Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3661-I

Appeal MA17-535

Town of Midland

September 19, 2018

Summary: The Town of Midland (the town) received a request for water meter maintenance and work order records regarding a specified property during a specified time period. The scope of the request was later expanded to "any and all" records related to the specified address of the property. The town searched but did not locate responsive records beyond those disclosed to the requester in response to a previous request. The appellant appealed the town's decision on the basis that additional responsive records exist, thereby raising the reasonableness of the town's search for records. The adjudicator finds that the town's search was not reasonable and orders it to conduct a further search for responsive records.

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

Orders Considered: Orders P-604, M-593, P-724, and MO-2990-F.

OVERVIEW:

[1] The Town of Midland (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA*, or the *Act)* for the following:

> Records for Property [at a specified address]
>
> 1. 2012 & 2013 maintenance on water meter and sewer works records for [a particular property]

> 2. 2010 - 2013 water and sewer work orders, site work orders and meter work orders records for [the above property].

[2] Upon receipt of the request, town staff were instructed to search for "any and all records related to the [specified property]".[1]

[3] The requester, the current owner of the property, alleges that the former owner by-passed the town's water meter system. The requester alleges a discrepancy between the prior consumption costs of running the business as identified by the previous owner and the current consumption costs the town is charging her. A civil lawsuit ensued and the Superior Court of Justice ordered the town to disclose certain documents such as water meter inspection reports to the requester.

[4] In response to the access request, the town issued an access decision indicating that it could not locate any responsive records beyond those already identified in a specified previous request. The town's decision letter confirms that the scope of the search, as it was in the response to the previous request, "was expanded to include any and all records related to [a specified address]".[2] In response to the first request, the town located a number of records identified in an index. The town initially withheld some records on the basis of a number of exemptions, but later disclosed all the listed records to the requester.[3]

[5] The requester (now the appellant) appealed the town's decision in response to its (second and present) request[4] to this office on the basis that additional responsive records must exist.

[6] Since there was no mediated resolution, the file was moved to the adjudication stage of the appeals process for an adjudicator to conduct a written inquiry under the *Act*. The sole issue on appeal is the issue of reasonable search. I sought and received written representations from both parties. Representations were shared in accordance with *Practice Direction 7* of the IPC's *Code of Procedure*.

[7] The appellant also asked for an award of costs, but the IPC has no legal jurisdiction to grant that.[5] Any other issues raised by the appellant that are outside the IPC's jurisdiction will not be addressed in this order.

[8] For the reasons that follow, I find that the appellant has demonstrated a reasonable basis for concluding that further records exist, and I order the town to conduct an additional search for responsive records.

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[1] Decision letter, dated September 10, 2017.
[2] Decision letter, dated September 10, 2017.
[3] Revised decision letter, dated July 28, 2017.
[4] It had also appealed the town's access decision to its first request. That appeal, Appeal MA17-231, was resolved through mediation at this office.
[5] See Orders P-604, M-593, P-724, and MO-2990-F. Also see Robert W. Macaulay, Practice and Procedure before Administrative Tribunals (Toronto: Carswell, 1988 at p. 27-10).

DISCUSSION:

Did the town conduct a reasonable search for responsive records?

[9] The appellant claims that additional records responsive to her request exist, so the issue to be decided is whether the town has conducted a reasonable search for records as required by section 17.[6] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified,[7] in this case, I find that the requester provided a reasonable basis for concluding that such records exist, so I order the town to conduct a further search.

[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.[8] 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.[9]

[11] To be responsive, a record must be "reasonably related" to the request.[10]

[12] The *Act* does not require the town to prove with absolute certainty that further records do not exist. However, the town was required to provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[11] In my view, it did not do so.

[13] The town provided an affidavit from the employee who conducted the searches, its clerk and designated head under the *Act*. The affidavit describes[12] the searches conducted as follows:

a. Complete search of all paper records within the care and control of the Town;

b. Complete electronic search of all electronic records within the care and control of the Town.

[14] The affidavit then includes these additional statements about the searches, which were repeated in the town's affidavit submitted in reply to the appellant's initial representations:

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[6] Orders P-85, P-221 and PO-1954-I.
[7] Order MO-2246.
[8] Orders M-909, PO-2469 and PO-2592.
[9] Order MO-2185.
[10] Order PO-2554.
[11] Orders P-624 and PO-2559.
[12] Paragraph 2 of the town clerk's affidavit.

- That all relevant records that were obtained as a result of the paper and electronic records search have been provided to the applicant during the course of this Freedom of Information Access Request.[13]

- That the municipality does not possess any additional or further records related to [this appeal].

- That the municipality has not withheld any information or records related to [this appeal].

[15] In the town's reply affidavit, it also referred to, and attached, the index of the records disclosed to the appellant in response to the appellant's first request.

[16] I do not find that the town's affidavits sufficiently address the issue of reasonable search in light of the appellant's representations and all the evidence before me.

