

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2991

Appeal MA13-201

Peterborough County-City Health Unit

December 30, 2013

Summary: The appellant sought access to records relating to smoking infraction prosecutions in 2011 and 2012. The health unit located responsive records and disclosed these to the appellant. The appellant asserted that additional records should exist and questioned the reasonableness of the health unit's search. The health unit's search is upheld as reasonable.

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

BACKGROUND:

[1] The Peterborough County-City Health Unit (the health unit) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

[A] copy of any and all expenses incurred for prosecutions under the Peterborough municipal bylaw covering smoking on hospital property, being Peterborough Regional Health Center (PRHC), in respect to prosecutions in 2011 and 2012.

...

[A] copy of all invoices and any other supporting documents that substantiate any funds disbursed for prosecutions on the PRHC property in 2011 and 2012 only.

...

[A] copy of the conclusions of the audits from 2011 and 2012 . . . [including] the portions of any audit that references the funds disbursed for prosecution of the smoking bylaw on PRHC property.

[sic]

[2] The health unit located records responsive to the request and disclosed them, in their entirety, to the requester. These included:

- An analysis of the costs of prosecutions for 2007 through 2011.
- A copy of invoices and supporting documents relating to prosecutions on PHRC's property for 2011 and 2012.
- A copy of [its] 2011 Audited Financial Statements.

[3] The health unit also advised the requester that its Audited Financial Statements for 2012 were not yet available, but would be available in August 2013.

[4] The requester appealed the decision of the health unit based on his belief that additional responsive records exist regarding other prosecutions during the relevant time period.

[5] During mediation, the appellant asserted that he knew of at least one other individual who was prosecuted for the same offence by the health unit, and accordingly, responsive records relating to this prosecution should exist. In response, the health unit advised that although there was an instance where the health unit had counsel attend court for the prosecution of another individual, the matter was adjourned and, therefore, no legal costs were charged or incurred for that court appearance. The health unit also confirmed that it provided a copy of its completed audit for 2012 to the appellant. It asserted that with this disclosure, it had fully complied with the appellant's request.

[6] Mediation did not resolve the appeal, and it was moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[7] During my inquiry, I sought and received representations from the parties and shared them in accordance with this office's *Practice Direction Number 7* and section 7 of the *Code of Procedure*.

[8] In this order, I uphold the search of the health unit as reasonable.

DISCUSSION:

[9] As the appellant claims that additional records exist beyond those identified by the health unit, the sole issue for me to determine is whether the health unit 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 health unit's decision. If I am not satisfied, I may order further searches.

[10] The *Act* does not require the health unit to prove with absolute certainty that further records do not exist. However, the health unit 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

[11] 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

[12] A further search will be ordered if the health unit 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.⁵

[13] Although the appellant is not in a position to indicate precisely which records the health unit has not identified, he still must provide a reasonable basis for concluding that such records exist.⁶

[14] In its representations, the health unit states that it has located all responsive records. It asserts that no further responsive records exist. It states:

- As the appellant's request was clear, it required no further clarification to respond to the request.
- Its Accounting Supervisor who has been with it since 1989, conducted a search of electronic and paper files for any invoices, backup materials and other financial records related to prosecutions at PRHC.
- Its Manager responsible for the Tobacco Use Prevention Program who authorized the charges, verified that no other lawyers were used, and confirmed that no other individual or entity was hired for any work related

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.

⁵ Order MO-2185.

⁶ Order MO-2246.

to prosecutions for smoking on PRHC property. This Manager has 15 years of experience, with nine in a management role.

- The Manager then checked what had been authorized and verified that no other work had been requested or authorized by the Health Promoter responsible for tobacco enforcement who maintains her own files.
- A further manual search was conducted after the appellant asserted that more records exist, and no additional records were found.
- It then confirmed with the lawyer that handled the prosecution that he had not invoiced the unit for any work other than that which was released in the responsive records to the appellant. The lawyer confirmed there were no additional charges.
- It is not possible that additional records existed but no longer exist because the health unit is required to retain all financial information for seven years. It strictly adheres to this requirement. Any records falling within the time period specified in the request would not be eligible for destruction until 2018 and 2019.

[15] In support of its representations, the health unit attaches four affidavits from experienced employees.

