

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4023-I

Appeal MA19-00664

Township of Perth East

March 12, 2021

Summary: The appellant challenged the reasonableness of the township's search for records responsive to his request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records identifying the owner of the culvert on his farm property. The township, which identified two by-laws and three sets of Council Meeting Minutes as responsive records, submitted two affidavits describing its search for records. The adjudicator does not uphold the reasonableness of the township's search and orders it to conduct an additional search for responsive records that relate to the appellant's property.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, section 17.

OVERVIEW:

[1] In this appeal, the appellant seeks access to records from the Township of Perth East (the township) that identify the owner of the culvert on his farm property and the sole issue is the reasonableness of the township's search for responsive records.

[2] The appellant submitted an access request to the township under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) seeking records that identify the owner of the access culvert crossing the Gordon Ruston Municipal Drain (the Drain) on his property, in 1968 and in 2009. In his access request, the appellant explained that the culvert crossing gives him his only year-round road access to his buildings and property, and stated that, as per By-Law 1042, the culvert crossing is part of the Drain. The appellant also states, "Our Municipal Clerk at no time has in our local

registry office put allowance for loss of access as stated shall be done in #33 & #68 of the Drainage Act to change ownership status.”

[3] In response to the appellant’s access request, the township issued a decision advising that his request did not fall under the *Act* because he had not specified the record he is requesting. The appellant was not satisfied with the township’s decision and appealed it to the Information and Privacy Commissioner of Ontario (the IPC).

[4] The IPC attempted to mediate the appeal. During mediation, the appellant clarified the nature of his request. In response to this clarification, the township issued a supplementary decision granting him full access to two records—the Gordon Ruston Drain Reports of March 31, 1967 (By-Law 14-67) and January 21, 1977 (By-Law 10-77)—and advising him that the culvert was not installed through the *Drainage Act* and, as such, his would be considered a “private crossing.” The appellant maintained that additional responsive records exist. The township subsequently disclosed three additional records to the appellant—Ellice Council Meeting Minutes from March 26, 1977, April 25, 1977, and June 20, 1977. A mediated resolution of the appeal was not possible and it was moved to the adjudication stage of the appeal process.

[5] During the inquiry at adjudication, the appellant asserted that records identifying the name of the original owner of the culvert and the name of the current owner of the culvert should exist. He insisted that, as the institution responsible for taxation and other property matters, the township should be able to give him clear, written answers to his questions about who owns the culvert on his land, and how, why and when the ownership changed.

[6] I sent a Notice of Inquiry to the parties setting out the appellant’s concerns about the township not locating records responsive to his request for records confirming culvert ownership. The township and the appellant provided representations in response to my Notice of Inquiry and submitted supporting documentation.

[7] In this Interim Order, I do not uphold the reasonableness of the township’s search for responsive records and I order it to conduct a further search for records that identify the owner of the culvert.

DISCUSSION:

Did the township conduct a reasonable search for responsive records?

[8] The sole issue in this Interim Order is whether the township conducted a reasonable search for responsive records, as required under the *Act*. Section 17 of the *Act* imposes obligations on requesters and institutions when submitting and responding to requests for access to records. Section 17(1)(b) requires requesters to provide sufficient details to enable an experienced employee of the institution, upon a reasonable effort, to identify the record. Section 17(2) requires an institution to inform

the requester if the request does not sufficiently describe the record sought, and to offer the requester assistance in reformulating the request to comply with section 17(1).

[9] To establish that it conducted a reasonable search for responsive records, the township must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹ The IPC has consistently held that to be responsive to the request, records must “reasonably relate” to the request.² 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 that are reasonably related to the request.³

[10] I invited the township to provide representations on the reasonableness of its search for responsive records. Specifically, I asked it to address the appellant’s assertion that records should exist that identify the name of the original owner of the culvert and the name of the owner in 2009. I also asked the township to address the appellant’s position that, as the institution responsible for taxation and other property matters, it should be able to give him clear, written answers to his questions about who own the culvert on his land.

The township’s representations

[11] The township provided a 42-page package of materials as its initial representations. Included in this package was a brief letter in which the township stated that three staff members, the Chief Administrative Officer (CAO), Municipal Clerk, and Administrative Assistant, searched for records in electronic and paper format that were stored in its administration building and at an offsite vault. The letter stated that the township disclosed to the appellant all the records it located through these searches that were responsive to the access request. Also included were three, one-paragraph affidavits, sworn by the three staff members identified in the letter, each stating the name and position of the affiant and the fact that the affiant has “knowledge of the matter,” but containing no other information.

[12] The remaining 37 pages of the township’s representations consist of two packages that both contain the responsive records the township disclosed to the appellant. The first package consists of documents that the township sent to the appellant in response to his request, while the second consists of documents the township sent to the IPC during the mediation stage of the appeal. The township located and disclosed the five following responsive records: Original By-Law No. 14-67

¹ OrdersP-264 and PO-2559.

² Order PO-2554.

