

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4265

Appeal MA19-00784

Township of Alfred and Plantagenet

October 26, 2022

Summary: The appellants submitted an access request to the Township of Alfred and Plantagenet (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information concerning the appellants' property, including photos, emails, memos and briefing notes. The township conducted a search and informed the appellants that no records were found in addition to the ones located and provided in response to earlier request for identical records. The appellants appealed the township's decision to the IPC claiming that further information should exist and pointing to specific documents in their possession that the township did not locate in its search. After two subsequent searches, the appellant continued to assert that further records exist. In this order, the adjudicator finds that ordering another search would not result in the location of additional responsive records and he upholds the township's search. However, the adjudicator also finds that the township failed to identify certain records as responsive because it believes that these records are either exempt from disclosure or not within its custody or control. Accordingly, the adjudicator orders the township to issue a decision letter regarding the responsive records and identifying the bases on which it withholds access.

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 appellants submitted the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Alfred and Plantagenet (the township):

We request a copy of any records about our property maintained at your agency. Please consider that this request is also made under [the *Act*]. Please provide any additional information that may be available under [the *Act*]. (This would include photo's, emails, memos and briefing notes).

[2] The appellants subsequently confirmed the date range of the responsive records as starting in 2009 (the year their house was built) to the date of their request.

[3] In response, the township issued a decision letter, stating that no responsive records were located other than those already provided to the appellants in response to a previous access request. The township's decision also stated that a search for emails exchanged between the appellants and the former chief building official and former building inspector was conducted but that no records were located.

[4] The appellants appealed the township's decision to the Information and Privacy Commissioner of Ontario (the IPC), claiming that additional records should exist.

[5] A mediator was appointed to explore resolution with the parties. During mediation, the township agreed to conduct further searches.

[6] The township conducted another search and issued another decision granting access, in part, to some responsive records but denied access to remaining portions identified as non-responsive. However, the appellants maintained their position that additional records should exist.

[7] The township conducted a further search and issued another decision granting full access to some emails and partial access to the minutes of a closed meeting of council. The township took the position that disclosure of the remaining portions of the minutes would constitute an unjustified invasion of personal privacy and were therefore exempt from disclosure under section 14(1). The township also stated that they were unable to locate emails exchanged with former employees of the township and that no additional responsive records exist. In response, the appellants maintained that additional records should exist. In particular, the appellants raised questions about the township's inability to retrieve additional emails.

[8] Finally, the township issued another decision during mediation, granting partial access to the minutes of a closed meeting of council and claimed that the personal privacy exemption under section 14(1) applied to the withheld portions. The township also disclosed some emails in full. The township stated that its IT department conducted searches for emails between the appellants and former employees but it was unable to locate further emails.

[9] The appellants confirmed that they are not pursuing access to the portions of the records withheld under the personal privacy exemption under section 14(1) or portions of the records identified as non-responsive. Accordingly, these portions of the records have been removed from the scope of this appeal.

[10] However, the appellants continue to take the position that additional responsive records, including emails, should exist.

[11] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may decide to conduct an inquiry.

[12] The original adjudicator assigned to this appeal commenced her inquiry by inviting the written representations of the parties. Representations were shared in accordance with the *IPC Code of Procedure*. The file was then assigned to me to continue with the adjudication of the appeal.¹

[13] In this order, I find that ordering a further search would not result in the location of additional responsive records and I uphold the township's search for records. However, I also find that the township may have located responsive records but did not identify them to the appellants as the township believed they were exempt from disclosure or not within its custody and control. Accordingly, I order the township to issue a decision regarding access to these records, identifying the basis it is relying on to withhold access.

DISCUSSION:

[14] In this appeal, the issue is whether the township's search for responsive records was reasonable and whether it has identified all responsive records to the appellants, including those that it claims it does not have to disclose.

[15] 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 24.² 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.

[16] 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.³ To be responsive, a record must be "reasonably related" to the request.⁴

[17] 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.⁵ A further search will be ordered if the institution

¹ I reviewed the representations submitted by the parties and have decided that I do not require further representations to decide the sole issue before me.

