

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-3732-I

Appeal MA17-535

Town of Midland

February 22, 2019

**Summary:** The appellant sought access to records regarding a specified property in the Town of Midland (the town) under the *Municipal Freedom of Information Act* (the *Act*). The town searched for “any and all” records in relation to that property and advised that no responsive records were located in addition to those already disclosed to the appellant. In Interim Order MO-3661-I, the adjudicator found that there was a reasonable basis to believe that additional records exist, and ordered the town to conduct a further search for responsive records. The town did so, and provided affidavit evidence regarding its efforts. In this order, the adjudicator finds that most of the reasons that a further search was ordered have still not been addressed, and that the town’s further search efforts were not reasonable. She orders the town to conduct a further search for responsive records.

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

### OVERVIEW:

[1] The Town of Midland (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*) for the following:

Records for Property [at a specified address]

1. 2012 & 2013 maintenance on water meter and sewer works records for [a particular property]

2. 2010 - 2013 water and sewer work orders, site work orders and meter work orders records for [the above property].

[2] Upon receipt of the request, town staff were instructed to search for “any and all records related to the [specified property],” as indicated in the town’s decision letter to the appellant.<sup>1</sup> In that letter, the town advised the appellant that it could not locate any responsive records beyond those already identified in a specified previous request.

[3] The requester (now the appellant) appealed the town’s decision to the Information and Privacy Commissioner of Ontario (the IPC, or this office) on the basis that additional responsive records must exist. Since there was no mediated resolution, the file moved to the adjudication stage, where the sole issue was whether the town had conducted a reasonable search. I sought, received, and shared written representations from both parties in accordance with *Practice Direction 7* of the IPC’s *Code of Procedure*.

[4] As a result of that inquiry, I found that the appellant had demonstrated that there was a reasonable basis for her belief that additional responsive records exist. Therefore, in Interim Order MO-3661-I, I ordered the town to conduct a further search for responsive records. The town did so, and the parties exchanged representations following the town’s further searches.

[5] For the reasons that follow, I find that there is insufficient evidence that the town’s further search was reasonable, and I order the town to conduct a further search for responsive records.

## **DISCUSSION:**

### **Did the town conduct a reasonable search for responsive records?**

[6] The appellant claims<sup>2</sup> that additional records responsive to her request exist, so the issue to be decided is whether the town has conducted a reasonable search for records as required by section 17.<sup>3</sup> Although a requester will rarely be in a position to indicate precisely which records the institution has not identified,<sup>4</sup> in this case, I find that there is insufficient evidence to persuade me that the town’s further search was reasonable. Therefore, I will order the town to conduct a further search for the reasons

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<sup>1</sup> Decision letter, dated September 10, 2017.

<sup>2</sup> The appellant’s representations regarding the town’s further search ordered by MO-3661-I also raise issues that are not relevant to this appeal (including financial compensation), and will, therefore, not be addressed in this order.

<sup>3</sup> Orders P-85, P-221 and PO-1954-I.

<sup>4</sup> Order MO-2246.

explained below.

[7] 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.<sup>5</sup> 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.<sup>6</sup>

[8] To be responsive, a record must be "reasonably related" to the request.<sup>7</sup>

[9] The *Act* does not require the town to prove with absolute certainty that further records do not exist. However, the town was required to provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>8</sup> In my view, it did not do so. Most of the concerns that formed the basis of a reasonable belief that additional records exist have still not been addressed by the town, and other concerns exist about the further search conducted, based on the evidence before me.

### ***Narrowing of the scope of search***

[10] Based on the affidavits provided, I find that the town narrowed the scope of its search in response to Interim Order MO-3661-I.

[11] This appeal is from the town's decision regarding its search for "any and all" records related to the address of the property in question, a scope that was clearly indicated in the town's decision letter.<sup>9</sup> The town's representations during the inquiry process of this appeal similarly indicated that the search conducted was for "all" records, not records falling within a specific time period, or of a certain type:

- a. Complete search of all paper records within the care and control of the [t]own;
- b. Complete electronic search of all electronic records within the care and control of the [t]own.

[12] Despite the clear language of the decision letter and the town's representations during the adjudication of the appeal, if the town took issue with the scope of the search I ordered in Interim Order MO-3661-I, it was open to the town to pursue this through judicial review, or the reconsideration process of this office. The town did not do so, despite being provided with the information about this office's reconsideration

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<sup>5</sup> Orders M-909, PO-2469 and PO-2592.

<sup>6</sup> Order MO-2185.

<sup>7</sup> Order PO-2554.

<sup>8</sup> Orders P-624 and PO-2559.

<sup>9</sup> The town's decision letter, dated September 10, 2017.

process after the issuance of Interim Order MO-3661-I.

