

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4211

Appeal MA21-00195

Municipality of Shuniah

June 15, 2022

Summary: The Municipality of Shuniah (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for work orders and any fines issued to the municipality by the Ministry of Labour and the Ministry of the Environment, Conservation and Parks during a certain period of time. In response to the request, the municipality partially disclosed Ministry of Labour orders, and noted that there were no records responsive to certain other aspects of the request. On appeal, the appellant received full disclosure of the partially disclosed records but maintained that additional responsive records exist. In this order, the adjudicator upholds the reasonableness of the municipality's search, and dismisses the appeal.

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 Municipality of Shuniah (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), as follows:

I am requesting all work orders issued to the municipality, by the Ministry of Labour and the Ministry of the Environment from April 15, 2020 to October 30, 2020. Also any fines that were issued as well.

[2] In response to the request, the municipality issued a decision to disclose the

responsive records in part (Ministry of Labour orders), citing two discretionary law enforcement exemptions¹ to deny access to the remaining information.² In an email that accompanied the decision letter, the municipality advised the appellant that there were no orders issued by the Ministry of the Environment, Conservation and Parks (MECP), and that no fines have been issued from either ministry.

[3] The appellant appealed the municipality's access decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] The IPC appointed a mediator to explore resolution. During mediation, the appellant confirmed that he believes records in relation to the MECP should exist. The municipality advised the mediator that although it does not have any MECP *work orders* regarding its two landfill sites, it does have an MECP site inspection reference report for one of the sites (which I will refer to as "landfill 1"), and the municipality's response to the recommendations contained in the report. The appellant confirmed that he would like those records, and the municipality disclosed them to him. The appellant took the position that there should be responsive records relating to the other landfill site ("landfill 2"). However, the municipality confirmed that there are no further records responsive to the appellant's request.

[5] At mediation, the appellant also challenged the application of the law enforcement exemptions over the Ministry of Labour orders that were partially disclosed to him. However, since the municipality subsequently issued a revised decision to fully disclose those records to the appellant, the law enforcement exemptions are no longer at issue in this appeal.

[6] Since mediation could not resolve the appellant's outstanding issue of reasonable search, the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the municipality. I sought and received written representations from the municipality in response, and then did the same for the appellant. I then invited the municipality to provide further evidence regarding its search efforts, and it did. The appellant provided representations in response. The appellant also indicated that he wanted to confirm the authenticity of an MECP email that the municipality was using in support of its position. As he did not make further contact with the IPC for some time, I decided to issue my decision without the appellant's further submissions.

¹ Specifically, the discretionary law enforcement exemptions at sections 8(1)(a) (law enforcement matter) and 8(1)(b) (law enforcement investigation).

² As the municipality did not respond within thirty days after the request was received, the requester filed a deemed refusal appeal with the Information and Privacy Commissioner of Ontario. The appeal file opened to deal with that matter was closed with the issuance of the municipality's access decision.

[8] For the reasons that follow, I uphold the municipality's search for responsive records as reasonable, and dismiss the appeal.

DISCUSSION:

[9] After the appellant was advised that the inquiry was complete, he wrote to the Information and Privacy Commissioner of Ontario. To summarize, his email to the Commissioner includes the appellant's views about the municipality's processing of his request, the results of mediation, and questions about whether a specified employee of the municipality will be charged with offences under the *Act*. The appellant requests that the employee be so charged. The appellant points to the processing history of his request as the basis of his request for these charges. Having reviewed the appellant's letter, I will not be considering offences under the *Act* in this appeal because there is no basis to do so. The municipality's initial reliance on a discretionary exemption and its decision to disclose previously redacted information are not offences under the *Act*. The Legislature has expressly provided institutions with the ability to claim discretionary exemptions, or not to do so. If an institution does not initially identify responsive records but later does, that is not an offence under the *Act* either. Such an issue goes to the reasonableness of the institution's search, which is what is at issue in this appeal. Accordingly, I will not be addressing this issue further in this order. The only issue to be decided in this order is whether the municipality conducted a reasonable search for records responsive to the appellant's request for work orders and fines regarding the two landfill sites.

[10] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.³ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[11] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.⁴

[12] The Act does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;⁵ that is, records that are "reasonably related" to the request.⁶

[13] A reasonable search is one in which an experienced employee knowledgeable in

³ Orders P-85, P-221 and PO-1954-I.