² Orders P-85, P-221 and PO-1954-I.

³ Orders P-624 and PO-2559.

⁴ Order PO-2554.

⁵ Orders M-909, PO-2469 and PO-2592.

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.⁶

[18] 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.⁷

Representations

[19] The initial representations from the township were in the form of an affidavit sworn by the clerk. The clerk of the township (the clerk) attests that after receiving the appellant's current request, it was identified as being identical to an earlier request made by the appellants approximately nine months prior. She attests that with regard to the earlier request, the township provided access to all records pertaining to their property from the date of purchase to the date of the previous request.

[20] The clerk attests that she confirmed with the township's current IT service provider that it did not have historic records for 2009. The clerk attests that in an effort to comply with the request, she contacted the township's prior service provider (for the period prior to 2010) and it confirmed that it was not able to retrieve any emails that may have been exchanged between the appellant and the township's inspector. The clerk set out the specific research process on behalf of the prior service provider to locate information that might be responsive. The clerk attests that the service provider confirmed that it took the only avenue available to find messages on its email server and confirmed that the appellant's name did not exist within the backup.

[21] The clerk attests that the township conducted a search of all emails exchanged between its employees and the appellants and disclosed all emails that were located. In addition, the clerk attests that a further search was conducted by a specified township employee as follows:

- a search of electronic email account for any emails exchanged between himself and the appellants
- a search of all electronic folders for any pictures related to the specified property including a search of the township's electronic archive platform for any pictures, notes, memos related to the property that may have been filed in a folder other than the property folder
- a search of all picture files on a portable tablet used by the construction department for any pictures related to the specified property.

[22] The clerk attests that the results of this search did not locate any responsive

⁶ Order MO-2185.

⁷ Order MO-2246.

records.

[23] The clerk also attests that after the appellants filed their appeal with the IPC, the township agreed to make further efforts to provide them with any and all information connected to their property. The further efforts the township made were as follows:

1. The township sent a letter to the appellants to address their request for information as to the elevation of a specified street in Wendover. This included a map of the area and results of a survey of the area showing the center of the street's elevations. Enclosed with the letter was the map as well as a list of the various elevations, and an indication of where they were taken.
2. A request was submitted to the Chief Building Official for a search of all building files to retrieve any pictures related to the property which did not result in pictures being located.
3. The township disclosed all minutes of meetings of Council where the matter concerning the appellants was discussed. The clerk attests that copies of all such documents were provided and were redacted to prevent disclosure of personal information to any person other than the appellants.

[24] The appellants were provided with a complete copy of the township's representations and provided their own representations in response. They submit that it is their belief that the township is withholding information. They submit that they compared what they received from the township from this access request with information they accumulated through the years and that some information was missing from what the township provided them. The appellants attached some letters and emails that they have kept since their house construction, noting that they were not in the file provided by the township in response to their access request. These included:

- A fax from the township to one of the appellants, dated February 8, 2010. The appellant has highlighted the information where the township employee stated that he was "looking back at the picture." The appellants submit that the letter clearly states that there were looking at pictures of a storm pipe but they did not receive those pictures.
- a township letter dated July 9, 2018 which references building inspectors' reports
- a township resolution (HC2010-80) concerning the appellants' property
- three email exchanges between the appellants and the clerk of the township
- a letter from the township dated November 4, 2010; the appellants submit that they did not receive this letter in response to their access request but did receive an earlier dated letter from the township's search

- a joint retainer to the appellants from a law firm that was also acting for the township in the same matter
- a letter from the township to the appellants dated July 21, 2010, and the survey plan and transfer documents that the letter mentions
- A resolution from Council concerning the appellants dated July 19, 2010.

[25] The original adjudicator shared the appellants' representations, including the attachments, with the township who provided a reply. In its reply, the township refers to section 5 of Ontario Regulation 823 that sets out that an institution that uses personal information shall retain it for the shorter of one year after use of the period set out in a by-law or resolution made by the institution. The township submits that it retains its records in accordance with the *Act* and in accordance with the township by-law 2017-63 which it provided. The township submits that it cannot confirm whether a record was destroyed once the retention period passed but can confirm if they were not located in its search.

