in the form of a video recording has been retained by the Municipality, the cost associated with acquiring a copy from the Municipality be determined on a cost recovery basis. Alternatively, Persons so inclined are free to make arrangements for purchase of copies of the recordings from the telecasters, if available.
>
> 2. That Council directs that copies of video recordings as of the date of passing this By-Law [January 13, 2014] are not to be streamed to the Town website or retained as a record but rather available to the public by way of such telecommunication companies as [named companies].
>
> 3. The Town shall have no obligation to retain copies of video recordings except as is necessary for compliance with this By-Law. ...

[3] The appellant appealed the town's decision to this office. In his letter of appeal, the appellant reported that another resident had requested and received from the town a video copy of a deputation made to council in fall 2011. The appellant also reported that he had contacted two of the telecommunication companies named in the by-law, and had been unable to obtain a copy of the recording he seeks from them.

[4] During the intake stage of the appeal process, an analyst with this office contacted the town, which provided more information about the process of videotaping town council meetings. The town explained that a third party videotapes the meetings, then provides the recording to one of the telecommunication companies named in the by-law for broadcast. The third party then deletes the video recording. The town stated that it is not in possession of the video recording at any point during this process.

[5] The analyst shared the town's explanation with the appellant. The analyst also noted that By-Law 123 came into force in 2014, and that an access request made by another resident for a video recording made in 2011 may have been subject to another retention policy. She observed that the town's decision in response to the appellant's request accords with the retention policy set out in By-Law 123.

[6] The appellant maintained that the requested recording should be available on the computer hard drives of the town or the telecommunication companies.

[7] The appeal was moved to the mediation stage of the appeal process. During mediation, the town conducted another search for the requested recording, this time involving the two telecommunication companies. One company confirmed that it does not have a copy of the specified council meeting in 2016, because it only stores files for the two most recently received recordings—as of the date of the town's discussion with the company in July 2017, the company only had recordings from June and July 2017. Similarly, the second telecommunication company confirmed that it does not have a copy of the specified council meeting. That company also stated that it is not its practice or policy to record any content to DVD.

[8] The town also clarified that the third party who videotapes council meetings is a contract employee of the town. The town asked the employee whether he has a copy of the requested recording from 2016. The town employee advised that the only recordings on file are from 2010 to February 2014. He reported that since the passage of By-Law 123, files of recordings are only kept until they have been broadcast by the two telecommunication companies, and then are deleted from the town computer.

[9] The mediator shared this information with the appellant, who maintains that a video recording of the specified council meeting ought to exist.

[10] As no mediation was possible, this file was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*.

[11] The town declined to provide representations during the inquiry stage, relying on its submissions made to this office and shared with the appellant during the earlier stages of the appeal.

[12] The appellant provided representations, which I will address below.

[13] For the reasons that follow, I conclude that the town conducted a reasonable search in satisfaction of its obligations under the *Act*. I dismiss the appeal.

DISCUSSION:

[14] 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

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

decision. If I am not satisfied, I may order further searches.

[15] 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]

[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.[4]

[17] There appear to be two main grounds for the appellant's belief that the record he seeks must exist. The first is a claim that the town did not search for non-DVD records. The second is a claim that there may exist recoverable copies of the deleted record.

[18] First, the appellant alludes to the possibility that the town unilaterally narrowed the scope of his request by considering only whether the requested information already exists in DVD format, and not whether the underlying information he seeks (i.e., a video recording of the council meeting of a specified date) exists. The appellant observes that his request is predicated on the existence of an electronic or digital video record, because without this underlying record, it would be impossible to make a copy in DVD format. He suggests that by accepting a telecommunication company's response that it does not record any content to DVD, the town is ignoring the fundamental question of whether any non-DVD version of the recording exists.

[19] I find no support for this allegation. The appellant's request to the town was for a DVD copy of a deputation to council on a particular date, and the town's decision letter accordingly refers to the record as a DVD copy of council proceedings on the specified date. However, it is clear from the information received during the appeal process that the town's search was not limited to DVD records.

[20] The town described the steps it took to locate video recordings of the requested meeting, and confirmed that no files post-dating the introduction of the by-law exist on the town computer. The town also reported that, in response to its inquiries, the telecommunication companies confirmed that they do not have files or digital recordings from the requested date. The fact that one company provided the additional information that it does not, as a practice or policy, record content to DVD does not suggest to me that it was instructed to limit its search to DVD records, or that it did limit its search in this way. I observe that the by-law itself refers to video records or

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[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Order MO-2246.

video recordings, rather than recordings in any particular format, being made available to the public. Based on the evidence before me, I am satisfied that the town directed its search efforts to any video recordings or files of the requested meeting from which a DVD copy could be made.