[13] Not having sought to correct the proper scope of the appeal, the scope of the ordered further search remains for "any and all" records in relation to the property address specified in the request.

[14] The town provided affidavits from five employees to describe the town's further search efforts, in response to Interim Order MO-3661-I. Four out of five of these affidavits indicate the following search parameters:

- a. 2012 and 2013 Maintenance on water meter and sewer works records for property [specified address];
- b. 2010-2013 water and sewer work orders and site work orders meter work orders records for [specified address] under Environmental Canada Policy.

[15] I find that these parameters amount to unilaterally narrowing the scope of the search for several reasons.

[16] None of the affidavits explain why the scope of the search conducted was no longer for "any and all" records related to the address in question. The limitation of the scope in this way is concerning on its own. It also means most of my concerns that led to an order for a further search largely unanswered. Without additional evidence to satisfy me that those concerns have been addressed, they remain as a basis to believe that additional responsive records exist on their own, as I will explain later in my decision.

[17] In addition, none of the affidavits explain why the scope included the words "under Environmental Canada Policy," or what such a policy is. This language is not found in the appellant's original request, the town's decision letter, or the town's representations. It is worth adding that if "Environmental Canada Policy" means "water maintenance – records related to the [m]inistry," (as described by one of the five affidavits), then the retention policy applicable to such records is 25 years. This, in turn, would invite reasonable questions about why more records have not been located for records well within the last 25 years.

[18] Before addressing the lingering issues from Interim Order MO-3661-I, I will address other aspects of concern with the town's further search efforts, beyond the unilaterally narrowed scope.

***Insufficient and/or inconsistent evidence re: physical locations searched***

[19] The affidavits of two town employees raise questions about the physical locations searched, which undermines the reasonableness of the town's search overall.

[20] The affidavit of the town Process Coordinator, Water & Waste Water management states that she searched her paper records in one paragraph, but

indicates "n/a" next to physical locations searched in another paragraph. Without more information about this apparent discrepancy, I have insufficient evidence to accept that this employee's physical records were searched. This is relevant because of the apparent importance and relevance of her position as it relates to the subject matter of the request. The appellant describes this employee in her representations "the ultimate one with power of records keeping" [sic].

[21] Similarly, a Water/Wastewater Operator for the town provided an affidavit stating that he searched his paper and electronic records, but later described the location of his physical search as "loose paper documents." This evidence does not help me understand where the employee searched, or why he might search for responsive records in "loose paper documents."

[22] The evidence about these aspects of the town's search efforts weighs towards not upholding the town's further search.

***Unaddressed/insufficiently addressed concerns from the interim order***

[23] The concerns raised in Interim Order MO-3661-I that remain can be summarized as follows:

- it is unreasonable to believe that certain records exist(ed) in isolation of others;
- there is insufficient evidence about purported statements by named town employees;
- there is no affidavit from a particular named employee with purported knowledge of the subject matter of the request;
- there is insufficient evidence about the town's retention policy concerning records such as e-mails and court orders; and
- there is no explanation in the town's representations regarding how water meter reports, etc. from as far back as 2009 could still exist, and were disclosed to the appellant in 2017, if the retention policy was one year.

*Unreasonable to believe that certain responsive records exist(ed) in isolation of others*

[24] As I discussed in Interim Order MO-3661-I, due to the content of the mayor's e-mail exchange, the court order, and records already disclosed to the appellant, it is unreasonable to believe that other records do not, or did not, exist in relation to them.

[25] The town's evidence regarding its further search efforts do not address these concerns. This weighs against upholding the reasonableness of the town's further search.

### The e-mail exchange with the mayor

[26] In Interim Order MO-3661-I, I explained that the content of the mayor's email, copied to an individual with a "midland.ca" e-mail address, provides a reasonable basis to believe that other records exist (or existed at one time) with the town. This e-mail had not been identified as a responsive record by the town (without explanation), though it indicates that the mayor discussed the by-pass issue relating to the property identified in the request with staff. Whether or not the mayor's communication to town staff was verbal, I noted that his e-mail suggests that other records could (or did) exist because his e-mail indicates that the town:

- "changed [its] inspection program to better ensure that commercial meters are not being by-passed";
- "will continue to investigate"; and
- "[will continue to] recover monies that are owing"

[27] During the inquiry, the town did not provide evidence about this e-mail exchange, beyond describing it as an e-mail exchange and self-explanatory. I found that there was insufficient evidence in relation to this record, and that it was reasonable to expect that additional records existed if the town had indeed changed its inspection program as a result (even in part) of a water by-pass at the specified property, had an investigation it was "continu[ing]", and/or had "continu[ing]" recovery efforts for monies owing.

