

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-2670-F

Appeal MA10-351-2

Township of Madawaska Valley

November 16, 2011

Summary: This order disposes of the outstanding issues from Interim Order MO-2652-I. The appellant sought access to records from the Township of Madawaska Valley (the Township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) relating to the road assumption process the Township followed in converting a private portion of a specified road to a public road. The Township provided the appellant with access to responsive records. The appellant filed an appeal asserting that further responsive records should exist. An oral inquiry was conducted and the adjudicator found that the Township had not conducted a reasonable search for records under section 17 of the *Act*. In reaching this conclusion, the adjudicator found that the record-holdings of four councillors and a former mayor are within the custody or control of the Township and subject to the search provisions of the *Act*, and that the Township had failed to consider the record-holdings of the four councillors and the former mayor during the course of completing its search. The adjudicator issued Interim Order MO-2652-I, ordering the Township to conduct a further search with the focus on the record-holdings of the four councillors and the former mayor. The adjudicator received written representations from both the Township and the appellant in response to the interim order. On the strength of the representations received, the adjudicator upheld the Township's new search for responsive records and dismissed the appeal.

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

Orders and Investigation Reports Considered: Interim Order MO-2652-I

OVERVIEW:

[1] This order disposes of the issues still to be resolved from my interim decision in Order MO-2652-I.

[2] The appeal arises out of a multi-part request submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Madawaska Valley (the Township) for information relating to the road assumption process followed by the Township in converting a private portion of a specified road (the road) to a public road. The Township issued an interim fee decision in response to the request, which the requester (now the appellant) appealed. Appeal MA10-351 was opened. The fee issue was resolved at the mediation stage of the appeal process and Appeal MA10-351 was closed.

[3] During the processing of Appeal MA10-351, the Township granted the appellant access to the November 5, 2007 Council Meeting Minutes (the Council Minutes), a by-law in which the municipality dedicated the specified road as a public road (By-Law 2007-67), two transfer documents, and the application to register the by-law. The appellant advised that he believes additional records should exist relating to the first part of his request, which is for the following information:

All documents related to the Township pre-transfer evaluation of [the road]. Also the documents about the procedure used by the Township to "score" [the road] during the transfer process. All documents related to this process and I request all results/minutes of any meetings.

[4] The appellant filed a new appeal with the IPC, on the basis that additional records should exist in response to the first part of his request. Appeal MA10-351-2 was opened.

[5] During mediation for Appeal MA10-351-2, the Township issued a decision stating, in part:

The Township has completed a reasonable search (both electronically and by hard copy) of the Regular Council Meeting minutes, and the Roads, Property and Planning Committee minutes from 2005 to the present. No records were found with regard to the scoring of [the road] during the transfer process.

[6] The Township, subsequently, wrote to the appellant advising him of the nature of the searches it had completed for responsive records, indicating that it had searched all possible places and no further records were located.

[7] Despite the Township's position, the appellant reiterated that additional records should exist.

[8] The parties were unable to resolve this issue through mediation. The file was transferred to the adjudication stage of the appeal process for an oral inquiry with the sole issue to be determined whether the Township had conducted a reasonable search for responsive records.

[9] On July 27, 2011, I conducted a hearing via teleconference into the reasonable search issue. The appellant attended the hearing and gave oral evidence. The Township's Chief Administrative Officer (CAO), Planning and Licensing Officer, Operations Manager and a member of its administrative staff attended and provided oral evidence.

[10] I subsequently issued Order MO-2652-I in which I concluded that the Township had not conducted a reasonable search for records in the circumstances of this case under section 17 of the *Act*. My conclusion was based on the Township's failure to consider the record-holdings of four councillors and a former mayor that had been involved in the road assumption process that resulted in the conversion of a private portion of the road to public status in 2007.

[11] In reaching my conclusion, I found that the record-holdings of both the four councillors and the former mayor, relating to the events surrounding the road assumption process of the private portion of the road, were within the Township's custody or control and subject to the access provisions of the *Act*. Accordingly, I ordered the Township to conduct a search of the record-holdings of both the four councillors and the former mayor relating to the road assumption matter.

