

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4298

Appeal MA21-00227

Township of South Frontenac

December 13, 2022

Summary: The Township of South Frontenac (the township) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for records about a specific township lake, road, and culvert. In response to the request, the township issued a decision letter granting full access to the responsive records.

The appellant believed that more responsive records should exist; as such the reasonableness of the township's search for responsive records was at issue in this appeal. In this order, the adjudicator upholds the township's search for records as reasonable.

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

Orders Considered: Order MO-3242.

OVERVIEW:

[1] This order concerns the reasonableness of a search for records about a specific township lake, road, and culvert.

[2] The Township of South Frontenac (the township or the municipality) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for records in reference to specified projects at a named township road and lake.

[3] In response to the request, the township issued a decision letter granting full access to the responsive records. The letter stated:

...You requested information about [name of road/name of lake] culvert. Access to these records is being granted. The information provided includes emails and correspondence.

I also wanted to note that the audio recording of the meeting in which [individual #1] was a registered delegation ([date]) can be found on the Township's Facebook page...

... Specific information regarding the monitoring and reporting of water levels would have been conducted by the Quinte Conservation Authority and as such they are the "authors" of those documents and you will need to contact their office for this data.

[4] As the appellant was dissatisfied with the institution's decision, she appealed the decision to the Information and Privacy Commissioner of Ontario (the IPC), where a mediator was appointed to attempt resolution of this appeal.

[5] During mediation, the appellant advised the mediator that she believes that the township had not given her access to all of the records responsive to her request.

[6] The mediator informed the township of the appellant's position. In response, on September 21, 2021, the township issued a supplemental decision that stated:

...On March 18, 2021, this office provided you with copies of documents found in the search related to these records along with an invoice for photocopying of said documents which included 30 copies of 8.5 X 11 single sided copies and 12 copies of 8.5 X 11 double sided.

On May 14, 2021, an additional 18 pages were emailed to you and copied to the office of the [IPC]...

On June 2, 2021, an email was sent to you... Included in that email were the instructions on how to access reports to Council with regard to the Private Lane Assistance Program which have been published for public access on the Township's Civic Web portal. As Council reports, minutes, agendas and by-laws are available on this site for the public; this was not considered to be within the [freedom of information] request. The drawings for the [name] Lake Dry Hydrant were in the custody of Quinte Conservation and once they provided us with a copy of the drawing it forwarded to you...

...[You] also inquired about financial records concerning the work done on the road, staffing, costs, bills and payments received. A spreadsheet is

attached to the email that provides detail on the labour, equipment and subcontractor used for work done in 2019 that represents about 10 hours of work undertaken by the municipality...

We wish to confirm that we have no further records that are responsive to your request...

[7] No further mediation was possible because the appellant advised the mediator that she remained dissatisfied with the township's decision, as she still believed that more records responsive to the request exist.

[8] Accordingly, this file was moved to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought the parties' representations, which were shared in accordance with the IPC's *Practice Direction 7*.

[9] In this order, I uphold the township's search for records as reasonable and dismiss the appeal.

DISCUSSION:

Did the township conduct a reasonable search for records?

[10] 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 17.¹ 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.

[11] 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.² To be responsive, a record must be "reasonably related" to the request.³

[12] 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.⁴

[13] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.⁵

[14] 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.⁶

[15] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.⁷

Representations

[16] The township was asked to provide a written summary of all steps taken in response to the request and whether it was necessary to clarify the scope of the request with the appellant. In particular, it was asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the institution did not contact the requester to clarify the request, did it:
 - a. choose to respond literally to the request?
 - b. choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
5. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

⁵ Order MO-2185.

⁶ Order MO-2246.

⁷ Order MO-2213.

[17] In response, the township states that it did not contact the appellant for clarification of the request as the request was for any and all records related to the subject of the request and was further identified in the correspondence. It states that it responded literally to the request and provided responses to additional questions posed by the appellant.

[18] The township states that because it had staff turnover during the relevant time period, it conducted a search of the emails and electronic files of its previous staff (namely, the former Chief Administrative Officer and the former Director of Public Services). It states:

A request was submitted to our Information Services Department to conduct a search on individual drives/directories as well as the company (combined) directory using keyword searches. The current Chief Administrative Officer, [name] conducted a search of the previous CAO's files and several other Public Service Department employees conducted searches both in their emails, correspondence and road files set up by Public Services. The Clerk conducted both an electronic search and physical search of files within our TOMRMS [the Ontario Municipal Records Management System] filing system. [The township] also reached out to the Quinte Conservation staff to determine if they had on file any correspondence, emails, reports etc. related to this request. It is my understanding that a separate Freedom of Information request was filed with Quinte Conservation. This search was an exhaustive search that looked at electronic files, emails, handwritten notes, and paper files.

The municipality follows By-law 2004-29 (A by-law to establish the schedule of retention periods for documents, records, and other papers of the municipality). [The township] cannot confirm or deny the existence of such records and clarified in the response to the appellant that the recordkeeping of past employees may not have been consistent with the corporate approach.

[The township] did reach out to Quinte Conservation as their staff were involved as the area in question falls within their watershed. They shared with us one file that was relayed to the appellant, which was a drawing, otherwise there were no other responsive records from any other institution.

