Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4275

Appeal MA21-00132

Town of Iroquois Falls

November 18, 2022

Summary: The Town of Iroquois Falls (the town) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a report delivered by the Integrity Commissioner and another individual at a certain town council meeting, in the format in which it was delivered. The town issued an access decision indicating that no responsive records were located. The appellant believes a report exists, so the issue on appeal is whether the town conducted a reasonable search. In this order, the adjudicator finds that the town provided sufficient evidence that it conducted a reasonable 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 Town of Iroquois Falls (the town) received an access request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for the following:

> Please provide the report delivered by Integrity Commissioner and [specified name] on October 26, 2020 Council Meeting. Please provide report in the format delivered at the meeting whether it be audio, print or any other format understandable in the English language.

[2] The town issued a decision, indicating that no responsive records were located.

[3] The requester, now the appellant, appealed the town's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. During mediation, the appellant advised the mediator that he was seeking the report provided by the Integrity Commissioner and a certain individual on a specified date; he relayed concerns, and provided information as to why he believes the record he is seeking should exist. The mediator conveyed this to the town. The town advised the mediator that it contacted the appropriate parties, and was informed that the record that the appellant seeks does not exist. The town maintained its position that no responsive records were located.

[5] The appellant advised the mediator that he continues to believe that the report exists and that he would like to pursue the appeal at adjudication.

[6] Since no further mediation was possible, the appeal was moved to the adjudication stage of the appeals process, where the parties made representations on the issue of reasonable search. The town included an affidavit with its representations, sworn by the town's chief administrative officer (CAO), who is also the town employee responsible for administering freedom of information requests made under the *Act*.

[7] In this order, I uphold the reasonableness of the town's search, and dismiss the appeal.

DISCUSSION:

[8] The only issue in this appeal is whether the town conducted a reasonable search for records responsive to the appellant's request.

[9] 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*.[1] 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.

[10] 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.[2]

[11] 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

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Order MO-2246.

that it has made a reasonable effort to identify and locate responsive records;[3] that is, records that are "reasonably related” to the request.[4]

[12] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[5] 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.[6]

[13] If the requester failed to respond to the institution’s attempts to clarify the access request, the IPC may decide that all steps taken by the institution to respond to the request were reasonable.[7]

[14] The institution must provide a written explanation of all steps taken in response to the request, including, for example: whether the institution contacted the requester to clarify the request, details of any searches the institution carried out (including who conducted the search, the places searched, who was contacted in the course of the search, the types of files were searched, and the results of the search), and whether it is possible that responsive records existed but no longer exist (and if so, details about destruction). The institution was asked to provide this information in an affidavit from the person or people who conducted the search.

Representations

The town’s initial representations

[15] The town’s position is that took reasonable steps to determine whether a responsive record existed, and determined that no such record exists, or ever existed.

[16] By way of background, the town states that the request relates to a council meeting on October 26, 2020 during which the Integrity Commissioner and a certain investigator presented their findings from an investigation involving town council members. The town submits that the appellant has assumed that the presentation was provided in the form of a report, and explains that it is possible this misunderstanding arose from the fact that the agenda and meeting minutes for the council meeting refer to a “report.” Notwithstanding this characterization of the presentation as a “report,” the town states that the presentation was made orally and was not recorded by the town, nor was a written summary of it prepared by the town.

[17] The town further states that the oral presentation provided an overview of what

[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] Order MO-2213.

would later be incorporated into individual reports, specific to members of town council. These reports are available to the public through a link provided with the town's representations;[8] a copy of these reports was also included with the town's representations (and shared with the appellant). Other than these individual reports, the town states that it was never provided with any other print report, or an audio report. In support of these representations, the town also provided an affidavit from its current CAO, consistent with these statements and providing further details of the town's search efforts.[9]

[18] The town's representations and affidavit evidence indicate that the request was originally processed by a former town employee (the town's clerk-treasurer at the time). This employee was directly involved with the initial search. To the best of the town's knowledge, this employee did not approach the appellant about the scope of the request. The town states that the request was clear on its face and not capable of different interpretations.

