

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3934- I

Appeal MA18-00901

The Corporation of the Town of Amherstburg

July 7, 2020

Summary: The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* to the town for correspondence about a particular matter from the town's CAO (and his staff) to the OPP. The town located two records, which were partially withheld on the basis of section 14(1) of the *Act*. The appellant appealed to this office. During the mediation, the town disclosed the records in full. The appellant was not satisfied with the reasonableness of the town's search.

In the inquiry, the town explained the steps taken to complete the search, which included both a manual and an electronic component. The appellant asserted that the town had improperly narrowed the scope of her request by limiting the electronic search undertaken and asserted that there was a reasonable basis to conclude that additional records existed. In this interim order, the adjudicator finds that the town did not conduct a reasonable search and orders it to conduct additional searches.

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

OVERVIEW:

[1] The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the Town of Amherstburg (the town) for the following records:

Correspondence from CAO [named individual] to the OPP regarding the police costing, including, but not limited to, letters, emails and notes regarding telephone calls from him and his staff.

[2] The town located responsive records and issued a decision granting her partial access to them. The town applied the mandatory personal privacy exemption in section 14(1) of the *Act* to withhold portions of the records.

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

[4] During mediation, the town issued a revised access decision to the appellant, granting her complete access to the two records it had located. Accordingly, the application of section 14(1) is no longer at issue in this appeal.

[5] The appellant reviewed the records and confirmed her interest in pursuing the appeal on the basis of whether the town conducted a reasonable search for records. The town provided the appellant with additional information regarding its searches. However, the appellant was not satisfied with the town's response.

[6] Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. The appellant and the town submitted representations in the inquiry. Representations were shared in accordance with the IPC's *Code of Procedure* and Practice Direction 7.

[7] In this order, I find that the town did not conduct a reasonable search and I order it to conduct additional searches.

DISCUSSION:

[8] The sole issue in this appeal is whether the town's search for responsive records was reasonable. 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.

[9] 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 To

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

be responsive, a record must be "reasonably related" to the request.³

[10] 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

[11] 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.⁵

[12] 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.⁶

Representations

The town's representations

[13] The town states that its search was reasonable. In support of its position, the town provided information about the steps it took to conduct the search. The town's head asked the Acting Manager of IT (the IT Manager), the Chief Administrative Officer (the CAO) and his Executive Assistant (the EA) to search for the records. As evidence of the steps taken, the town produced copies of internal memoranda from the head to these employees describing the request, asking them to search their records and to provide written assurance that necessary searches were undertaken.

[14] In further support of its position that its search was reasonable, the town relies on the search criteria used by the IT Manager to conduct the search, which were:

Email From contains '[name of CAO]@amherstburg.ca' AND

Email To/Cc contains 'opp.ca' AND

Email Date on or after '[specified date]-500' AND

Email Date on or before '[specified date] -500'

[15] Based on the criteria, the town asserts that the searches conducted went beyond the request made by the appellant because it would have yielded records of the CAO's communications both from *and* to the OPP.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

The appellant's response

[16] In response, the appellant states that the evidence provided by the town demonstrates that the town's search was unreasonable and narrower than her request. She points to the fact that the search terms used by the IT Manager were limited to emails with the CAO's email address when the request expressly sought communications "from [the CAO] and his staff."

[17] The appellant also points to language contained in the records that were disclosed to her as evidence that there ought to be additional records. One record dated May 8, 2017 indicates that there would be future additional communications from the CAO to the OPP.

[18] Regarding the memoranda, the appellant pointed out that contrary to the town's representations, the CAO himself had not provided a signed assurance.

The town's reply

[19] In reply, the town provided further information about its access request procedures in general. It explained that all town employees are trained about the institution's obligations under the *Act*. As I understand the town's representations on this point, this means that it reasonably relies on the signed assurances provided by the staff who performed the searches.