⁴ Order MO-2246.

⁵ Orders P-624 and PO-2559.

⁶ Order PO-2554.

the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁷ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁸

The municipality's initial representations

[14] Initially, the municipality sent a copy of a November 2021 email as the substance of its representations. The email is from the senior environmental officer of the MECP's Drinking Water and Environmental Compliance Division in the district office relevant to the municipality, responding to questions from the municipality's chief administrative officer (CAO), who processed the appellant's request. The municipality explained that it was sharing this email with the IPC and the appellant to confirm that the records that the appellant is seeking do not exist.

[15] In the email, the MECP employee describes himself as the environmental officer assigned to both of the municipality's active waste disposal sites (which are the ones relevant to the request). I will summarize the MECP employee's answers to the municipality's CAO, below:

- there were no orders or fines issued from MECP for either of the municipality's landfill sites for 2020 or 2021, and more specifically, to the MECP employee's knowledge, neither he nor any other MECP representative issued a Provincial Officer's Order or any other fine or for contravention(s) to the municipality during 2020 and 2021;
- with respect to landfill 1, for which there was a site inspection in 2020, the municipality took appropriate action and met the compliance dates for the action items listed in a specified inspection report;
- there was no formal inspection completed in 2020 or 2021 for landfill 2 (although the MECP employee had site conversations and email correspondence with the municipality's manager of operations during the spring of 2020; all issues identified by the MECP were addressed through corrective action taken by the municipality); and
- any existing landfill inspection reports can be shared with the general public, through a freedom of information request to the MECP.

The appellant's initial representations

[16] In response to the municipality's evidence, the appellant submits that the municipality "still refuses" to disclose copies of MECP work orders that were issued to

⁷ Orders M-909, PO-2469 and PO-2592.

⁸ Order MO-2185.

the municipality for landfill 2.

[17] The appellant explains why he believes an inspection was conducted at landfill 2. He states that in May 2020, he spoke with the MECP officer (whose November 2021 response to the municipality is summarized above), and this MECP officer told the appellant that if he had environmental concerns, he should submit a complaint to the municipality. The appellant states that because he complained to the municipality, the municipality was legally required to send this complaint to the MECP. The appellant asserts that the municipality did so and that the MECP inspected the landfill. He states that it was after this inspection that the MECP officer ordered them to clean up the hazardous waste in the area. The appellant states that he “know[s] this because [he] was talking to [the aforementioned MECP officer] and he told me he ordered the Municipality to clean up the Household Hazardous waste area.” Therefore, the appellant states that he knows the work orders exist and rejects the municipality’s claim to the contrary.

[18] With respect to landfill 1, the appellant states that he also made a complaint to the MECP about the conditions there, and that the ministry inspected this landfill in October 2020 and issued work orders.

[19] The appellant also provided copies of email correspondence he had with the municipality and the MECP employee regarding his respective freedom of information requests to each of those institutions regarding the landfill sites.⁹

The municipality’s reply representations

[20] In reply to the appellant, the municipality provided further evidence regarding its search efforts.

[21] The municipality explains that when the appellant expressed a wish to move the appeal to adjudication, the municipality requested the information that the appellant had requested from the MECP, describing this step as “going beyond [the municipality’s] responsibilities.” The municipality again shared a copy of the November 2021 email from the MECP officer responsible for inspections in the area, in support of its position that no additional responsive records exist.

[22] The municipality also explains that three employees searched for responsive records, and explained the rationale for engaging each one in a search:

⁹ The MECP employee indicated that he had contacted a certain branch of the ministry about the request and learned that only physical records exist (but that they could not be provided to him at the time due to the remote work situation). The employee also indicated that he had reached out to another office and was waiting to hear back. (This is the office where the MECP officer who inspected landfill 1 works, according to the email signature.)

- the municipality's manager of operations, chosen to search because that individual is responsible for managing the landfill sites and is the key contact with MECP for most correspondence;
- the municipality's clerk, asked to search because when ministries formally communicate with municipalities, it is generally through the office of the clerk; and
- the municipality's CAO/deputy clerk, asked to search because that individual was responsible for handling the freedom of information requests since the clerk was new to the clerk position and was transitioning to full clerk duties at the time.

