

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3694-I

Appeal MA17-232

The Corporation of the Municipality of Mattawan

November 28, 2018

**Summary:** The Corporation of the Municipality of Mattawan (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records pertaining to the Municipality of Mattawan Official Plan Update. The municipality provided access to responsive records. The appellant claimed further responsive records should exist. In this order, the adjudicator finds the municipality did not conduct a reasonable search for responsive records and orders a further search.

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

### BACKGROUND:

[1] The Corporation of the Municipality of Mattawan (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

This is a request for all records (without limiting the generality of the following) including notes, emails, correspondence, reports, proposals and draft documents pertaining to the Municipality of Mattawan Official Plan Update, including any affected Bylaw(s) or Schedules, for the period from October 01, 2015 to February 15, 2017.

For clarity, let me be explicit that this request is for the Municipality's records, and not those of [a specified planning municipality].

[2] The municipality issued a decision granting full access to 46 pages of responsive records, including emails and correspondence, Notices of Public Meetings, Official Plan Review Notes and Agendas.

[3] The requester, now the appellant, appealed the municipality's decision to this office.

[4] During the course of mediation, the appellant raised the issue of whether the municipality had conducted a reasonable search for records, to which the municipality responded by providing the appellant, via the mediator, with additional information regarding the search and status of the Official Plan Review. However, the appellant maintained his position that additional records should exist.

[5] As further mediation was not possible, this appeal proceeded to adjudication, where an adjudicator conducts an inquiry under the *Act*. Representations were received from the appellant and the municipality, and shared in accordance with *IPC Practice Direction 7*.

[6] In this order, I find that the municipality did not conduct a reasonable search and order the municipality to conduct a further search for responsive records.

## **DISCUSSION:**

### **Did the municipality conduct a reasonable search for records?**

[7] Where a requester claims 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.<sup>1</sup> If I am satisfied 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.

[8] 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 it has made a reasonable effort to identify and locate responsive records.<sup>2</sup> 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>3</sup>

[9] 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 such records exist.<sup>4</sup>

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

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

<sup>3</sup> Orders M-909, PO-2469 and PO-2592.

<sup>4</sup> Order MO-2246.

[10] The municipality submits that it has one part-time employee, the Clerk-Treasurer, who responded to the appellant's request. The municipality submits that in response to the request, it sent the appellant a copy of the complete file dating from October 1, 2015 to February 15, 2017.

[11] The municipality submits that some of the appellant's arguments with respect to why he believes further records exist were shared during mediation. In the municipality's representations, it addresses a few of the appellant's concerns. For the most part, the municipality's answer to the appellant's concerns is that the document "does not exist".

[12] In its reply representations, the municipality submits that some records, including the Official Plan review and notices, and files were searched both manually and on the computer, while email correspondence and presentations were searched on the computer. The municipality further submits that the appellant took certain lines from the records disclosed out of context when information was being requested by the Planner, ministries, as well as the Planning Board. The municipality indicates that the items were listed to give advance notice of the requirements that would be applicable or required for the Official Plan review process. However, they do not exist, because the Official Plan review process is still proceeding and a full public consultation process will be taking place. The municipality submits that the "complete file/record" was provided to the appellant and nothing was excluded.

[13] The appellant submits that due to the municipality's small size, the Clerk-Treasurer should be able to easily locate and assemble relevant records than one would normally expect in a larger institution and the Clerk-Treasurer can be reasonably expected to have more immediate knowledge of the municipality's activities. In the case of this particular Clerk-Treasurer, the appellant submits that she has occupied this position for almost a decade and should be expected to have current and comprehensive knowledge of all records and where they are located.

[14] The appellant submits, however, that the size of the municipality also raises concerns about "loyalty" and "good faith". The appellant submits that the determination of a reasonable search should take into consideration the issues of loyalty and job security and the influence they may have on what an employee regards as reasonable.

[15] The appellant submits that even if issues of loyalty and good faith are irrelevant, the core issue with respect to the reasonableness of the search is that it was misguided due to the focus being on "the file" and not his actual request. The appellant submits that the municipality interpreted his request incorrectly and limited it to finished documents. However, the appellant submits that his request was for all records and explicitly included drafts. The appellant submits that the municipality did not reach out to clarify his request and chose to redefine the scope of his request without providing any reason or rationale for doing so.

[16] The appellant submits that it appears the municipality did not search for records from a specific councillor or the municipality's contracted Planner because there is a

lack of responsive records from them which he believes should exist.

[17] The appellant submits that he was provided no details regarding where the Clerk-Treasurer searched for responsive records and what locations were excluded from the search. He submits that he has not been provided with any information regarding what effort the municipality made to identify and locate all the responsive records within its custody or control.

[18] The appellant submits that the municipality acted in an evasive, uncooperative manner and it is reasonable to conclude there are additional responsive records that have not been located and disclosed. The appellant submits that the municipality should be ordered to conduct a further, more comprehensive search.

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

[19] The onus is on the municipality to provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records. While the municipality's representations did address some of the concerns the appellant raised early in the appeal process, it did not provide sufficient evidence to demonstrate that it has conducted a reasonable search.

[20] The appellant claims that the municipality may have unilaterally narrowed the scope of his request. There is some support for this claim. The municipality's representations continually refer to "the file". However, there is no explanation as to what "the file" includes and whether or not there may be records responsive to this request that are kept outside of "the file". The municipality reiterates many times that "the complete file" dating from October 1, 2015 to February 15, 2017 was provided to the appellant. However, the municipality does not provide any information as to what was searched, who conducted the search, and when and where the search was conducted.

[21] The municipality submits that the Clerk-Treasurer responded to the request, but does not specify she was the one that completed the search. The municipality submits that the Official Plan Review and notices, the records and files were searched both manually and on the computer. While the municipality specifies that a search was conducted manually, it does not specify who conducted the search, or where that person searched.

[22] In its representations, the municipality appears to submit that email correspondence and presentations were searched on the computer. However, there was no indication of whose email accounts or computers were searched and what parameters were used in conducting the search. There is also no indication as to who conducted the search.

[23] Based on the municipality's representations, there is insufficient evidence before me to demonstrate that it has conducted a reasonable search. Therefore, I find the municipality has not conducted a reasonable search for responsive records and order it

to conduct a further new search.

**ORDER:**

1. I order the municipality to conduct a further search for responsive records.
2. I order the municipality to provide me with an affidavit sworn by the individual who conducts the search within 21 days of this Interim Order. At minimum, the affidavit should include information relating to the following:
  - a. information about the employee swearing the affidavit and a statement describing the employee's knowledge and understanding of the subject matter and scope of the request;
  - b. the date(s) the person conducted the search and the names and positions of any individuals who were consulted in conducting the search;
  - c. information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
  - d. the results of the search; and
  - e. whether it is possible that responsive records existed but no longer exist. If so, the municipality must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules.
  - f. if as a result of the further search, it appears that no further responsive records exist, a reasonable explanation for why further responsive records do not exist.
3. If the municipality locates additional records as a result of its further search, it must provide a decision letter to the appellant regarding access to those records, in accordance with the *Act*, treating the date of this order as the date of the request for the purpose of the procedural requirements for responding to the request.
4. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1 and 2 of this order.

Original Signed by: \_\_\_\_\_  
Anna Truong  
Adjudicator

\_\_\_\_\_ November 28, 2018