[21] After making the search efforts described above, the town concluded that no responsive records exist. In light of the town's evidence, I asked the appellant to explain the basis for his belief that the town had not conducted a reasonable search for records.

[22] The appellant observes that the town initially stated that a third party videotapes council meetings, and only later clarified that the third party is, in fact, a town employee. Although the town took the positon that it is never in possession of video recordings, the appellant argues that the town is in possession of a recording for at least the length of time necessary for the employee to make the recording and to transfer it to the telecommunication companies.

[23] I agree with the appellant that based on its own evidence, the town, through its employee, is in possession of video recordings of council meetings for at least some period of time. However, this does not answer the question of whether the town has custody or control of the particular recording sought by the appellant in order to make a decision on access under the *Act*. In this case, the town specifically confirmed that it does not possess the requested recording. This accords with the town's retention by-law in effect at the time of the specified meeting. In addition, although the town did not take a position on whether it has control of video recordings once they are transferred to the telecommunication companies, in this case the town asked the companies whether they have copies of the record, and was told that they do not.

[24] The appellant does not appear to dispute the town's evidence. He states, however, that it would "almost be beyond belief that no one 'saved' the video record at some point." He reports that if a file is saved to a computer, and then deleted, the file may be difficult to recover but may still be retrievable from the computer's hard drive. The appellant observes that various law enforcement agencies employ specially trained forensic computer technicians and forensic software to access records stored in hard drives of computers, and he suggests obtaining the services of such an expert to help determine the probability of recovering the video recording from a computer hard drive.

[25] There is no evidence that the town or the telecommunication companies saved a copy of the record to their computer hard drives, as the appellant suggests. Even if there were, however, I do not agree that a reasonable search in these circumstances requires a search for deleted copies of the record.

[26] The *Act* requires that an institution expend reasonable efforts to locate responsive records. What is reasonable will depend on the circumstances. This office has, in some cases, determined that deleted records must be part of an institution's search efforts in order for the search to be reasonable. In Order PO-3050, for instance,

the adjudicator found it reasonable to expand the scope of a request for email records to include deleted emails after it was revealed that the computer belonging to the subject of the searches had crashed, raising the possibility that the requested emails had been lost.

[27] Similarly, in Order PO-3304, the factual context surrounding the request was the basis for the same adjudicator's conclusion that a reasonable search would include a search for deleted emails. The context in that case included evidence of a culture of inappropriate record-keeping practices, including the indiscriminate deletion of emails, by political staff in some offices of government, and the identification (through other processes) of many thousands of pages of potentially responsive records that were not located through the institution's searches under the *Act*.

[28] In both cases, the adjudicator acknowledged that there is no general expectation that a reasonable search will include a search for deleted records. He indicated, instead, that findings on this matter are made on a case-by-case basis.

[29] I find the circumstances in this appeal to be unlike those in the cases described above. In this case, I am satisfied that a search for deleted records is not warranted.

[30] The town's handling of the video recording requested by the appellant was in accordance with its retention by-law, and its practice of deleting recordings after transferring copies for broadcast. There is no suggestion that the record should exist in the town's record-holdings but was inadvertently lost, or that it was deleted after the appellant made his access request in order to circumvent his right of access, or for some other improper purpose. The circumstances here do not establish a need to remedy a defective search through the extraordinary measures proposed by the appellant.

[31] The appellant's remaining submissions do not relate to the issue of reasonable search, and are outside the scope of this appeal. He describes his initial difficulty obtaining from the town a copy of a legal opinion appended to the by-law. Now having received a copy, he questions the accuracy of the legal advice behind the town's decision to no longer retain video recordings of council meetings. He also complains that although the by-law states that video recordings of town council meetings are available to the public by way of the telecommunication companies, he has been unable to obtain other recordings (of more recent council meetings) by requesting them directly from the companies. It is the appellant's position that the companies are parties to the by-law, and should have been made to sign implementation agreements with the town to ensure their compliance with it.

[32] These representations are largely focused on the appellant's dissatisfaction with the town's decision, implemented through the by-law, to no longer retain video recordings of town council meetings. They appear to be premised on an assumption that the town is obligated to create and to retain (or to otherwise make available) video recordings of town council meetings for the purpose of providing access. There is no

such obligation in the *Act*, or other legislation of which I am aware.

[33] The right of access in the *Act* applies only to records in the custody or under the control of institutions. In this case, in consideration of the evidence before me, I am satisfied that the town made reasonable efforts to locate responsive records in its custody or under its control, and reasonably concluded that none exists. I dismiss the appeal.

ORDER:

I uphold the town's search for records. I dismiss the appeal.

Original Signed by: April 6, 2018
Jenny Ryu
Adjudicator