Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3741-I

Appeal MA17-662

Town of Erin

March 8, 2019

Summary: The Town of Erin (the town) denied a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to severance payments paid by the town to former employees during a five-year period. The town determined that any responsive records were excluded from the *Act* under section 52(3) (employment or labour relations), while also claiming that the record as requested did not exist, and that it was not required by the *Act* to create a record for the sole purpose of responding to the access request. In this order, the adjudicator finds that the town interpreted the request too narrowly and orders it to search for responsive records. She orders the town to issue a decision regarding those records.

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

Orders Considered: Orders 99, P-880 and PO-1730.

OVERVIEW:

[1] This interim order addresses a decision by the Town of Erin (the town) in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to severance payments paid out by the town over a five-year period. The request, made by a member of the media, sought:

> The total amount of severance payments made to terminated employees from Jan. 1, 2012 to Aug. 11, 2017. *(Not seeking any personal information, just a total).

[2] The appellant submitted his request on a form titled "Request Form" (the request form)[1]. He called this his official request. With his official request, the appellant also submitted a letter (the letter), in which he explained that he was not seeking access to personal information or information that could be exempt under the *Act*, but only a dollar amount. In the letter, the appellant wrote that he was not seeking access to:

- personal information about affected former employees,
- details about individual settlements, or about discussions or deliberations that led to decisions by the town,
- any information that could be subject to solicitor-client privilege, or
- year-by-year figures, recognizing that in some cases, those totals could be attributable to one individual.

[3] The letter went on to say that:

> …we are not requesting any documents at all, per se – we are simply seeking one dollar figure for the five-year period. This, in our opinion, does not violate in any way the provisions of the MFIPPA – and specifically, "does not constitute an unjustified invasion of personal privacy," as noted in the legislation.

[4] The town issued a decision denying access to the requested information, stating in part, that:

> …the Town of Erin has determined that the records containing information relating to this request are excluded from the application of the [*Act*] in accordance with section 52(3). Further, please note that the record as requested does not exist, and under the legislation, the municipality is not required to create a record.

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

[6] A mediator was appointed to explore the possibility of resolution. During mediation, the town maintained its position that the "record as requested" does not exist and that it is not required to create a responsive record, while the appellant maintained that responsive records do, in fact, exist and that the town did not conduct a reasonable search for them. As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry.

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[1] A one-page form for requests under the *Act*.

[7] The adjudicator initially assigned to this appeal sought representations from the town, which were then shared with the appellant. Because the appellant raised issues in his representations to which the adjudicator determined the town should have the opportunity to reply, he invited the town to provide reply representations which he also shared with the appellant, who then provided his own sur-reply representations. At the conclusion of the sur-reply stage, the appeal was transferred to me.

[8] In this order, I find that the town unilaterally narrowed the appellant's request and that its search for responsive records was not reasonable. I order the town to conduct further searches and to issue an access decision to the appellant.

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

B. Did the town conduct a reasonable search for records?

DISCUSSION:

[9] Since the issues are interrelated, I will set out the parties' positions on both before moving onto my analysis of each. I have reviewed and considered all of the parties' representations, including the supporting materials they have submitted. However, I have only summarized those portions of their representations that I found relevant to my determination, below.

The town's representations

[10] The town's initial representations submit that the request was for "a record" that sets out the requested information "in one spot." The town describes the request as "not seeking any documents in particular, except a record that contains one dollar figure for the five-year period." It submits that the "record as requested" does not exist.

[11] The town states that it did not seek clarification of the request because it is clearly written and straightforward; because it is so clear and specific, the town states that it was not necessary for it to expand the scope of its search to include records related to the request.

[12] The town submitted an affidavit in support of its position that its search for records was reasonable. That affidavit, sworn by the town's deputy clerk, provides that:

- the former town clerk issued the decision;
- the deputy clerk assumed carriage because the former town clerk is no longer an employee of the town;

- the former town clerk was responsible for this request, for the search and subsequent decision;
- the former town clerk had discussions with the appellant prior to the request being submitted but did not seek clarification with respect to the request itself;
- the deputy town clerk "reviewed town files for the within matter" and believes that the former clerk personally searched the town's payroll and human resource records "for the requested record" and asked members of town staff to do the same; and
- all searches concluded that no such record exists or ever existed.

[13] The town submits that, where no record as requested exists, it is not required to create one for the sole purpose of responding to the request.