[19] The appellant states that although she has received, from other sources, dozens of emails that originated from the township's email server using the township's domain, the township claims none of these, or any emails or documentation that either responded to or preceded these emails, could be located.

[20] The appellant submits that none of the background correspondence between

staff who responded to September 2020 questions posed to the South Frontenac Council have been produced. She also questions why there are no records resulting from the township's major reconstruction of a dam on the road named in the request, including communications with citizens, internal work orders, instructions, and approvals.

[21] The appellant submits that either:

1. The township's recordkeeping system is so inept that it permitted certain persons to be able to remove or delete months of emails, engineering records, financial records and other internal communications, without leaving a trace and with no backups. Possible, but if so, they certainly have not met even the lowest standard for record retention or maintenance; or
2. The township is aware that some of the activities of certain of [its] employee(s) may expose the township to scrutiny in regards to staff oversight and use of township assets and records that may shed light on some of those activities are no longer able to be located.

[22] She states that if there are other explanations, she invites the township to be forthcoming with them. She submits that in the absence of substantive reasons for certain records being missing, she does not see how a finding on the "reasonableness" of the search will serve any useful purpose.

[23] In reply, the township states that:

...unfortunately, the standard of recordkeeping may not be to the highest standard, however every effort was made to locate and share found files pertaining to this request. Records that were found were provided to the appellant. [The township] reaffirm[s] that the recordkeeping of past employees was not to a standard that is considered acceptable, and [it is] moving towards a unified records management system to improve this.

For the purposes of this file, [the township] once again confirm[s] that [it is] not withholding any records as speculated by the appellant.

Findings

[24] The issue before me is whether the township has conducted a reasonable search for responsive records.

[25] In its representations and two access decision letters, the township detailed the multiple searches it undertook for responsive records. With both decision letters, it disclosed records to the appellant. In conducting its searches, the township conducted searches of:

- its previous staff's (namely, the former Chief Administrative Officer and the former Director of Public Services) records including their emails and "personal" drives on their computers/laptops as well as their files;
- individual drives/directories as well as the company (combined) directory using keyword searches.
- other Public Service Department employees' emails, correspondence and road files set up by Public Services.
- files within the township's TOMRMS filing system.

[26] The township also received responsive records from another institution, Quinte Conservation, even though the appellant made a separate request to that institution.

[27] Based on my review of the parties' representations, I find that the township has made a reasonable effort to locate responsive records within its current record holdings. In this case, experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to locate records which are reasonably related to the request.

[28] Although additional responsive records may have existed at one time, it appears that these records cannot be located due to deficient recordkeeping practices of past employees of the township. The township has admitted that its former recordkeeping practices were inadequate.

[29] In all the circumstances, I am satisfied that further searches would not yield additional responsive records. I am satisfied that experienced staff with the township, who knew where to search, conducted the searches in the appropriate areas, and the reason that the searches did not locate all relevant records is that they were improperly deleted.

[30] I have found Order MO-3242 to be relevant and of assistance to the issues before me in this appeal. In Order MO-3242, the adjudicator upheld the reasonableness of the search of the Regional Municipality of Halton (Halton) under similar circumstances. Halton had advised in its representations that responsive emails may have been deleted by accident due to the large number of emails received and stored in the inboxes of staff. The adjudicator determined that there was a possibility that responsive emails could have been deleted.

[31] In upholding Halton's search for responsive records in Order MO-3242, the adjudicator found that while an institution is required to undertake a reasonable search, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. She determined that the appellant in that case had not provided a reasonable basis for a belief that further emails existed, beyond those located by Halton. In those circumstances, she found that the appellant had not provided sufficient

evidence to justify conducting further searches.

[32] In considering that Halton may have had responsive records but no longer had them, the adjudicator stated that:

I also note the appellant's submission that [Halton's] recordkeeping is deficient; that [Halton] should work with the Information and Privacy Commissioner to ensure its recordkeeping systems comply with the legislation; and that [Halton] should explain why its record management systems remain noncompliant and deficient. While I acknowledge the appellant's concerns, such concerns are not properly addressed in a reasonable search appeal.

[33] Similarly, in this appeal, the township has admitted that the recordkeeping practices of its former staff were deficient and there may have been responsive records that no longer exist. The township has indicated that it has worked to remedy this by establishing a unified recordkeeping system and I expect it to retain records properly in future.

[34] The IPC has published a guideline for institutions on best practices in recordkeeping. I encourage the township to take note of, and put into practice, the recommendations in this guideline, which is titled: *Improving Access and Privacy with Records and Information Management*.⁸

[35] In conclusion, I am satisfied that the township has located and disclosed to the appellant the responsive records it still has, consisting of numerous emails, letters, and photographs. In my view, based on my review of the records located and the township's representations on the searches it has conducted as outlined above, the township has conducted a reasonable search for responsive records in its record holdings. Therefore, I will uphold its search as reasonable and dismiss the appeal.

ORDER:

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

Original Signed by: _____

Diane Smith
Adjudicator

December 13, 2022

⁸ This guideline is found at:

<https://www.ipc.on.ca/wp-content/uploads/2016/11/2016-11-03-improving-access-and-privacy-with-rim.pdf>