

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER MO-3765-F

Appeal MA17-535

The Corporation of the Town of Midland

May 3, 2019

**Summary:** The appellant sought access to records from the Town of Midland (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) regarding a specified property in the town. The town searched for “any and all” records in relation to that property and issued a decision advising that no responsive records were located in addition to those already disclosed to the appellant. In Interim Order MO-3661-I, the adjudicator found that there was a reasonable basis to believe that additional records exist, and ordered the town to conduct a further search for responsive records. The town did so, and provided affidavit evidence regarding its search efforts. In Interim Order MO-3732-I, the adjudicator found that most of the reasons that a further search was ordered had still not been addressed, and that the town’s further search efforts were not reasonable, so she ordered the town to conduct yet a further search for responsive records. In this final order, the adjudicator upholds the town’s search as reasonable and orders the town to issue an access decision regarding a newly located record.

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

### OVERVIEW:

[1] The appellant sought access to records from the Town of Midland (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) regarding a specified property in the town. The town searched for “any and all” records in relation to that property and issued an access decision advising that no responsive records were located in addition to those already disclosed to the appellant. In Interim Order MO-3661-I, I found that there was a reasonable basis to believe that additional

records exist and ordered the town to conduct a further search for responsive records. The town did so, and provided affidavit evidence regarding its efforts. In Interim Order MO-3732-I, I found that most of the reasons that a further search was ordered had still not been addressed, and that the town's further search efforts were not reasonable. As a result, I ordered the town to conduct a further search for responsive records.

[2] In response to Interim Order MO-3732-I, the town provided this office with affidavits from three employees who conducted further searches, and attached two additional responsive records. One of these records was shared with the appellant. The town appeared to have some concern about sharing the other. The town also appears to dispute the scope of this appeal at this stage.

[3] The appellant's representations in response to the town's representations refer to matters outside the scope of this appeal, which will not be addressed in this order. The appellant does challenge the truth of specified claims made in the affidavit of the employee whose further search resulted in the location of further records.

[4] For the reasons that follow, I uphold the town's search efforts as reasonable, order the town to issue an access decision with respect to the record located through its recent search that was not shared with the appellant, and dismiss this reasonable search appeal.

## **DISCUSSION:**

### **Did the town conduct a reasonable search for responsive records?**

[5] 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.<sup>1</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. That is the case here.

[6] The sole issue is whether the town conducted a reasonable search for responsive records as required by section 17 of the *Act*, in response to Interim Order MO-3732-I.

[7] 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.<sup>2</sup> To

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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.

be responsive, a record must be "reasonably related" to the request.<sup>3</sup>

[8] 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>4</sup>

***Interim Orders MO-3661-I and MO-3732-I***

[9] In Interim Order MO-3732-I, based on the affidavits provided, I found that the town had narrowed the scope of its search in response to Interim Order MO-3661-I. In both interim orders, I stated that the town decision under appeal was one regarding a search clearly described by the town in its decision letter as being for "any and all" records related to the address of the property in question.

[10] In Interim Order MO-3732-I, I also pointed out that the town's representations during the inquiry process of this appeal similarly indicated that the search conducted was for "all" records, not records falling within a specific time period, or of a certain type.

[11] Furthermore, in Interim Order MO-3732-I, I stated the following:

Despite the clear language of the decision letter and the town's representations during the adjudication of the appeal, if the town took issue with the scope of the search I ordered in Interim Order MO-3661-I, it was open to the town to pursue this through judicial review, or the reconsideration process of this office. The town did not do so, despite being provided with the information about this office's reconsideration process after the issuance of Interim Order MO-3661-I.

Not having sought to correct the proper scope of the appeal, the scope of the ordered further search remains for "any and all" records in relation to the property address specified in the request.

[12] Interim Order MO-3732-I included the following provision:

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 (including the employee referred to at paragraphs 42-43 of this order) with specific knowledge about water consumption or metering to

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<sup>3</sup> Order PO-2554.