[23] With respect to the locations it searched, the municipality explains that its clerk, manager of operations and CAO searched their email files for responsive records, and that the clerk and manager of operations searched paper files (including the files of the CAO), but no responsive records were located in any of these locations. The municipality explains that the MECP later verbally confirmed that there were no orders or fines, and thus no records. It states that it later received an email from the MECP, the aforementioned November 2021 email, confirming that. The municipality states that it "then stopped searching for something that does not exist." The municipality notes that the MECP email attached to the appellant's representations is from April 2021, and that it appears that the appellant has not followed up with the MECP employee since then.

The appellant's sur-reply representations

[24] In response to the municipality reply representations, the appellant expresses suspicion about the authenticity of the November 2021 MECP email upon which the municipality relies, pointing to the municipality's changed stance about the existence of records, and a right of access to them (having initially claimed discretionary exemptions and then ultimately disclosing the records over which they were claimed in full). He acknowledges that he received responsive records during the mediation stage of his appeal.

[25] The appellant also expresses a hope that I will ask the municipality to forward the actual MECP email to the IPC so that "we all know it was from [the MECP officer in question]."

[26] In addition, the appellant questions the accuracy of the MECP's response to the municipality when it asked for confirmation that there were no site inspection actions for landfill 2, given conversations he asserts that he had with the MECP officer (whose response to the municipality is found in the November 2021 email).

[27] The appellant also advised that he contacted the MECP officer to confirm whether the November 2021 email is authentic, and that he was waiting for a response. After some weeks had passed and the appellant provided no further representations to

the IPC, I decided to proceed with my decision in this appeal.

Analysis/findings

[28] Based on my review of the parties' representations and supporting evidence, I uphold the reasonableness of the municipality's search for records responsive to the request. I find that the municipality has provided sufficient evidence explaining the steps it took to respond to the appellant's request.

[29] The municipality identified the employees who conducted a search, and explained the rationale for asking each of these employees to do so in response to the request. Given the subject matter of the request and the evidence explaining why each employee was chosen to conduct a search, I find that the municipality engaged experienced employees knowledgeable in the subject matter of the request to conduct searches for records responsive to the request. I find it reasonable that they searched their email and paper files to do so.

[30] In addition, I find that it was reasonable for the municipality to seek written confirmation from the MECP, and specifically, the inspector responsible for the landfill sites of the municipality, about the existence of additional responsive records. Furthermore, it is worth noting that this MECP officer's answers to the municipality's questions about responsive records covered 2020 and 2021, a longer timeframe than the one specified in the request (April 15, 2020 to October 30, 2020).

[31] In the circumstances, I find that the municipality has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. I note, again, that the *Act* does not require the institution to prove with certainty that further records do not exist.

[32] As mentioned, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist. In my view, the appellant has not sufficiently done so.

[33] While I acknowledge that the appellant provided an April 2021 MECP email (from the freedom of information coordinator) that there were physical records responsive to the request made to the ministry, I do not have sufficient evidence to establish these records would also reasonably be expected to be in the municipality's record holdings. I do not know what those physical records consist of in order to consider the April 2021 email as evidence undermining the reasonableness of the municipality's search, which is what I am assessing in this appeal. The MECP's response to the appellant's request under the *Act* is outside the scope of this appeal.

[34] In any event, the appellant has not provided a reasonable basis to question the reasonableness of the municipality's search efforts in terms of the choice of employees who searched, their expertise in the subject matter of the request, or the locations

searched. The appellant relies on an April 2021 email from the MECP to take the position that additional records that have not yet been disclosed to him exist, but when faced with a later email, from November 2021, he challenges its authenticity. I find that the appellant has not established a reasonable basis for doing so. For example, the municipality's revised decision to fully disclose the Ministry of Labour orders does not establish that the municipality has put forward an inauthentic MECP email in support of the reasonableness of its search. Based on my review of the MECP email, including my electronic review of it which allows me to "hover" over names to see complete email addresses, I find no reason to question the authenticity of the MECP's email to the municipality.

[35] For these reasons, I uphold the reasonableness of the municipality's search, and dismiss the appeal.

ORDER:

I uphold the municipality's search as reasonable, and dismiss the appeal.

Original Signed by: _____

Marian Sami
Adjudicator

_____ June 15, 2022