[14] In light of its determinations, the town argues that the issue of the exclusion of responsive records from the *Act* is not applicable and that section 52(3), the labour relations and employment records exclusion, does not need to be addressed. Although specifically directed in the Notice of Inquiry to consider whether responsive information may exist in the town's finance or other records that would not fall within the scope of section 52(3), the town made no representations on this point and, according to its affidavit, did not search for responsive records outside payroll or human resource records.

The appellant's representations

[15] The appellant submits that the town has deliberately mischaracterized his request to be for "a record that contains one dollar figure for the five-year period" in order to avoid disclosing the requested information. He submits that his official request sought access to the "total amount of severance payments made to terminated employees" for the five year period between January 2011 and August 2017 and that nowhere in his request or subsequent communication with the town did he limit the request to a single, specific, document.

[16] In his letter to the town, the appellant identified as his goal a dollar figure, but he noted that getting there would require accessing several records. He submits that the town unilaterally narrowed and deliberately mischaracterized the scope of the request in order to keep the information secret, in contravention of the principle that requests should be interpreted liberally. He submits that the town's decision to narrow the scope of the request, and not the wording of the request itself, led the town to determine that the record does not exist, thereby limiting the scope of its search.

[17] The appellant submits that the town did not conduct a reasonable search. He states that he made the exact same request of eight neighbouring townships, including the Town of Erin, and that seven provided the requested information.

[18] The appellant submits that given the wording of the request, the information he seeks is not excluded from the *Act* under section 52(3).

Reply representations

[19] In contrast with its initial representations in which the town described the request as being for a record containing the requested information "in one spot," the town submits in its reply representations that it "is clear that the request is for information/compiled information and not for any specific record or record(s)."

[20] The town maintains that it is not required to create a record in order to respond to the request and that its search was diligent and reasonable.

Issue A: What is the scope of the request? What records are responsive to the request?

[21] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
> >
> > . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[22] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2]

[23] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

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[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.

Analysis and findings

[24] I find that the town's interpretation of the request (to be for a single, existing record containing the specific number sought by the appellant for the time period identified by the appellant) is an overly narrow and restrictive interpretation of the request.

[25] I conclude that a liberal interpretation of the request, in keeping with the purpose and spirit of freedom of information legislation, would include existing records that contain the information sought by the appellant and that are not excluded from the *Act*. By interpreting the request as it did, the town, whose staff know where and how its financial information and information relating to its expenditures is stored, unilaterally narrowed the scope of the request. By redefining the request as it did, its decision on how it chose to respond to the request resulted in a complete denial of access to the information sought by the appellant.

[26] Clarity concerning the scope of a request and what the responsive records are is a fundamental first step in responding to a request and, subsequently, determining the issues in an appeal.[4] Previous orders of this office have confirmed the importance of properly determining the scope of a request.

[27] In Order P-880, Adjudicator Anita Fineberg wrote that:

> …the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness." That is, by asking whether information is relevant to a request, one is really asking what is "responsive" to a request.

[28] She also made the following statement regarding the approach an institution should take in interpreting a request, which was cited with approval by former Commissioner Ann Cavoukian in Order PO-1730:

> …the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the

[4] Order MO-2863.

> *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

[29] In addition, previous orders have clearly stated that, upon receipt of an access request, an institution has an "obligation to identify and locate any records which it believes are responsive to the request."[5]

[30] In my view, the town did not meet its obligation to identify the records that are responsive to the request. The town's representations refer to the request as being for a single document that contains information in a particular form. By determining that a "record as requested" does not exist, the town took the position that the information could only be found in a single record in a particular format.

[31] It is clear from the appellant's request and his representations that he is not seeking access to a specific record. His representations emphasize that to locate the information he is seeking would require accessing several records. It is also clear from his request and his letter to the town that he was attempting to seek access to the requested information in a way that would not compromise the personal information of any affected employees or trigger personal privacy exemptions.

[32] Although the town submits that the request was clear and straightforward, in its initial representations the town described it as a request for access to a single record containing information "in one spot." In its reply representations, the town identified the request as not a request for documents but for information or compiled information. In my view, as I noted above, a reasonable interpretation of the request would include existing records that contain the information sought by the appellant. To the extent that there was any ambiguity in the town's understanding of the request or what records might be responsive, section 17(2) required the town to work with the requester to reformulate the request, if necessary, and not to narrow it unilaterally.

[33] As a final matter, it has been established and recognized in a number of previous orders of this office that section 17 of the *Act* does not, as a rule, oblige an institution to create a record where one does not currently exist. However, even if responsive records do not exist, former Commissioner Sidney Linden made the following comment in Order 99 regarding the obligation of an institution to create a record from existing information which exists in some other form:

> While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the Act is to information contained in a record existing at the time of his request, in my

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[5] Order P-337.