[12] Interim Order MO-2652-I contained the following order provisions:

1. I order the Township to conduct a further search for records responsive to the appellant's request regarding the road assumption review and approval process that took place at the November 5, 2007 Council meeting, with specific focus on the record-holdings of the four councillors and the former mayor in attendance at that Council meeting. In completing its search, the Township is requested to make its best efforts to consult with the four councillors and the former mayor regarding their record-holdings relating to the road assumption review and approval process that is the subject of this appeal. Without limiting the scope of the Township's further search efforts, responsive records would include:
 - the proposal to initiate the road assumption process

- all consultant engineering studies reviewed
 - all asset checklists documenting prevailing road characteristics
 - the standards considered by Council during the review process
 - the criteria considered and applied during the Council meeting by the councillors and the former mayor in approving the road assumption of the road
 - any notes taken by the mayor and the councillors leading up to, during and following the Council meeting about this matter
2. With regard to Provision 1, I order the CAO of the Township to prepare and submit an affidavit by **September 15, 2011** setting out the details of all further searches completed, including the following:
- a) information about all employee(s) who conducted searches, describing their qualifications, position and responsibilities;
 - b) a statement describing each employee's knowledge and understanding of the subject matter of the request;
 - c) the date(s) each employee conducted his or her search and the names and positions of any individuals who were consulted;
 - d) information about the type of files searched, the nature and location of the searches, and the steps taken in conducting each search;
 - e) the results of each search;
 - f) if as a result of these searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
3. If further responsive records are located as a result of the searches referred to in Provision 1, I order the Township to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

4. The affidavit referred to in Provision 2 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*, which is available on our website.
5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

[13] The Township submitted representations that document the further search efforts it completed in response to my interim order. The appellant provided representations in response.

[14] The only remaining issue in this appeal is whether the Township has complied with the provisions of Interim Order MO-2652-I by conducting a reasonable search for records responsive to the appellant's request.

[15] In the discussion that follows, I conclude that the Township has complied with the provisions of my interim order and has conducted a reasonable search for records responsive to the appellant's request.

DISCUSSION:

HAS THE TOWNSHIP COMPLIED WITH THE PROVISIONS OF INTERIM ORDER MO-2652-I?

[16] Having ordered the Township to conduct a further search, the issue to be determined is whether, as a result of its additional search efforts, it has conducted a reasonable search for records as required by section 17 of the *Act*.

Township's additional search efforts

[17] The CAO provided an affidavit documenting the Township's further search efforts. She indicates that the Township's Planning and Licensing Officer, Operations Manager and administrative staff person were requested to conduct further searches of their respective offices for both hard and electronic copies of records relating to the events surrounding the road assumption process of the private portion of the road. The CAO reports that no further records were found by the Planning and Licensing Officer, Operations Manager and administrative staff person.

[18] The CAO also reports in her affidavit that she completed a search of the two vaults located within the Township's Municipal Building that contains all minutes of meetings from 2005 up the date of the request and that no further records were found.

[19] The CAO advises that the former mayor and the four councillors were contacted and that no further records were found with regard to the search parameters set out in Provision 1 of my Interim Order MO-2652-I. The CAO concludes her affidavit by noting that "Members of Council (whether former or present) do not retain unique or different records than is found within the jurisdiction of the municipality."

Appellant's response

[20] The appellant is highly critical of the Township's additional search efforts in his representations, which reflect a deep mistrust of the Township's efforts in responding to his request for records regarding this matter.

[21] The appellant takes the view that the CAO's affidavit is deficient, as it does not address all of the elements of Provision 2 of my interim order by not setting out, for each person who conducted a search, their qualifications, their knowledge and understanding of the subject matter, when their searches were conducted, the steps taken to conduct the searches and the results of each search. As well, the appellant takes the position that in order to comply with Provision 2 of the interim order, the Township was required to deliver separate affidavits, from each of the nine people consulted, that address the elements set out in Provision 2.

