

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2868-I

Appeal MA12-72

Nottawasaga Valley Conservation Authority

April 16, 2013

Summary: The appellant submitted a request for information related to an identified property. The Nottawasaga Valley Conservation Authority (the conservation authority) located responsive records and granted partial access to them, severing them pursuant to section 14(1) (personal privacy) of the *Act*. The appellant appealed the conservation authority's decision. She advised that she was not appealing the conservation authority's application of the exemption to the records but that she believed that additional records responsive to her request exist. Accordingly, the issue of whether the conservation authority conducted a reasonable search is the sole issue to be determined on appeal. This order finds that the conservation authority did not conduct a reasonable search for responsive records and, as a result, that it must conduct a further search.

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

Orders and Investigation Reports Considered: Order MO-2285.

OVERVIEW:

[1] The Nottawasaga Valley Conservation Authority (the conservation authority) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to a specific address in the Town of New Tecumseh.

[2] The conservation authority located responsive records and issued a decision letter granting access, in part, claiming the application of the mandatory exemption at section 14(1) (personal privacy) of the *Act* and setting out the applicable fee. The requester paid the fee and the conservation authority disclosed the records, in part.

[3] The appellant appealed the conservation authority's decision to this office.

[4] During mediation, the appellant advised that she did not take issue with the information that was severed from the responsive records pursuant to section 14(1). Accordingly, the application of the mandatory exemption at section 14(1) to the records is not at issue in this appeal. However, the appellant advised that she was of the view that additional records that are responsive to her request should exist. She provided this office and the conservation authority with a list of 26 concerns and questions she had with the conservation authority's search that she entitled "search issues." Some of these issues further specified the type of information that she was seeking through her request while others asked questions about the information to which she was given access.

[5] The conservation authority provided a response to some of the appellant's questions and issues. The conservation authority also stated that some of the appellant's questions pertain to records which are not responsive to her request and that "all information pertaining to the property in question was disclosed in its entirety, with the exception of an individual's name on record 1."

[6] During mediation, the appellant did not take issue with the conservation authority's position that some of her questions fell outside of the scope of her request. However, she confirmed that she continues to believe that more responsive records exist.

[7] As the appeal could not be resolved during mediation, it was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to this appeal began the inquiry by sending a notice of inquiry setting out the facts and issues, to the conservation authority, initially, and then to the appellant, seeking representations. Both parties provided representations, in turn, which were shared in accordance with the practices of this office. Reply representations were sought from and provided by the conservation authority in response to the appellant's representations.

[8] The appeal was transferred to me to complete the inquiry. The sole issue to be determined is whether the conservation authority's search for responsive records was reasonable. For the reasons that follow, I find that the conservation authority failed to perform a reasonable search and order them to conduct a further search.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

[9] 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.

Representations

[10] The conservation authority submits that following its receipt of the appellant's request, it did not contact the appellant for further clarification on the records being sought as the request was clear. It submits that a thorough search for responsive records was conducted by planning and engineering staff and that one file regarding the identified property was located. It further submits that any records regarding the subject property would be found in the planning file.

[11] The conservation authority explains that a search for responsive records was conducted by its Senior Environmental Officer who is experienced in searching for records. The Senior Environmental Officer provided an affidavit attesting to the search that she conducted. In her affidavit she states that:

- She has been employed by the conservation authority for over 10 years and is very familiar with the importance of conducting a thorough search of records in accordance with freedom of information requests.
- She conducted a thorough search for information through both electronic and paper files. All files pertaining to the subject property are kept within the confines of the conservation authority's administration building. She provided all responsive records that were found in the property file to the Freedom of Information Coordinator (FOIC).
- She is aware that records existing for the identified property are the result of a complaint received regarding work being done on the property in 2010. All related records would still be retained as the conservation authority's retention schedule dictates a "5yr (held)" status for general unfounded complaints.

¹ Orders P-85, P-221 and PO-1954-I.

