Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3695

Appeal MA15-236-2

Town of Blind River

November 28, 2018

Summary: The appellant made a request to the Town of Blind River (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the expenditure of funds with regard to the Municipal Infrastructure Lending Program. The town issued an interim decision containing a fee estimate that was appealed to this office resulting in Order MO-3469. Subsequent to the issuance of Order MO-3469, the town issued an access decision advising that it did not have records relating to part one of the request and that it did not have access to personal email accounts and could only provide emails that were sent or received through its email server. The town also withheld one record under section 12 (solicitor-client privilege). The town disclosed the remainder of the responsive records to the appellant. The appellant appealed, taking issue with the reasonableness of the town's search. In this order, the adjudicator finds that the town's search was reasonable.

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

OVERVIEW:

[1] The following request was made to the Town of Blind River (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

- A complete audited breakdown detailing how the municipality (and subsequently North Shore Power Group) spent the $49.5 million Municipal Infrastructure Lending Program (MILP) loan which was granted to the town in 2010. This would include all projects, investments (such as [a specified investment]) and other projects or [expenditures] to which the funds were allocated.

- For the time period specified above, all emails including [specified individual] (both sent and received from City operated communication systems and personal accounts such as Gmail, Hotmail, etc.) regarding the MILP loan, negotiations with CMHC, feedback from the community, all communications on the subject of the loan or repayment, as well as any communications with [a specified law firm] about NSPG, communications with [a specified law firm], communications with [two specified individuals], and other town councillors.

- For the time period specified above, all communications from [the mayor] about the loan, its repayment or any discussion regarding renegotiation or public concern regarding the loan.

- The legal opinion of [a specified law firm] on the town's finances and specifically its Annual Repayment Limit (ARL) when it was considering taking on the CMHC/MILP loan in 2010.

- Due diligence documents that were provided to the town prior to the investment in Plasco.

- For the time period specified above, communications from [a specified individual] to town officials (elected and appointed) regarding the CMHC MILP loan, NSPG or the re-negotiation of the loan.

[2] The request was for access to the information for the period between November 1, 2014 to April 20, 2015, unless otherwise specified.

[3] The town issued an interim decision containing a fee estimate in the amount of $2,278.20. The requester appealed the town's fee estimate. Appeal MA15-236 addressed the issue of the fee estimate, resulting in Order MO-3469.

[4] Following the issuance of Order MO-3469, the town granted access to responsive records for a fee of $478.10. In its access decision, the town indicated that records do not exist in relation to the MILP referenced in the first item of the request. The town also explained that it does not have access to personal email accounts and can only provide correspondence that was sent and received through its email server.

[5] The requester, now the appellant, appealed the town's decision challenging the reasonableness of the town's search.

[6] During the course of mediation, the appellant advised the mediator that he believed additional responsive records should exist, including emails based on the town's initial fee estimate. The town advised the mediator that it produced all of the records that it located and that no further responsive records exist. The town also clarified that it withheld one record containing a legal opinion pursuant to section 12 of the *Act*.

[7] The appellant advised the mediator that he would like to pursue the appeal at adjudication and confirmed that he is not pursuing access to the record that was

withheld pursuant to section 12 of the *Act*.

[8] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*. As the adjudicator in this appeal, I invited the parties to provide representations which were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[9] In this order, I uphold the town's search as reasonable and dismiss the appeal.

DISCUSSION:

[10] The only issue in this appeal is whether the institution conducted a reasonable search for records.

[11] 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.

[12] 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]

[13] 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]

[14] 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]

[15] 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]

Representations

[16] The town submits that following the issuance of Order MO-3469, which dealt

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[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.
[6] Order MO-2246.

with the fee estimate, the appellant advised that he would like to move forward with the request and obtain the records.

[17] The town submits it is important to note the following:

- The town owns its own servers on premise.
- The town hosts its own exchange email/servers.
- The town uses Small Business Server 2008, which is Windows Server 2008 and Exchange Server 2007.
- Default settings are used for Exchange 2007, that being when users delete emails, emails are kept for recovery for thirty (30) days and removed thereafter.
- Otherwise there is no extended history beyond what users keep in their mailbox.
- The town has a third-party IT service provider, Unique Data Systems (UDS), who it engaged to assist with the search for responsive records.
- In 2015, Unique Data Systems (UDS) purchased the software MAPILab Search for Exchange specifically to expedite the search for responsive records in mailboxes on the town's servers.
- The software permitted Unique Data Systems (UDS) to do keyword searches of the said mailboxes and export the results.
- The town reviewed a random sample of the exported results to provide the appellant with a fee estimate.

[18] The town submits that it was only when it received the email from the appellant requesting the records, after Order MO-3469 was issued, that it reviewed the entirety of the exported results and provided all responsive records to the appellant. The town submits that the number of pages of actual responsive records was less than it initially estimated in its fee estimate, as the number in the estimate was based on a random sample. The town submits that the reason for this difference was that the software used by UDS picked up some records based on the keyword search criteria that were actually not responsive to the request after review of the actual record. The town submits that it only charged the appellant a fee based on the actual number of responsive records provided.

[19] The town submits that after sending the appellant the responsive records, the appellant contacted it stating that he believed some of the emails provided were redacted. The town submits that it forwarded this information to UDS who confirmed that it had not removed or altered any data in the emails. According to the town, UDS suggested that there were no "bodies" missing, for example, and all those with subject "Fw_North Shore Power Group Question…" were messages that were forwarded. The town submits that it provided the appellant with the response from UDS. The town

submits that it conducted a reasonable search for records and disclosed all responsive records in its custody or control to the appellant unaltered.