[22] The appellant also makes the following demands of the Township in his representations:

- a. a statement from the CAO confirming that the only records provided to date are
 - o Council Minutes of November 5, 2007 meeting
 - o By-law 2007-67
 - o application to register by-law/transfer
- b. a statement setting out its "record maintenance policy"
- c. a direct response from the four councillors regarding their search efforts, including a statement from them that they understand the nature of the request and the information sought
- d. a copy of the document that initiated the road assumption process in this case

- e. the name of the association (if any) that brought this road assumption issue forward as well as the names of the association's President, Vice-President and Treasurer
- f. the name of the individual who brought the road assumption issue to Council and the dates it was raised

Analysis and findings

[23] I have carefully reviewed and considered the evidence presented to me by the Township and the appellant in response to my Interim Order MO-2652-I. I am satisfied that the Township has complied with the provisions of my interim order and has conducted a reasonable search for records responsive to the appellant's request.

[24] The issue for me to decide is whether the Township has taken *reasonable* steps to search for records responsive to the appellant's request [Orders P-85, P-221, PO-1954-I]. A reasonable search is one in which an experienced employee expending *reasonable* effort conducts a search to identify any records that are *reasonably* related to the request [Order M-909]. The key is, therefore, *reasonableness*. The *Act* does not require an institution to prove with absolute certainty that records do not exist. An institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

[25] In this case, the affidavit evidence presented by the CAO demonstrates that the Township has taken reasonable steps to undertake a further search in compliance with the provisions of my interim order. I acknowledge the appellant's concerns that the CAO's affidavit does not adequately address all of the elements of Provision 2 of my interim decision. I also acknowledge the appellant's view that in order to comply with Provision 2 of my interim decision, the Township was required to furnish separate affidavits from each of the nine people consulted during the additional search for records.

[26] I reiterate that the standard expected of an institution in conducting a search is reasonableness, characterized by evidence of an experienced employee expending reasonable efforts to conduct a search for records that are reasonably related to the request.

[27] I find the CAO's failure to identify the qualifications of those who conducted the searches of little significance. The CAO, Planning and Licensing Officer, Operations Manager and administrative staff person all were identified during the initial phase of this inquiry as the Township employees best placed to conduct the search for responsive records. I have not received evidence that suggests there are other Township employees better qualified to conduct the search. With regard to the former

mayor and the four councillors, these individuals are known to all parties, and I am satisfied that the CAO made her best efforts to consult these individuals in an appropriate fashion, taking into consideration that any responsive records they might have possessed in regard to this matter would likely have been held off site in their respective private homes. While the CAO's affidavit could have provided more detailed information regarding the nature of the searches conducted by all individuals consulted, including when and how the searches were conducted, the results of each search are clear and I am satisfied that the Township met the standard of reasonableness in describing its further search efforts in the circumstances of this case. As well, while the Township may have bolstered its position by delivering separate affidavits from each of those individuals consulted, I did not order the Township to do so in this case. I sought and received an affidavit from the CAO only.

[28] Turning to the appellant's six demands, as set out above, I find as follows:

1. With respect to paragraph a, this information is already known to the appellant. In my view, requiring the Township to identify what it has already disclosed to him serves no useful purpose in the context of this appeal.
2. With regard to paragraph b, the Township indicated during the oral inquiry that it has a records retention by-law which requires that legal documents be retained for seven years. I have not been provided with evidence to indicate that the Township has destroyed or otherwise disposed of responsive records in contravention of that by-law.
3. In response to paragraph c, I have indicated above that I am satisfied that the Township made its best efforts to consult the four councillors in the circumstances of this case. I see no benefit in requiring the Township to seek independent statements from each councilor, as noted above.
4. With regard to paragraphs d, e, and f, in my view, the information that the appellant seeks is outside the scope of the appellant's current request. This is a request for new information that requires the filing of a new request.

[29] To conclude, in the circumstances of this case I find that the Township has made a reasonable effort to respond in good faith to the issues raised in my interim order and has complied, in an appropriate way, with the provisions of that order. Accordingly, I am satisfied that the Township has conducted a reasonable search for records responsive to the appellant's request.

ORDER:

On the basis of the Township's compliance with Interim Order MO-2652-I, I uphold the Township's new search for records responsive to the appellant's request and dismiss the appeal.

Original Signed by: _____
Bernard Morrow
Adjudicator

_____ November 16, 2011