[12] In addition, the conservation authority provided an affidavit sworn by their Water Resource Engineer who also conducted a search for responsive records. In her affidavit she states:

- She has been employed by the conservation authority for over 4 years and is very familiar with requests pertaining to their records.
- She conducted a thorough search for information through both electronic and paper files. All files pertaining to the subject property are kept within the confines of the conservations authority's administration building. She located records pertaining to the subject property including "emails and internal memorandum that [she] confirmed were in the possession of the Planning Department, in the property file."
- She is aware that records existing for the identified property are the result of a complaint received regarding work being done at the property in 2010. All related records would still be retained as the conservation authority's retention schedule dictates a "5yr (held)" status for general unfounded complaints.

[13] The conservation authority's FOIC also provided an affidavit attesting to her role in the search for responsive records. She stated the following:

- She forwarded the request to the Directors of Planning and Engineering and Technical Services and received the file containing the records regarding the property in question from the Senior Environmental Officer.
- She reviewed the file and compiled the records for which access was to be granted, and severed the personal information of individuals other than the appellant pursuant to section 14(1) of the *Act*. With the exception of the personal information that was severed regarding the owner of the property and any other personal information in the records, no records were withheld. She estimates the degree of disclosure was 99%.

[14] As noted above, during mediation, the appellant provided a list of 26 "search issues" which consist of questions and concerns that she has regarding the conservation authority's search. Many of her issues ask specific questions about the property named in the request and adjacent properties or about the content of the records that have been disclosed to her. Others ask the conservation authority to provide explanations of or clarifications to the information contained in the records that have been provided to her, including why certain notes or information have been added or omitted or why something was prepared in a certain way. In some instances, she requests the name of the conservation authority staff who prepared the record and the dates on which they were prepared. In the majority of the issues however, the appellant requests the

"release of" additional records or specific types of information that she believes might exist that would help to explain the content of the records released to her or that might explain why information related to the property identified in her request was not provided to her.

[15] As outlined in the mediator's report, during mediation the appellant did not take issue with the conservation authority's position that some of her 26 search issues refer to information that falls outside of her original request. However, in her representations she changes her position with respect to this issue and states that while she believes that her request was "quite clear in that it asked for ALL records," she submits that the conservation authority "chose to define the scope of [her] request unilaterally, without outlining the limits of the scope to [herself] as requester."

[16] The appellant references a number of the search issues that she raised and makes specific submissions on why she believes that the conservation authority's response to those specific issues is not satisfactory. For example, in instances where the conservation authority has responded "has been disclosed" she questions which of the records provided to her are responsive and, in some instances, submits that additional responsive records including notes and supporting documents related to references in some of the records provided to her must exist.

[17] The appellant also questions why permits related to the identified property do not form part of the records that have been provided to her:

As a property that has been regulated by [the conservation authority] for some time (at least 27 years), there should be a file merely as a consequence of a permit having been issued at some point, as it has come to my attention that [the conservation authority] retention schedule dictates a 'permanent (held)' status for permits. I query why no copies of permits have been released to me by this institution for my own property seeing that a permit would have been required for the construction for same (circa 1985). Copies of same should be part of the record, and if they are not, then the filing (record keeping) system would appear to be extremely unreliable and in dire need of overhaul.

It is for the above reasons that I believe a complete and thorough further search needs to be made by [the conservation authority] to address my search issues above rather than a cursory "has been disclosed" responsive which does not unequivocally state that no records exist or what has in fact been disclosed. I would also request that the further search be expanded to include all departments at the [conservation authority] (not just Planning and Engineering).

[18] Finally, the appellant questions whether all departments or personnel (including board members or representatives of the Town of New Tecumseth) have been thoroughly canvassed for responsive records but states that she remains hopeful that a "further thorough search" will generate the records that she has been seeking.

[19] On reply, the conservation authority states that it has reviewed the appellant's representations and has considered her concerns regarding the "unilateral limiting of scope of the FOI request." The FOIC states: "After review of the file in question, I reiterate that all records in accordance with the request were released with the exception of identifiable information."

Analysis and finding

[20] 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

[21] 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.³

[22] 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 of the responsive records within its custody or control.⁴

[23] It is clear that the appellant is not satisfied with the answers that she received from the conservation authority in response to her letter identifying 26 questions and concerns that she has with the search undertaken for records responsive to her request.

