Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1728

Appeal MA-020009-2

District Municipality of Muskoka

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NATURE OF THE APPEAL:

This appeal concerns a decision by the District Municipality of Muskoka (the Municipality) made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) submitted a request for the following information relating to the alleged "blackballing" of a named company from providing bonds for contracts with the Municipality:

> We seek all records touching upon the above matter to date which should also include the following specific types of records:
>
> - Internal records, correspondence, e-mail, etc. discussing and implementing the "blackballing of a [named company]" from anyone at [the Municipality] (this is to specifically address records maintained by [four named individuals] or an acknowledgement that any of these specific individuals do not possess responsive records)
>
> - Any submissions or reports to council addressing these issues
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> - Any council records or minutes including "in-camera" sessions addressing the above that are not currently published on the [Municipality's] website
>
> - Any correspondence with others outside of [the Municipality] concerning the above, including records to and from lawyers with [the Municipality] or elsewhere
>
> - Any instructions to [the Municipality's] lawyers touching upon these issues
>
> - In addition, all records which disclose [the Municipality's] past history of "blackballing" entities of any kind and for any reason for over last fifteen years

The Municipality issued a decision letter in which it stated that no records exist in response to the appellant's request.

The appellant appealed this decision and the file was referred to the mediation stage of the appeal process.

During mediation, the appellant narrowed the last item of his request to the history of "blackballing" over the past 10 years. The Municipality issued a revised decision letter stating that the appellant's request is frivolous and vexatious.

Mediation was unsuccessful and the file was moved adjudication.

The Municipality decided to withdraw its frivolous and vexatious claim and so the file was referred back to mediation for a further attempt at resolution. After some communication between the Municipality and the appellant, the appellant submitted a revised and narrowed request for the following:

> . . . records for incidence (sic) where, companies were originally "pre-approved" for products or services and subsequently were no longer "pre-approved" for products or services.

The appellant clarified that the time frame he was now interested in was the five-year period between December 1996 and December 2001.

The Municipality issued a new decision letter providing an explanation about the "pre-approved bonding list" and stating that four records responsive to the appellant's narrowed request had been found. The Municipality provided access to one record and denied access to two others pursuant to section 12 of the *Act*. The Municipality indicated that the fourth record had been disclosed to the appellant at an earlier date.

After receiving the revised decision letter, the appellant indicated that through another process he had already received copies of the two letters withheld under section 12; therefore, these two records were removed from the appeal. The appellant also wrote to the Municipality setting out alleged deficiencies in the Municipality's revised decision letter. A further exchange of correspondence occurred between the appellant and the Municipality regarding the "pre-approved bonding list". The appellant believes that further records exist that are responsive to his revised request.

Further mediation was not possible and the file was transferred to adjudication. The sole issue to be determined is whether the Municipality's search for responsive records was reasonable.

I first sought representations from the Municipality. The Municipality submitted representations, which were shared with the Municipality in their entirety. I then sought representations from the appellant who submitted representations. The appellant's representations raised issues in response to the Municipality's representations. The appellant's representations were shared with the Municipality and I sought and received reply representations from the Municipality. The Municipality's representations were then shared with the appellant and I sought and received reply representations from the appellant.

DISCUSSION:

REASONABLE SEARCH

Introduction

In appeals involving a claim that responsive records exist, as is the case in this appeal, the issue to be decided is whether the Municipality has conducted a reasonable search for the records as required by section 17 of the *Act* (Orders P-85, P-221, PO-1954-I). If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Municipality will be upheld. If I am not satisfied, I may order further searches.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Parties' representations

The Municipality states that the named company was removed from its list of "pre approved" bonding companies, although it was not excluded from participating in the tender process or supplying products or services to the Municipality. The Municipality indicates that the named company continued to provide services to it. The Municipality states that four responsive records were identified.

With respect to the steps taken by the Municipality to respond to the appellant's request, the Municipality's Freedom of Information Co-ordinator submits:

> The [appellant's] request was discussed with the District Treasurer, the Commissioner of Engineering, the District Solicitor, the Public Works Contract Manager and the Administrative Services Manager – the group of people who deal with contracts and purchasing. I was advised that the only company that had ever been removed specifically by [the Municipality] from our pre-approved list was [the named company]. Searches were carried out by the District Solicitor and the Public Works Office Manager to locate any records referring to that incident and 4 were found and identified in [our revised decision letter]. I was advised there were no records relating to the actual removal, other than the one-line email. The other 3 records existed because of dealings that were occurring with [the named company]. I was advised there were no records of the 1993 removal, they were simply removed.
>
> [The Municipality] has a list of pre-approved bonding companies which is based on the Treasury Board Secretariat list. [The Municipality] has no lists of any other pre-approved suppliers. [The Municipality] also has no other pre-approved suppliers, that are not on a list. No searches per se were done for other pre-approved suppliers because I have been advised by [Municipality] staff dealing with purchasing that we have no such suppliers. Therefore there is nothing to search for.

The Municipality acknowledges that the appellant has expressed concern over the narrow interpretation of the word "pre-approved". However, the Municipality states that it does not know what other type of information the appellant is requesting. It states that there are products and suppliers that were at one time used by the Municipality that it no longer uses. However, the Municipality asserts that this does not mean that it "blackballed" these products or suppliers.

In response, the appellant submits that the Municipality is avoiding his request "…by not identifying other occasions it has blackballed other commercial entities from its procurement contracts." He states that "undoubtedly" further records exist but that he cannot have access to them unless the Municipality identifies them to this office.

The parties' reply representations do not add anything to the discussion of the reasonable search issue.

Conclusions

In my view, the Municipality has provided a sufficiently detailed and credible explanation of the efforts it took to locate responsive records. On the other hand, the appellant has failed to provide any tangible evidence of other incidents beyond those identified by the Municipality that would point to the existence of further responsive records. Apart from this, the appellant's bare

assertions that more records must exist do not constitute a reasonable basis for believing additional responsive records may exist or that the Municipality failed to conduct a reasonable search for relevant records. Accordingly, I find that the Municipality has discharged its obligations under section 17 of the *Act*.

ORDER:

I uphold the Municipality's search for responsive records and dismiss the appeal.

Original signed by: December 16, 2003
Bernard Morrow
Adjudicator