<sup>4</sup> Orders M-909, PO-2469 and PO-2592.

conduct searches for “any and all” records in relation to the property in question. These searches must be for both electronic and paper records. These searches must include searches for any records relating to the contents of the mayor’s e-mail to the appellant (regarding discussions with town staff, a change to the town’s water inspection program, and ongoing town efforts to investigate and recover monies in relation to the specified property), and the court order issued to the town.

b. Separate from the search for court-related records mentioned in (a), I also order the town to ask its legal department to conduct a broader search for responsive records relating to the court order referenced in this order, and to provide an explanation as to why there are no records, if none are found.

c. I also order the town to search for “any and all” records regarding the property in question that is the subject matter of the request, 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.

### ***The town’s current position***

[13] In response to Interim Order MO-3732-I, the town conducted further searches and provided this office with affidavits from three town employees: the town clerk, town solicitor, and a specified utility billing clerk.

[14] The town clerk’s affidavit states that in Interim Order MO-3732-I, I ordered it to search for information that is outside the scope of the original request (and another request, which was resolved at the IPC through mediation).

[15] Despite this disagreement about scope, the town clerk then explained, albeit briefly, that retrieving the former mayor’s e-mails would be impractical. Similarly, despite her position about the scope of the information I ordered the town to search for in Interim Order MO-3732-I, which included records relating to a court order to the town, the town clerk conducted a further search of her paper and electronic records, at specified locations, and did not find any responsive records relating to that court order.

[16] In spite of the town solicitor’s apparent disagreement about the scope, he did perform a further search for paper and electronic records at specified locations related to the court order, but found no responsive records.

[17] Notwithstanding the town’s continued disagreements about the scope of the

request, I accept that the town clerk and town solicitor each conducted further searches, which were reasonable in the circumstances. The *Act* does not require the institution to prove with absolute certainty that further records do not exist.

[18] The third town employee who conducted a search provided an affidavit explaining his efforts, during which he located two additional records. He searched for responsive records in relation to the property in question by address, which is consistent with the town's access decision under appeal. He had not previously provided an affidavit of his search efforts, a point raised by the appellant earlier in the inquiry as a reason for believing that additional responsive records exist due to their alleged past communications about the property in question. In Interim Order MO-3732-I, I addressed this point and ordered the town to provide an affidavit from this employee. As it now has, describing this employee's experience, search parameters, and the locations he searched, I find that his search was reasonable. Furthermore, his search yielded two records in relation to the property, one concerning the appellant's use (which was shared with the appellant), the other concerning the previous owner's. I find that this other record reasonably relates to the appellant's request, and is thus a responsive record. As this record is responsive, I will order the town to issue an access decision in relation to it.

### ***The appellant's position***

[19] 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.<sup>5</sup> Following the town's further searches, I find that the appellant has not provided a reasonable basis for concluding that additional records exist, as explained below.

[20] In response to the town's representations after the issuance of Interim Order MO-3732-I, the appellant states that her position was made in previous representations, and that no new information would be introduced. However, given the town's further searches by three experienced employees, including one that the appellant had specifically named, and the location of further records, I find that there is no longer a reasonable basis for believing that further records exist.

[21] The appellant also disputes the truth of certain provisions of the affidavit of the utility billing clerk regarding past communications with him. She offers possible reasons for the clerk having provided the disputed statements. However, having reviewed her representations and attachments, I find these reasons to be speculative and without sufficient evidentiary basis. My role is to evaluate this employee's level of experience and the reasonableness of his search efforts. Moreover, my review of the records

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<sup>5</sup> Order MO-2246.

located do not suggest a reasonable basis for believing that additional responsive records may exist.

[22] In addition, the appellant disputes the town's characterization of the water in question (which is related to the retention period for records relating to the water), but as I stated in Interim Order MO-3661-I, I do not think it would be appropriate for me to make a finding about whether the water at the property is drinkable, and I decline to do so. I defer to the town's characterization of this water.

[23] Finally, the appellant again asks for compensation. As I stated in Interim Order MO-3661-I, it is outside of my jurisdiction to order compensation to her for time and money spent in relation to her dealings with the town.

**ORDER:**

1. I order the town to issue an access decision regarding the record that was not shared with the appellant, in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
2. I uphold the reasonableness of the town's search and dismiss this appeal.

Original signed by \_\_\_\_\_  
Marian Sami  
Adjudicator

\_\_\_\_\_ May 3, 2019