³ Orders M-909, PO-2649 and PO-2592.

dated May 11, 1967, Provisional By-Law #10-77 of the Township of Ellice, Ellice Council Meeting Minutes of March 28, 1977, Ellice Council Meeting Minutes of April 25, 1977, and Ellice Council Meeting Minutes of June 20, 1977.

[13] I sought supplementary representations from the township on its search and, in response, the township provided two almost identical additional affidavits sworn by the Municipal Clerk and the CAO. In these additional affidavits, both affiants affirm they "searched" the Gordon Ruston Municipal Drain report of March 31, 1967 (By-Law 14-67) and January 21, 1977 (By-Law 10-77), and the By-Laws and minutes concerning the endorsement of the Drain. The affiants also affirm that they and other staff members conducted comprehensive searches for records pertaining to the Drain in the township's administrative office, in its archives vault and in its electronic record holdings. Finally, the affiants confirm that this search for and review of responsive records "occurred in coordination with Drainage Engineers, the Township Drainage Superintendent and the Ministry of Agriculture, Food and Rural Affairs."

The appellant's representations

[14] In his representations, the appellant provides a history of the culvert. He explains that in 1968, the Township of Ellice provided the culvert under By-Law 1042, which established the building of the Drain, and he encloses a copy of By-Law 1042, dated August 2, 1950. He continues that the Township of Ellice gave one Drain-owned crossing to each owner of each property on which the Drain was built, so that each property owner had a crossing of the Drain to access his or her property. The appellant states that after the township was amalgamated, he received a letter from the Municipal Clerk on September 24, 2009, regarding "Private Culvert Replacement," which contradicted his understanding that the culvert was never private. The appellant states that the township's unilateral decision to categorize the culvert as 'private' without any records to support a change in ownership has resulted in his incurring significant expenses.

[15] The appellant states that he purchased his farm property more than 40 years ago. He explains that, in 2009, when he asked the township to replace the culvert before it collapsed and blocked the drain, the township refused and he replaced the culvert at his own expense. The appellant repeats his request for the township to provide him, in writing, records that confirm the ownership of the culvert and, specifically, records that show how, when and why the ownership of the culvert changed. He laments that, to date, the township has not answered his request. He also states that, for tax purposes the culvert under his road crossing is "accessed to the Drain," but for maintenance and repair purposes the crossing is private and the township says no reference to a culvert exists in the *Drainage Act*. The appellant concludes by stressing that he requires the date that the culvert changed status so that the Municipal Property Assessment Corporation can make retroactive tax adjustments for his property, since it is no longer comparable to neighbouring properties.

Analysis and finding

[16] Based on my review of the parties' representations and the responsive records disclosed by the township to date, and for the reasons below, I am not satisfied that the township's search for responsive records was reasonable. I agree with the appellant that there is a reasonable basis for concluding that additional records exist.

[17] The appellant's request for access to records regarding the ownership of the culvert on his property arises from the fact that he believes the township unilaterally decided to change the ownership and attribute it to him, without an explanation as to why, when and how it did so. The township's evidence, that it searched and reviewed the Drain reports, and the By-Laws and minutes concerning the endorsement of the Drain, establishes that it conducted a search focused on records relating to the Drain. The township's evidence does not confirm that it searched for all records related to the culvert on the appellant's property specifically, which, the appellant submits, is receiving different treatment from the township in comparison to the neighbouring properties on which the Drain is also built.

[18] Considering the wording of the appellant's request and his repeated concerns about what he views as the township's unilateral claim that he currently owns the culvert, it would be reasonable for the township to search for responsive records that relate specifically to his property and that support its position that the appellant privately owns the culvert. Furthermore, it would be reasonable to expect that the property records the township has for the appellant's farm would contain some reference to or information about the culvert, and at the very least, some record that confirms the township's position that the appellant owns the culvert. Because the township appears not to have searched for records relating to the appellant's property specifically, I will order it to do so below.

INTERIM ORDER:

1. I do not uphold the township's search for records responsive to the request. I order the township to conduct a further search for all records responsive to the appellant's request. Specifically, I order the town to search for:
 - a. records related to the appellant's property, Concession 13, W ¼ 17 and E ½ 18, that address culvert ownership.
 - b. any other records that refer to the ownership of the culvert on the appellant's property as of 1968 and as of 2009.
2. I order the township to provide me with an affidavit or affidavits sworn by individuals who have direct knowledge of the additional search ordered. The affidavits shall include, at a minimum:

- a. The names and positions of the individuals that conducted the search.
 - b. The steps taken in conducting the search.
 - c. The types and locations of files searched and the result of each search.
3. I order the township to provide me with the affidavits and the results of its further search by **April 15, 2021**.
 4. If the township locates additional records responsive to the request through its further search, I order it to issue an access decision to the appellant in accordance with the *Act* treating the date of this Interim Order as the date of the request.
 5. The timelines in order provisions 3 and 4 may be extended if the township is unable to comply due to the Covid-19 pandemic.
 6. I remain seized to address any issues arising from order provisions 1 to 5 above, including any extension request for compliance.

Original signed by: _____

Stella Ball
Adjudicator

_____ March 12, 2021