[17] The appellant provided the basis for her belief that additional records exist. Based on my review of her representations, I find that her relevant concerns fall generally within the following five categories:

- two records exist, which fall within the scope of the request but were not identified as responsive by the town, without explanation;

- it is unreasonable to believe that certain records exist(ed) in isolation of others, based on their contents;

- there is insufficient evidence about whether certain identified town employees with apparent expertise in the subject matter of the request were contacted about a search, and if not, why not;

- there is insufficient evidence about any searches related to purported statements made by town employees with expertise and/or direct knowledge of regarding alleged by-pass at the property in question; and

- there is insufficient evidence about the town's retention policy concerning records such as e-mails and court orders, and there is no explanation in the town's representations regarding how water meter reports, etc. from as far back as 2009 could still exist, and were disclosed to the appellant in 2017, if the retention policy was one year.

[18] I will address each of the appellant's reasons in turn.

Existence of responsive records that were not identified by the town as responsive

[19] The appellant's representations include two attached records that I find are

[13] Paragraph

reasonably related to the scope of the request for "any and all" records related to the property in question.

[20] These two records are:

a. **The appellant's e-mail exchange with the town mayor in 2014.** The appellant's e-mail, dated March 20, 2014, clearly identifies the alleged water by-pass issue. Its subject line is "enforcement required". The mayor's response on the following day was sent from a "simcoe.ca" e-mail address, and it copied a person at the town with a "midland.ca" e-mail address. The mayor's response refers to discussions with town staff and what he was advised of in those discussions. The content of this exchange is clearly relevant to the request. The town used the opportunity it was given to make representations about this document to say only this: "*Exhibit 1: Is an e-mail exchange and is self explanatory*".[14] The town submitted that the e-mail was self-explanatory and provides no explanation as to why it was not identified as a responsive record.

b. **An Order of the Superior Court of Justice, dated October 1, 2015.** This was issued in the course of the civil lawsuit mentioned earlier. The judge ordered the town to produce records concerning the property that is the subject of the request, making this court order clearly within the scope of the request. The town's representations do not deny having received the court order. Rather, the town's comment on this record was: "*Exhibit 2: is a court Order and is self-explanatory*". The town provided no explanation as to why the record was not identified as responsive to the request.

Unreasonable to believe that certain responsive records exist(ed) in isolation of others

[21] Due to the content of the mayor's e-mail exchange, the court order, and records already disclosed to the appellant, I agree with the appellant that it is unreasonable to believe that other records do not, or did not, exist in relation to them.

The e-mail exchange with the mayor

[22] The content of the mayor's email, copied to an individual with a "midland.ca" e-mail address, provides a reasonable basis to believe that other records exist (or existed at one time) with the town. The e-mail indicates that the mayor discussed the by-pass issue relating to the property identified in the request with staff. Whether or not the mayor's communication to town staff was verbal, his e-mail suggests that other records could (or did) exist because he indicates that the town:

- "changed [its] inspection program to better ensure that commercial meters are not being by-passed";

[14] Paragraph 4(a) of town's employee's affidavit, on reply.

- "will continue to investigate"; and
- "[will continue to] recover monies that are owing"

[23] Given the opportunity to comment on the contents of this e-mail from the mayor, the town's representations are silent beyond stating that this document is an e-mail exchange and is self-explanatory. With insufficient evidence from the town to the contrary, I find it reasonable to believe that other records could exist, or did, if the town changed its inspection program as a result (even in part) of a water by-pass at the specified property, had an investigation it was "continu[ing]", and/or had "continu[ing]" recovery efforts for monies owing.

The court order to the town

[24] Likewise, the town did not explain how it is reasonable or possible that it received a court order and did not generate *any* records in relation to it. I find that it is reasonable to believe that some records were generated when the town received the court order, and those would have been responsive to the request. This, too, weighs heavily against upholding the reasonableness of the town's search.

Records already disclosed by the town

[25] The content of certain records disclosed to the appellant, when considered alone, or in conjunction with the mayor's e-mail reference to an investigation and monetary recovery efforts, also make it reasonable to believe that other related, or similar, records exist.

[26] For example, the town disclosed a "Record Notes Report" created on December 18, 2013 (but printed or otherwise accessed about four years later, on November 4, 2017), and it is reasonable to believe that other records exist in relation to it based on its contents. This record explicitly states that there was an investigation regarding the property in question. Considering this reference to an investigation and the mayor's e-mail, the town's representations do not explain how there could not be records generated in relation to this record.

[27] Similarly, as a result of the appellant's first request, the appellant's former counsel raised many detailed questions to the town's counsel about records that were disclosed to the appellant. A copy of these questions was attached to the appellant's representations in this appeal and provided to the town for comment. The town did not provide representations on the questions arising out of the disclosed records discussed in the e-mail exchange, but stated: "*Exhibit 6: Is an e-mail exchange and is self-explanatory*". The town then commented on another issue related to this e-mail exchange and raised by the appellant that I do not find relevant to the issue in this appeal. I find that the questions in the e-mail exchange about disclosed records support the reasonableness of the belief that other records exist.