[26] The township addresses the submissions made by the appellant that certain records were not located in its search, as follows:

- no building inspector reports were located in its search and may have been destroyed in accordance with its retention policy
- a specified resolution, which the appellant provided a copy of, was a resolution made by its council in a closed meeting and is exempt from disclosure under section 6(1)(b) of the *Act*
- the three emails referred to by the appellants were all provided to the appellant with its access decision
- the letter dated November 4, 2010 was not located in the search and the reference plan referenced in the letter is not in the care and control of the township and can be accessed through a local office of the Land Registry Office
- the joint retainer is an agreement with the appellants and their lawyer and under section 1(a) of the *Act*, the township shall provide a right of access to information under its control. The township submits that this is not a record that belongs to it nor does it have custody or control of this record.
- With regard to the survey plan and transfer documents mentioned in a letter of July 21, 2010, the township submits that as the lawyer acted for the appellant in granting a transfer and easement in favour of the township, the appellant and their lawyer would have the documentation relating to the transfer and easement. It also submits that in its search it did not locate a plan of survey or copies of any transfers

- Another specified resolution, which the appellants provided a copy of, was a resolution held during an open meeting of council and under section 15(a) of the *Act*, a head may refuse to disclose a record if the record or the information contained in the record has been published or is publicly available.

[27] In their sur-reply representations, the appellants submit that a note that references the aforementioned photo is less than 10 years old and questions if it was irresponsible of the township to not save information in an ongoing matter.⁸

[28] Regarding the joint retainer letter that the township did not provide, the appellants submit that the township made the arrangement for them to be represented by the lawyer and the letter clearly states that “no information received in connection with the matter from one party can be treated as confidential.” The appellants submit that this retainer should be provided to them by the township.

[29] The appellants submit that the specified resolution is about their house, and was made during a closed meeting of council that they agreed to. They submit that they were supposed to attend but were not invited.

[30] The appellants proceed to list additional records that they assert should exist with the township. They submit that the township and the ombudsman had many meetings concerning their property and more documents should exist. They submit that a meeting between them and the township was held in February 2019 yet there is no paperwork trail for it.

[31] The appellants also submit that they did not receive the inspection report of their pool. They again submit that they did not receive the building inspectors’ report mentioned in a letter of July 9, 2018. The appellants submit that if the township is destroying records once 10 years have passed, but their house closed in 2018, there should be records.

Analysis and finding

[32] As set out above, the *Act* does not require the township to prove with absolute certainty that further records do not exist. However, the township must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁹ As I find below, it is evident that the township has located what exists in its records holding in relation to the request, however, in this instance, and for the reasons set out, I find that the township has not properly identified some records as responsive and should issue a new decision letter concerning the information it located but did not disclose to the appellants because it was relying on an exemption or other basis to withhold the information under the *Act*.

⁸ Although the appellants did not specifically state so, the ongoing matter appears to be in relation to an issue with the storm pipe at the appellants’ home.

⁹ Orders P-624 and PO-2559.

The town's search

[33] The appellants submit that as the township retains records for 10 years, records from three years ago should have been provided to them. However, the township confirmed in its representations that its retention policy for personal information is in accordance with Ontario Regulation 823 and also provided a copy of its retentions schedule for township records in by-law 2017-63. The schedules to this by-law set out that correspondence will be destroyed after one year and that building/structural inspections are retained for 2 years for inspections relating to the fire code. Therefore, I accept the township's submission that it was unable to locate the information referenced by the appellants and that the information may have been destroyed according to the retention policy. I acknowledge the appellants' suggestion that they were provided with some records that are older than records that are usually destroyed according to the retention policy. However, the township has explained, and I accept, that it does not have the ability to confirm if a record was destroyed, but can only confirm whether it was located in its search. In the circumstances of this appeal, the fact that the township provided the appellant with records older than the retention policy requires does not provide a sufficient basis upon which to find that the township did not conduct a reasonable search for responsive records.