[28] In response to Interim Order MO-3661-I, the town provided no evidence in relation to this e-mail. Therefore, my concerns about the reasonableness of the town's search in connection with this record, and its contents, remain.

[29] I do note that one of the affidavits indicates that the town does not view commercial establishments in the same way as it does residential addresses in terms of tracking leaks. This appears to be an explanation for the lack of records in connection with the commercial property in question. However, given the contents of the mayor's e-mail and some of the records disclosed to the appellant that clearly reference an investigation, I am unpersuaded to accept the implication that because the address in question is commercial, it would not have been investigated. The mayor's email and other records brought forward by the appellant clearly contradict this.

### The court order to the town

[30] During the inquiry, the appellant had attached the copy of a court order related to the property in question to her representations.

[31] The court had ordered the town's water department to produce and make available to the appellant's counsel:

. . . . copies of their complete records pertaining to the supply of municipal water to the premises known as [the specified address of the property], Midland ON for the period of time from 1 January 2012 to 31 December 2013, which records shall include water accounts, meter readings, meter inspection reports, meter alteration and repair, notes and memoranda and correspondence related to suspicions or allegations of meter tampering or supply of municipal water by-passing the meter.

[32] As I noted in Interim Order MO-3661-I, this court order itself clearly fell within the scope of "any and all" responsive records, but the town did not ever identify it as a responsive record. The town's representations in the inquiry were limited to the following: "*Exhibit 2: is a court Order and is self-explanatory.*" I did not find that the case. I found that it is not reasonable to believe that a court order to the town could exist in the absence of any other records. This, too, weighed heavily against upholding the reasonableness of the town's search.

[33] In response to Interim Order MO-3661-I, the town's solicitor conducted a search in relation to that court order, but his search yielded no responsive records. His affidavit also does not help me understand why that was, though I had clearly questioned how it was possible for the town to have received a court order and not generated any records as a result.

[34] In addition, his affidavit describes search terms that the appellant submits were too narrow, and I agree with that submission. For example, he did not search by the property address or any court-related numbers or references, though this address was specifically mentioned in the court order and the appellant's request. I find that unreasonable.

[35] Without explanation about these concerns, I find that the town's search efforts in respect to this court order are not reasonable.

#### Records already disclosed by the town

[36] In Interim Order MO-3661-I, I found that the content of certain records disclosed to the appellant, when considered alone, or in conjunction with the mayor's e-mail reference to an investigation and monetary recovery efforts, also make it reasonable to believe that other related, or similar, records exist. I discussed records that clearly used the words "investigation" and "tampering," and a lawyer's e-mail referencing such records with many detailed questions. I found that it is reasonable to believe that other records exist in relation to these records, based on their contents. The town's representations during the inquiry did not explain how these records that were disclosed to the appellant could exist in isolation of other records, given their contents. The town's evidence after the issuance of Interim Order MO-3661-I does not address this issue either. Therefore, my concerns stand.

*Insufficient evidence about purported statements by named town employees*

[37] As discussed in Interim Order MO-3661-I, the appellant submits that named town employees advised her that there was by-pass at the property in question, but I found that the town's representations did not sufficiently address these claims during the inquiry. The town's evidence following its further search does not substantially change this concern.

[38] In my interim order, I reasoned that if the named employees (who included the former manager and chief operator of the town's Waterworks department)<sup>10</sup> did confirm by-pass to the appellant, it is reasonable to expect that they would have communicated about the alleged by-pass, and that there would be electronic or paper records of those communications.

[39] During the inquiry, the town's representations were silent on the substance of those claims. Therefore, I found that it was reasonable to question whether those named employees' records were searched, especially given the content of the mayor's email, clearly referencing an investigation and recovery effort. My order pointed to which paragraphs of the appellant's representations mentioned these employees, and included a specific provision to search their records.

[40] However, the town's response does not mention three out of the five named employees' records, without explanation. This does not allow me to find that this aspect of the search was reasonable.

[41] The town did have its current manager of Water and Wastewater search for the records of the other two named employees, one of them a past employee, one of them still employed with the town.<sup>10</sup> Because there is no evidence that the scope of these searches was not narrowed as discussed earlier, I cannot accept that these two searches were sufficient.