[28] Likewise, the appellant's representations flag a May 30, 2014 Record Notes

Report that uses the word "tampering", but the town's representations do not provide an adequate explanation as to whether records were generated in response to this reported "tampering". I find that the word "tampering" suggests that other records could exist in relation to this record.

Insufficient evidence about whether knowledgeable employees were contacted in the course of the searches

[29] 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.[15]

[30] 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.[16]

[31] The Notice of Inquiry asked the town to provide information about who was contacted in the course of the searches conducted, and the appellant identified specific names and/or titles of experienced town personnel involved in water metering, but they do not appear to have been contacted about a search. The town's first affidavit only identifies the town clerk as having conducted paper and electronic searches. The town's decision letter of January 10, 2018 does mention that the town's water and wastewater administrative assistant and process coordinator (of 18 and 9 years employment at the town, respectively) were involved, but the town was asked to include such information in its affidavit evidence too during my inquiry into the matter, and did not, without explanation. If the involvement of these employees was inadvertently left out of the affidavit, I am still left without an explanation as to whether employees identified by the appellant who appear to be more directly involved in the town's water metering, were contacted about a search, and if not, why not.

[32] In addition, the town's representations do not describe any contact about a search for responsive records with town employees identified in the metering records disclosed to the appellant.

Insufficient evidence about purported statements by named town employees

[33] The appellant submits that named town employees advised her that there was by-pass at the property in question, but the town's representations do not sufficiently address these claims. The named employees apparently include the former manager and chief operator of the town's Waterworks department.[17] If the appellant's evidence on this point is accurate, it is reasonable to expect that the named employees would have communicated about the alleged by-pass, and that there would be electronic or paper records of those communications. The appellant referenced these purported

[15] Orders M-909, PO-2469 and PO-2592.
[16] Order MO-2185.
[17] Paragraphs 11(b) and 13 of the appellant's initial representations at adjudication.

statements to her at paragraphs 1, 2, 11(b), and 13 of her initial representations, which were shared with the town. However, the town's representations are silent on the substance of those claims, which raises questions about whether the records of those named employees were searched. It is reasonable to have these questions in circumstances when there is an e-mail from the Mayor referencing a change in inspection policy and ongoing investigative and recovery efforts, and records disclosed to the appellant that point to alleged by-pass.

Insufficient evidence about the retention policy

[34] The Notice of Inquiry also asked the town to provide representations about its retention policy, but the town provided insufficient evidence of this. It only addressed the retention policy for one category of responsive records without describing its retention schedule for records such as the mayor's e-mail exchange with the appellant or the court order to the town, which are responsive to the request. Assertions that nothing was withheld, or that everything found has been provided do not adequately address this. The town's failure to provide details about whether records were destroyed weighs against upholding the town's search.

[35] The town provided persuasive evidence that its retention policy regarding water billing and metering records (which include meter reading histories, work orders, and records regarding installation, control and replacement of meters) is one year. The appellant insists that the water involved is drinkable and, therefore, would fall under a certain category in the retention schedule that stipulates a total retention of 25 years.

[36] While I do not think it would be appropriate for me to make a finding about whether the water was drinkable, there is insufficient evidence about why the town retained and disclosed some water metering records for 2009-2012, well beyond the applicable one-year retention period for metering records identified by the town. This raises reasonable concerns that other responsive records have not been destroyed in accordance with the stated retention schedule of a year and could, therefore, have been identified as responsive records to the appellant's request.

[37] Taking all of the considerations noted above into account, I find that the town has not provided sufficient evidence of a reasonable search and the appellant has provided a reasonable basis for concluding that additional records exist.

ORDER:

1. I do not uphold the town's search for records responsive to the request. I order the town to conduct a further search for responsive records. That search is to include the following:

    a. I order the town to ask the town employees referenced in an e-mail sent by the town's counsel to the appellant's counsel (at Exhibit 6 of the appellant's representations), and/or any other town employees with

specific knowledge about water consumption or metering to conduct searches for responsive records. These searches must be for both electronic and paper records.

b. I also order the town to ask its legal department to search for responsive records relating to the court order referenced in this order.

c. I also order the town to search for responsive records in the paper records of all the named employees (referenced in the appellant's representations at paragraphs 1, 2, 11(b) and 13) who are said to have advised and/or confirmed that there was a by-pass issue, and to ask its information technology department to search for responsive records in the e-mail records of these employees as well.

2. I order the town to provide me with an affidavit or affidavits sworn by individuals who have direct knowledge of the searches, which are to include at a minimum the following information:

   - the name(s) and position(s) of the individuals)s) who conducted the searches;

   - the steps taken in conducting the searches;

   - the locations searched; and

   - the results of the search.

3. I order the town to provide me with the affidavit(s) by **October 19, 2018**.

4. If the town locates further records responsive to the request, I order it to issue an access decision to the appellant in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

5. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1, 2 and 3 of this order.

Original Signed by: September 19, 2018

Marian Sami
Adjudicator