> view the creation of a record in some circumstances is not only consistent with the spirit of the Act, it also enhances one of the major purposes of the Act i.e., to provide a right of access to information under the control of institutions.

[34] Because the town has not conducted a reasonable search for records, as discussed below, and has not identified or provided any records in this appeal, it is premature to consider whether the circumstances of this appeal are such that the town should be required to create a record by compiling the requested information in order to respond to the request. I am mindful of the appellant's submission that this would simply require the town to provide an amount based on information already in its possession. I will consider whether this is a situation that warrants the creation of a record based on information contained in records already in the town's possession once the town conducts a further search of records, discussed below.

Issue B: Did the town conduct a reasonable search for records?

[35] 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.[6] 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.

[36] 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 made a reasonable effort to identify and locate responsive records.[7] To be responsive, a record must be "reasonably related" to the request.[8]

[37] 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.[9] 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.[10]

[38] 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

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[6] Orders P-85, P-221 and PO-1954-I.
[7] Orders P-624 and PO-2559.
[8] Order PO-2554.
[9] Orders M-909, PO-2469 and PO-2592.
[10] Order MO-2185.

basis for concluding that such records exist.[11]

Analysis and findings

[39] As noted above, to the extent that there might have been any ambiguity in the request, the town did not seek additional clarification from the appellant. The town chose to define the scope of the request unilaterally and limited its search based on its own narrow interpretation of the request.

[40] As further noted, the appellant submits the town's search was not reasonable because it was confined to a single record in a particular format unilaterally defined by the town and which did not exist. The appellant submits that the requested information – a lump sum number – is not excluded from the application of the *Act* and that, of eight townships that received the same request, all but the town responded by providing access to the requested information.

[41] I find that the appellant has provided a reasonable basis to conclude that responsive records exist. The town's decision also indicates that responsive records exist, although the town says that they are excluded from the *Act* under section 52(3). In the circumstances, I find that the town has failed to conduct reasonable searches for responsive records that may exist. First, as a result of unilaterally narrowing the request to be for a single document already in existence, the town confined its search to such a record. Second, according to the town's affidavit, its search was further confined to payroll and human resource records. On this point, I note that in the Notice of Inquiry, the town was specifically asked to consider and comment whether responsive information might exist in records other than employment-related records, such as in the town's financial records. The town made no representations on whether responsive records exist in its finance or other records, or on the application of the exclusion in section 52(3) to the information requested, taking the position that it was not necessary to do so given that the "record as requested" did not exist.

[42] By interpreting the request narrowly and by failing in its obligation to "identify and locate records which it believes are responsive to the request,"[12] I find that the town has failed to conduct a reasonable search. Further, although the town determined that "responsive records" would be excluded under the *Act,* the town did not search those records so that a determination could be made. Accordingly, I find that the town has not met its search obligations under the *Act* and I order it to conduct further searches for any records in its custody or under its control that might be responsive to the request. These searches will include budget, finance or other records that are not limited to payroll or human resource records which may or may not be excluded from

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[11] Order MO-2246.
[12] Order P-337

the *Act* under section 52(3).

ORDER:

1. I order the town to conduct further searches for any records within its record holdings that may contain responsive information, including financial and other records that are not limited to payroll or human resource records.

2. With regard to Provision 1, I order the town to provide me with an affidavit sworn by the individual or individuals who conduct the searches. At a minimum, the affidavit should include information relating to the following:

    a. information about the employee(s) swearing the affidavit describing his or her qualifications, position and responsibilities;

    b. a statement describing the employee's knowledge and understanding of the subject matter of the request;

    c. the dates(s) the person conducted the search and the names and positions of any individuals who were consulted;

    d. information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;

    e. the results of the search;

    f. if, as a result of the further searches, it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices, such as evidence of retention schedules.

3. If further responsive records are located as a result of the searches referred to in Provision 2, I order the town to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, including sections 19, 21 and 22, considering the date of this order as the date of the request. I also order the town to provide a copy of any new decision letter to me.

4. The affidavit(s) referred to in Provision 2 should be sent to my attention, and may be shared with the appellant, unless there is an overriding confidentiality concern.

5. I remain seized of this appeal in order to deal with any outstanding issues arising from this order.

Original Signed By: March 8, 2019

Jessica Kowalski
Adjudicator