[16] The first affidavit, sworn by the Manager, states:

- She verified all charges/invoices and approved payments for all prosecutions for smoking on PRHC property.
- She contacted both the accounting department of the health unit and the Provincial Offences Officer for the Smoke-Free Ontario Act to confirm that all responsive records were located and disclosed to the appellant.
- She also confirmed with prosecutions counsel that all charges, invoices and billings were disclosed to the appellant by electronic mail.

[17] The second affidavit, sworn by the Accounting Supervisor, states:

- He checked the health unit's electronic accounting records and paper files for all documentation related to the request.
- He is satisfied that all responsive records from the accounting department of the health unit were provided to the appellant.
- The Smoke-Free Ontario Program is audited by independent external auditors who have not reported any errors or omissions.

[18] The third affidavit, sworn by the Health Promoter and Provincial Offences Officer for the Smoke-Free Ontario Act, states:

- She is the only person authorized to enforce the non-smoking by-laws in the City and County of Peterborough and she maintains her own filing system.
- She conducted a thorough search of all tickets, notes, photos and any other records in her possession relating to the smoking provisions at PRHC.
- She is satisfied that all records related to the appellant's request have been located and provided to the appellant.

[19] The final affidavit, sworn by the Director of Corporate Services, confirms that he authorized extensive searches for records related to the appellant's requests and that he provided complete disclosure of all responsive records.

[20] In his representations, the appellant asserts that additional records exist because he personally knows of numerous individuals that have been charged with smoking on PRHC property. In support of his assertion he encloses copies of ten Provincial Offence notices. These notices are dated between August 18, 2010, and November 8, 2011; the names, addresses and birthdates of the individuals who were issued the notices have been redacted by the appellant. The appellant states that if numerous individuals were charged, as he claims is evidenced by the redacted copies of the notices, it is preposterous in his view to suggest that no records exist regarding legal expenses incurred in the numerous appearances that these charges entailed.

[21] The appellant also refutes the health unit's submission that the adjournment noted by the health unit resulted in no legal fees being incurred. He states that he was present in court on the date of the adjournment in question and it was not an adjournment. The appellant concludes by submitting:

[T]here is no way any objective person can conclude that the [health unit has] adequately discharged [its] responsibilities under section 17 of the *Act* to conduct a reasonable search for all responsive records.

[22] In its reply representations, the health unit reiterates the evidence provided by its employees under oath in the four affidavits that: all invoices related to its legal and other fees for smoking on PRHC property have been disclosed; and no other legal services were requested, authorized or paid regarding smoking on PRHC property. The health unit also states that its Enforcement Officer advised that once the notices are turned in to the Provincial Offences Office, the province assumes responsibility; therefore, while the health unit assists the prosecutor with prosecution services for tickets issued under the municipal smoking by-law, it does not have access to the judicial database. Accordingly, the health unit cannot state with certainty what the outcomes of the notices provided by the appellant were, or whether the health unit handled any prosecutions related to those notices.

Analysis and findings

[23] Having reviewed the representations and evidence of the parties, I am satisfied that the health unit conducted a reasonable search for responsive records in this appeal. I accept the affidavit evidence provided by the health unit that experienced employees knowledgeable in smoking by-law enforcement and prosecution expended a reasonable effort to locate records related to the request. While the appellant has provided copies of Provincial Offence notices in support of his assertion that additional records exist, I find that these do not provide a reasonable basis for me to conclude that additional records exist. The ten redacted notices do not contain any identifying information, and thus, it is impossible to know who the infractions relate to. The appellant's request is for records related to prosecutions in 2011 and 2012 only. While the notices were issued between August 18, 2010, and November 8, 2011, this does not establish that the individuals who received them were ever prosecuted; or if they were, that the prosecutions occurred during 2011 or 2012 such that responsive legal fees records exist.

[24] I find that the evidence before me is sufficient to demonstrate that the health unit made a reasonable effort to identify and locate all of the responsive records within its custody and control. Accordingly, I find that the health unit's search was reasonable.

ORDER:

I uphold the search of the health unit as reasonable and dismiss the appeal.

Original signed by: _____
Stella Ball
Adjudicator

_____ December 30, 2013