[24] Although the appellant submits that the conservation authority "unilaterally limited the scope of the request," I find that this is not the case. In her request, the appellant listed an identified address in the Town of New Tecumseth and requested "all records pertaining thereto." It is a well-established principle that the institution should adopt a liberal interpretation of a request in order to best serve the purposes and spirit of the *Act* and that ambiguity in the request should generally be resolved in the requester's favour.⁵ In many of her "search issues" the appellant requests the "release of" information related to properties other than that identified in the request. In others she requests access to general information that might help her to better understand technical aspects of the records that were provided to her. It is also a well-established

² Orders P-624 and PO-2559.

³ Orders M-909, PO-2469, PO-2592.

⁴ Order MO-2185.

⁵ Orders P-134 and P-880.

principle that to be considered responsive to the request, records must “reasonably relate” to the request.⁶ In my view, information that is not specifically related to the identified property is not reasonably related to the appellant’s request. Accordingly, I find that the conservation authority appropriately defined the scope of the request.

[25] Moreover, in some of her “search issues”, the appellant asks for explanations about the content and significance of the records that have already been disclosed to her, including explanations of what certain things in the records mean, why certain graphics or notes may have been added and by whom, or the date and the name of the staff member who prepared the record. The conservation authority is not required by the *Act* to answer questions with respect to the content of records disclosed through access to information requests unless such information already exists in a recorded form. In the absence of existing recorded information, the *Act* does not require the conservation authority to create a new record.⁷

[26] Based on the conservation authority’s representations and the affidavits sworn by members of its staff, I accept that the various searches conducted for records responsive to the request were conducted by experienced employees who are knowledgeable in the subject matter of the request and that those individuals expended efforts to locate responsive records. I accept that it is reasonable that there is a file held by the planning department that contains all of the information relevant to the property identified in the request and that the relevant file was disclosed to the appellant.

[27] However, in the appellant’s representations she questions why no permits related to her property, which she states has been regulated by the conservation authority over two decades, have been disclosed her. She submits that permits should have been required for construction that occurred on her property in or around 1985. The appellant’s question is based on information that she obtained during the course of the inquiry into a related appeal (Appeal MA12-73) where the conservation authority submitted that its retention schedule dictates a “permanent (held)” status for permits.

[28] The conservation authority was provided with an opportunity to respond to the appellant’s position that given construction occurred on her property in or around 1985, and given that the conservation authority’s retention schedule dictates a “permanent (held)” for permits, permits relating to her property must exist. In its reply representations, the conservation authority does not address this issue or provide any explanation as to why no permits related to the property were located in the planning file.

⁶ Orders P-880 and PO-2661.

⁷ Orders 17, MO-2285.

[29] 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.⁸ In my view, the appellant has provided a reasonable basis for concluding that additional records related to the property identified in her request should exist.

[30] Accordingly, in the circumstances, I find that the appellant has provided a reasonable basis to conclude that additional records related to her request might exist and the conservation authority has failed to provide sufficient evidence to establish that it has conducted a reasonable search for all responsive records. As a result, I will order the conservation authority to conduct a further search for records relating to the property identified in the appellant's request.

ORDER:

1. I order the conservation authority to conduct a further search for permits pertaining to the property identified in the original request.
2. I order the conservation authority to provide me with an affidavit from the individual(s) who conducted the search, confirming the nature and extent of the search conducted for responsive records within 30 days of this interim order. At a minimum the affidavit should include information relating to:
 - (a) Information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
 - (b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - (c) information about the type of files searched, the search term used, or the nature and location of the search and the steps taken in conducting the search; and
 - (d) the result of the search(s).
3. The affidavit referred to above should be sent 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 this office's *Practice Direction 7* which can be found on the website at www.ipc.on.ca.

⁸ Order MO-2246.

4. If, as a result of the further search, the conservation authority identifies any permits responsive to the request, I order the conservation authority to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
5. I remain seized of this appeal in order to deal with any outstanding issues.

Catherine Corban
Adjudicator

April 16, 2013