[19] After the former employee was no longer working for the town, the town's current CAO was made aware of this appeal and the upcoming mediation at the IPC. His affidavit indicates that he reviewed the file information to prepare for the mediation. From this review, according to his affidavit, he understood that the former employee conducted the initial inquiries for a responsive record and ultimately determined that no audio, print, or any other "report" for the meeting in question had been created or ever existed.

[20] In addition, the representations and affidavit also state that the town's CAO conducted his own independent inquiries as to the existence of a responsive record and was advised no such record existed. The CAO reviewed the files of the former employee who had processed the request, to confirm that there was no discrepancy in her findings. The CAO also swears to asking town staff who were experienced and knowledgeable about the records of the meetings of town council. After various searches and inquiries, the town determined that the requested report (either through an audio recording or a print copy) was never in existence.

[21] The affidavit provides further details about the efforts made to reconcile the use of the word "report" in the public meeting minutes. The town CAO states that, to determine the nature of the report and whether there was a recorded copy, he made inquiries with the administrative assistant of the clerk-treasurer, who had prepared the meeting's minutes. The administrative assistant advised the town CAO that the "report" was an oral presentation, which the town did not record and was not given a written

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[8] The town states that this link is: http://www.iroquoisfalls.com/code-of-conduct-integrity-commissioner.

[9] The town also makes an alternate claim: if the IPC were to order another search, any responsive record would be in the custody or the control of company appointed by the town to act as the town's Integrity Commissioner, and not in the custody or the control of the town. Due to my finding in this order that the town has provided sufficient evidence that it made a reasonable effort to locate a responsive record, I do not address the town's alternate claim in this order.

summary of. According to the affidavit, the administrative assistant also advised the town CAO that the former employee who had conducted the initial search was at the town council meeting in question, taking handwritten notes. These notes were later given to the administrative assistant to type into the final minutes. The affidavit states that these typed notes provided an "outline" of the meeting, indicating, for example, the dates, attendees, and brief summaries of what was discussed – but are not a verbatim transcript. His affidavit also indicates that although the original intent was to draft one "overall public report" for the town following the meeting in question, the Integrity Commissioner ultimately issued individual reports, which include the content of the oral presentation given, but no overall report was ever created.

[22] The town CAO's affidavit also states that, for the sake of completeness, he spoke with the Integrity Commissioner in question by telephone to confirm whether the record sought by the appellant exists. The Integrity Commissioner advised the town CAO that she issued individual reports regarding the subject of her presentation for each town councillor, which were published publicly online. She also advised the town CAO that she did not prepare a separate report for the town. The Integrity Commissioner followed up this telephone conversation with an email to the town CAO, which the town CAO set out within his affidavit.

The appellant's initial representations

[23] In response to the town's representations and supporting documentation, the appellant submits, on the one hand, that nothing in the town's representations is relevant to his request, and on the other, that he finds it hard to believe that the report was verbal.

[24] More specifically, the appellant states that he finds it hard to believe that the report, which he says was 16 pages long, was presented in October 2020 without being read from a computer, tablet, hard copy, or investigation notes. He submits that there is too much information to have presented from memory, or to compile the individual reports that were eventually published. I note that the appellant does not explain the basis for believing that the October 2020 presentation was from a 16-page document.

[25] The appellant points to the following as substantiating facts for his position that the report was written:

- the agenda of the October 2020 council meeting contains an item for delegations and presentations, referred to as staff reports, indicting that the Integrity Commissioner presented a report;
- the minutes of the October 2020 council meeting say that council passed a (specified) resolution to discuss the report ("That Council discusses the Integrity Commissioners report and recommendations at a Special Meeting");

- the minutes also say that council passed another (specified) resolution to receive the information from the Integrity Commissioner ("Council receives the information from the Integrity Commissioner"), indicating that a report "was actually given to council" (in the appellant's view);

- under a (specified) by-law, the town's policy on Delegations and Presentations must be in writing or electronic unless dispensation requested from Clerk-Administrator; and

- Department Heads and Officers of the Corporation must submit their reports in writing, and the Integrity Commissioner is an officer of the town (under a specified by- law).