[20] The appellant was provided with a copy of the town's representations and provided his own representations in this appeal. The appellant submits that the town has indicated that a preliminary search yielded an estimated 1000 pages of responsive records and that a full search could yield as many as 2000 pages. The appellant submits that the town, in subsequent submissions, indicated that it had purchased new software in order to better complete these searches and stated that a minimum of 363 email records were found.

[21] The appellant submits that counsel for the town has indicated that the specialized software and services, MAPILab Search for Exchange, were purchased in order to conduct a search. The appellant submits that according to the MAPILab's website, the product is a solution intended for searching messages and other items in multiple mailboxes on Microsoft servers.

[22] The appellant submits that the records from the town arrived with fewer than 120 pages of email records and of those, the majority were the same email threads being repeated (for example, one thread takes a four page email and repeats it becoming a 50-page inclusion).

[23] The appellant submits that it appears that responses from the mayor and the CEO of North Shore Power Group appeared to be heavily redacted, with entire pages of text that looked to be deleted and similar responses from other town councillors included in these communications also receiving similar treatment.

[24] The appellant submits that the town has retained external legal counsel to respond to the request and has also retained the services of a professional in IT services. The appellant submits that it was only after the town was ordered to release the records by this office that the number of available records dropped to a few dozen.[7] The appellant submits that either the documents existed, or they did not and if the documents no longer exist, he encourages the IPC to launch its own investigation in order to determine what happened to them.

[25] The appellant refers to the *Municipal Act*, section 254(1) (retention of records) where it states that a municipality shall retain and preserve the records of the municipality and its local boards in a secure and accessible manner. The appellant also refers to Ontario's *Archives and Recordkeeping Act*, 2006, section 22.1 where it states that "every person has the right to examine a public record of archival value." The appellant submits that outside of the confusion over the actual number of documents available, the town has a 30 day records retention schedule which seems to be directly in conflict with its responsibilities, especially given that most residents of the town will not become aware of the town's decisions until after the data has been deleted.

[7] Order MO-3469 dealt with the town's fee estimate and the appellant's request for a fee waiver; it did not include an order for the town to release records.

[26] The town was provided with a copy of the appellant's representations and in turn provided reply representations. In its reply, the town reiterated that it estimated a larger number of records, but when it actually reviewed the various emails, in the course of processing the request, it determined that many were, in fact, not responsive to the request.

[27] The town submits that none of the provided responsive records was redacted before being sent to the appellant. It submits that it and Unique Data Systems corresponded extensively with the appellant to explain that no redactions had been made.

[28] The town also submits that none of the email records retrieved in the search was destroyed and reiterates that once it reviewed the actual emails, it determined that many were not responsive to the request which is the reason why the actual number of responsive records differed from the number of records estimated in the fee estimate. Further, the town submits that the *Municipal Act* is not relevant to the subject matter of this appeal and also that it is not subject to the *Archives and Recordkeeping Act*.

Analysis and finding

[29] In this appeal, I have considered the appellant's representations on the discrepancy in the number of responsive records actually received with the town's estimated number of pages before it actually reviewed the records. I have considered the appellant's assertion that the records appeared to have been redacted. I have also considered the town's initial and reply representations. In the circumstances of this appeal, I find that the town has provided sufficient evidence to establish that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.

[30] As set out above, in appeals involving a claim that further responsive records exist, the issue to be decided is whether the town conducted a reasonable search for the records as required by section 17 of the *Act*. As mentioned, if I am satisfied that the town's search for responsive records was reasonable in the circumstances, its search will be upheld. If I am not satisfied, I may order that further searches be conducted.

[31] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. On my review of the appellant's representations, the suggestion that further records should exist is the small number of records actually received (fewer than 120 pages) when compared with the estimated number of records set out in the town's fee estimate (1,000 pages). However, in its representations, the town explained that the initial number of pages of responsive records was based on a random sample and once it completed its actual review of the records, it found that most of the records were not responsive to the request. The town explained that the larger number of records identified in the random sample was on account of the software employed by Unique Data Systems which picked up non-responsive records based on the keyword search. I

find this explanation to be reasonable.

[32] The appellant also indicated his belief that parts of the responsive records that were disclosed had been redacted. The town submits that after being alerted to this possibility, it contacted UDS and was informed that it had completed no redactions to the records. The town also confirmed that it did not make redactions to the records. The appellant did not refer me to specific references within the records where he claims redactions were made. Although the appellant submits that it appeared that responses from the mayor and another individual appeared to be heavily redacted, I see no evidence of redaction when examining the records.

[33] I note that the town did not explain whether any of the responsive emails were deleted by town employees between the time period at issue and the date of the request, and if so, when. It would have been preferable had the town addressed this issue. However, I note that the issue before me is whether the town's search was reasonable and not retention of records.

[34] While the appellant has suggested that further records should exist, I find that he has not provided a reasonable basis for me to conclude that additional records exist. As stated above, the *Act* does not require the town to prove with absolute certainty that further records do not exist. Accordingly, I am satisfied that the town provided sufficient evidence to demonstrate that it made a reasonable effort to address the appellant's request and locate all records reasonably related to the request.

[35] Furthermore, I find that the appellant has not provided evidence to show that the town has destroyed records. The actual decrease in the number of records from the fee estimate was as a result of the UDS initial keyword search and there is no evidence to support that the town destroyed records.

[36] Accordingly, I uphold the town's search for responsive records.

ORDER:

I dismiss this appeal.

Original Signed by: November 28, 2018

Alec Fadel
Adjudicator