*No affidavit from a named employee with purported knowledge of the subject matter of the request*

[42] As just discussed, a search was conducted on behalf of one of the employees flagged in my order, but not by that employee himself. In her representations, the appellant took issue with the fact that this particular employee did not provide an affidavit because she alleges that he had verbally confirmed the water by-pass issue to her. In response, the town explained that that employee was away during the three-

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<sup>10</sup> His affidavit also states that, in addition to searching his own records, he searched the records of three of the five employees who did provide affidavits in response to my interim order. It is not clear if these searches were in addition to the ones these three employees attested to, and if so why they were necessary.



week period of affidavit preparation in response to Interim Order MO-3661-I. Although this response was given long after that three-week period of absence would have ended, the town did not ask the employee to provide an affidavit with its sur-reply representations. However, the town did attach a print-out of what it describes as an email from this employee to the town solicitor before he left. It is unsigned, and the relevant content is brief: "*I have checked all my paper records and electronic records and in good conscience [I] do not have any records regarding the [property in question]. I have already submitted everything billing related for this account.*" The town provided this e-mail with its sur-reply representations. It is not clear to me why it did not provide this employee's evidence in a more detailed, affidavit form, as expected of all other town employees, especially given the allegation made by the appellant with respect to this employee's level of experience and knowledge in relation to the property in question.

[43] I find that the failure to provide an affidavit from this particular employee, detailing his search, undermines the reasonableness of the town's search.

*Insufficient evidence about the retention policy*

[44] The Notice of Inquiry had asked the town to provide representations about its retention policy, but as discussed in my interim order, the town provided insufficient evidence of this. It had only addressed the retention policy for one category of responsive records, without describing its retention schedule for records such as the mayor's e-mail exchange with the appellant or the court order to the town, which are responsive to the request.

[45] In response to my interim order, the town provided additional information about its retention policy with respect to maintenance records related to the ministry (25 years), water customer inquiries (1 year), water and sewer work orders (2 years), and water, sewer, metering and site work orders (1 year).

[46] Although I had specifically flagged the lack of evidence about the retention schedules for records such as the mayor's email and the court order in my interim order, the town's affidavits are silent on the retention policy for such records. Given their relevance to the request and the context in which they were created (in relation to an alleged water by-pass), I do not find that I have sufficient evidence to dispose of this issue. The town's failure to provide details about whether records such as e-mails and court-related records were destroyed weighs against upholding the town's search.

*Failure to explain retention schedule and age of disclosed records*

[47] In Interim Order MO-3661-I, I found that there was no explanation in the town's representations regarding how water meter reports, etc. from as far back as 2009 could still exist, and were disclosed to the appellant in 2017, if the retention policy was one year. The town's affidavits in support of its further search do not help me understand this. The fact that the one additional (undated) record that was found in the town's

further search relates to 2013 only adds to this concern and, in my view, forms a reasonable basis for believing that other records from this period (beyond the one-year mark) exist.

**ORDER:**

1. I do not uphold the town's search for records responsive to the request. I order the town to conduct a further search for responsive records. That search is to include the following:
  - a. I order the town to ask the town employees (including the employee referred to at paragraphs 42-43 of this order) with specific knowledge about water consumption or metering to conduct searches for "any and all" records in relation to the property in question. These searches must be for both electronic and paper records. These searches must include searches for any records relating to the contents of the mayor's e-mail to the appellant (regarding discussions with town staff, a change to the town's water inspection program, and ongoing town efforts to investigate and recover monies in relation to the specified property), and the court order issued to the town.
  - b. Separate from the search for court-related records mentioned in (a), I also order the town to ask its legal department to conduct a broader search for responsive records relating to the court order referenced in this order, and to provide an explanation as to why there are no records, if none are found.
  - c. I also order the town to search for "any and all" records regarding the property in question that is the subject matter of the request, in the paper records of all the named employees (referenced in the appellant's representations at paragraphs 1, 2, 11(b) and 13) who are said to have advised and/or confirmed that there was a by-pass issue, and to ask its information technology department to search for responsive records in the e-mail records of these employees as well.
2. I order the town to provide me with an affidavit or affidavits sworn by individuals who have direct knowledge of the searches, which are to include at a minimum the following information:
  - the name(s) and position(s) of the individual(s) who conducted the searches;
  - the steps taken in conducting the searches;
  - the locations searched;

- the results of the search; and
  - if no further records are found from previous timeframe of the request, an explanation as to why, given that some records for this period appear to still exist (and were disclosed to the appellant), notwithstanding the town's stated retention period of one year.
3. I order the town to provide me with an affidavit or affidavits sworn by individuals who have direct knowledge of the applicable retention policy or policies regarding e-mails and court-related records, which are to include at a minimum the following information:
- the name(s) and position(s) of the individuals(s) who have direct knowledge of the applicable retention policy or policies;
  - if no responsive records are located in relation to the contents of the mayor's e-mail or the court order, a reasonable explanation as to why that is.
4. I order the town to provide me with the affidavit(s) by **March 26, 2019**.
5. If the town locates further records responsive to the request, I order it to issue an access decision to the appellant in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
6. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1, 2, 3, and 4 of this order.

Original signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

February 22, 2019 \_\_\_\_\_