[26] The appellant also raises other issues that are not relevant to the issue of whether the town conducted a reasonable search (such as accessibility to the town's public meeting, and whether the content of the October 2020 report is the same as reports made at two other later town council meetings). However, such issues are irrelevant to whether the town made reasonable efforts to find a record responsive to his request for the October 2020 report, so I will not set these arguments and questions out here. I note that he asks how a lawyer would know what needed to be changed in a report if it was only verbal, but does not explain why this would not be possible, especially given the town's evidence that the October presentation was only an overview of the issues that were later written about.

The parties' reply representations

[27] In response to the appellant's representations, the town reiterates its position that that it has conducted a reasonable search for records and ultimately determined that no records exist which are responsive to the request. Furthermore, the town states that appellant indicates that a report exists but has not provided any reason for this belief. The town submits that this belief is inconsistent with the town's affidavit and supporting evidence, which the town submitted with its initial representations. The town submits that the evidence clearly indicates that there is no record responsive to the request.

[28] The appellant states, in sur-reply, that he still believes a responsive report exists, and reiterates many of the points he previously made. He asserts that he submitted all relative supporting documentation that the report exists (such as the agenda and minutes). He also raises issues that are not relevant to whether the town provided evidence of reasonable search efforts, such as the public dollars that were spent on the Integrity Commissioner's investigation and report.

[29] On the substantive issue of the town's search efforts, the appellant submits that the town CAO's involvement in the town's search efforts rely on other town hall staff because he was not employed by the town at the time of the initial search. In addition,

he asserts that a number individuals have resigned their elected positions, and a couple of senior staff are also no longer working for the town; he submits that these individual would know what exactly transpired at the time and know what happened to the report he seeks.

Analysis/findings

[30] Having examined the representations and supporting evidence of both parties, I am persuaded that the town has provided sufficient evidence that it conducted a reasonable search in the circumstances. As mentioned, the *Act* does not require an 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;[10] that is, records that are "reasonably related" to the request.[11] I find that to be the case here.

[31] Since the town employee who initially conducted the search is no longer employed by the town, I am satisfied that it was reasonable for the town CAO, who is also responsible for processing requests under the *Act*, to conduct inquiries of his own about the possible existence of a responsive record, after reviewing the file. It was reasonable for him to review the file of the former employee. It was also reasonable of him to consult that employee's administrative assistant, who was tasked to type the clerk-treasurer's handwritten notes taken at the meeting in question. Likewise, given her role in making the presentation, I also find it reasonable that he consulted the Integrity Commissioner herself. In my view, these steps indicate that the town CAO sought out information about the possible existence of a responsive record from individuals who were directly involved in the subject matter of the request and are experienced and knowledgeable employees in the subject matter of the request. The town was not obliged to contact the former mayor, former councillors, and/or former staff to conduct a reasonable search under the *Act*.

[32] I acknowledge that the agenda and minutes use the words "report" (more specifically, under the heading "STAFF REPORT(S)"). However, I am not satisfied that this necessarily means that the report had to be written, and could not possibly have been verbal. In my view, the town sufficiently explained the use of this word through its representations and affidavit evidence.

[33] In addition, I find that the appellant has not sufficiently established a reasonable basis for believing that a written record exists. Whether or not the town was obligated to have a written copy of the presentation is irrelevant to whether the town conducted a reasonable search and provided sufficient evidence of its search efforts. If, for example, the town was obligated to create a record, but did not do so, no search efforts would result in the location of a responsive record. The obligation to create a

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[10] Orders P-624 and PO-2559.
[11] Order PO-2554.

record (assuming one exists), does not establish that a record actually exists in an institution's record holdings.

[34] Furthermore, the appellant's stated belief that a record exists, and his reliance on the wording of the agenda and minutes (in the face of the town's explanations) are not sufficient to establish that it is reasonable to believe a record exists. Although he asserts that the October 2020 was 16 pages long, he does not reasonably explain the basis for believing that it was so long, thereby diminishing his argument that the presentation could not have been verbal because it was so detailed.

[35] For these reasons, I find that the town has provided sufficient evidence of its search efforts. As a result, I uphold the town's search as reasonable, and dismiss the appeal.

ORDER:

I uphold the reasonableness of the town's search and dismiss the appeal.

Original Signed By: November 18, 2022

Marian Sami
Adjudicator