[34] In this appeal, the appellants submit that documents already in their possession were not located by the township and that this is evidence that its search was not reasonable. After reviewing the representations, I find that a further search by the township is not likely to result in additional responsive records being located. The appellants submit that certain documents mentioned in letters, such as photos, inspector reports, survey plans and transfer documents were not located and should have been. However, the township has responded to each of these claims, either confirming that the records were located and provided to the appellant or that the information could not be located in its searches and referring to its retention policy indicate that the record may have been destroyed.

[35] In her affidavit, the clerk affirmed that subsequent to the township's initial search, another search by a specified employee was conducted of all his email accounts, electronic folders for pictures, a search of the archive platform for pictures, notes, memos related to the property, and a search of the portable tablet resulted in no further responsive information being located. I am not satisfied that there is a reasonable basis to believe that a further search would locate any further responsive information relating to this specified employee.

[36] In my view, the township's search, including the subsequent searches during mediation, would have resulted in it locating any further documentation if same exists. The appellant's suggestion that the township is withholding information is not substantiated when considering the township's retention policies. In my view, there is no evidence to support that the township has not conducted its search in good faith. It is clear that the township worked with the appellants before they filed for this appeal

and also made efforts during mediation to locate information the appellants believed should exist. In its representations, the township addressed the information the appellants submit should exist and responded to each of these claims, either confirming that the information was located and already provided or that further attempts to locate the information were unsuccessful and that the information may have been destroyed. The township also explained that it was withholding some information, which I address under the next subheading.

[37] The appellants submit that a joint retainer letter was not located by the township. In my review of this retainer,¹⁰ I note that the retainer was copied to both appellants with no indication it was copied to anyone else, including the township. Although the appellants indicate that the township arranged the retainer, there is no indication in the letter that it was provided to the township. In my view, the township has provided sufficient evidence to show that this is not a record it is able to locate in its record holdings.

[38] I am not persuaded that ordering the township to conduct another search will locate additional responsive records that the appellant claims should exist, when its further attempts to locate this information did not result in any of this information being located. As stated, the *Act* does not require the township to prove with absolute certainty that further records do not exist.

The town's failure to identify responsive records that it found in its searches

[39] However, based on my review of the parties' representations, it appears that the township may have identified responsive records but did not identify them as responsive as they believed they were either exempt or not within its custody or control.

[40] With regard to the specified reference plan referenced in a November 4, 2010 letter, the township does not state that the record does not exist but that this plan does not belong to the township and it is not in its custody or control. However, since the township does not specifically state that the record was not located it is unclear to me if the record exists in the township's record holdings or is otherwise in its control. If the record was located by the township in its search or its under its control it should address the existence of the record in an access decision, setting out its reasons for denying access.

[41] Finally, the appellants included two specified resolutions which they submit should have been located by the township. It is only in its reply representations that the township submits that one of these records is a resolution made by council in a closed meeting and is exempt from disclosure under section 6(1)(b) of the *Act*. It also submits that the other resolution was made during an open meeting of council and under

¹⁰ The retainer letter was provided to me by the appellants.

section 15(a) of the *Act*, a head may refuse to disclose a record if the record or the information contained in the record has been published or is currently available. It appears, therefore, that these are records that are in the township's record holdings and they should have been addressed in the township's decision letter. As a result, I will order the township to issue an access decision relating to this information.

[42] Given these examples, I am also concerned that there may be other responsive records that the township located but that it did not identify in its access decisions because the township believed it did not have to disclose those records to the appellants under the *Act*.

[43] To summarize, if the township has responsive records in its record holdings that it did not issue an access decision on because it was of the view that the records were not in its custody or control, or were excluded or exempt under one of the exemptions under the *Act*, the township must issue an access decision for this information. An institution must identify responsive records and either provide access, in full or in part, or provide a reason for denying access.

ORDER:

1. The township's search for records is reasonable.
2. The township is ordered to issue a new access decision setting out the documents it has located but had decided to withhold along with the bases on which it is denying access under the *Act*.

Original Signed By: _____
Alec Fadel
Adjudicator

_____ October 26, 2022