[20] The town provided further information about how the two methods of searching – paper-based and electronic – work together. The town asserts that the electronic search is in addition to the paper-based search. On this point, I understand the town to be saying that the electronic search is an extra, failsafe mechanism to ensure that nothing is missed in any paper-based search undertaken.

[21] The town also provided more information about the steps it took to respond to the specific request at issue. It explained that the "CAO's Department" searched "the emails of the CAO and his staff, and, physical file holdings." The town says that the "Office of the CAO consists of two staff members, the CAO and the EA to the CAO." On this point, I understand the town to be saying that the EA performed the necessary search of the CAO's office.

[22] The town explained that the electronic search was performed first, then the "administrative clerk" had discussion with the CAO and his EA about the search. The town explains that the CAO and the EA provided assurance that there were no meeting notes, letters, notes of telephone calls or other records that were in the scope of the appellant's request. The town also explains that the EA searched one of the town's common hard drives, yielding no results. The town explained that the CAO was present when his EA signed the memorandum; however, the town provided a newly-signed assurance form in this inquiry.

[23] In response to the appellant's assertion that the electronic search was too narrow, the town explains:

... The Town of Amherstburg takes its responsibilities under the Act seriously and endeavours at every opportunity to ensure that redundanc[ies] exist for additional assurances of transparency and accountability. While the IT search included a field from "[CAO's email]" this was:

- a) In keeping with the wording of the request stating "*Correspondence from [CAO]*"
- b) With the understanding that the only other individual in the Office of the CAO, the Executive Assistant, was already tasked with performing a search;
- c) With the understanding that this search itself was redundant to a search being processed within the department itself and acted as an additional component of the search and was not an exhaustive interpretation of the request;
- d) With the understanding that the CAO's Department has linked emails that provide duplication of content between accounts; and,
- e) With the understanding that this particular search was merely with regards to email communication and did not constitute the entirety of the search performed.

Appellant's sur-reply

[24] In sur-reply, the appellant asserts that the electronic search ought to have included the email account of the EA. The appellant also describes specific records that she is aware of that ought to have been yielded by the search: emails to the OPP from the CAO's EA, possibly flowing from or related to a May 8, 2017 email from the OPP with the re line: "Greetings and Commencement of the OPP Costing and Proposal Process"; and, a letter from the CAO to the OPP.

The town's sur-reply

[25] Although invited to do so, the town made no specific response to the appellant's assertion that these specific records exist.

[26] I also received representations from both parties about language contained in the decision letter that indicated that the appellant had altered her request. The town explained in reply to this that the language at issue was included in error. The town does not take the position that the appellant altered her request, so I will not discuss this issue further in this order.

Analysis and Finding

[27] I find that the town's search was not reasonable, and I will order it to conduct a new search.

[28] I am persuaded by the appellant's argument that the *electronic search* was too narrow and that it ought to have included the EA's email address. The town does not dispute that the scope of the request included the CAO's staff and it has explained that the CAO has only one staff member. While I acknowledge that the town stands by the reasonableness of the search, it has not provided a sufficient explanation for why no electronic search was undertaken of the EA's email.

[29] I further acknowledge that the town takes the position that the electronic search was only complementary to the paper-based search. However, the town has also emphasized that both components of the search are important. To that end, in this case, I have concluded that it is in fact because the town itself relies on the electronic component of the search that the omission of the EA's email from the search renders the search incomplete.

[30] I am also persuaded that there is a reasonable basis to conclude that there ought to be additional records. Using the content of the records that were disclosed to her in this appeal, the appellant has established a reasonable basis that additional records ought to exist. Further, the appellant has possession of responsive records that have not been disclosed by the town in this appeal. Although it had the opportunity to do so, the town has not provided an explanation for this fact.

ORDER:

1. I order the town to conduct a further electronic search in response to the appellant's request using the email addresses of the EA and any other staff in the CAO's office.
2. I order the town to conduct a further search of its electronic and paper record holdings for records that may flow from the May 8, 2017 email referred to in paragraph 24 of this order.
3. I order the town to provide me with an affidavit sworn by the individual(s) who conduct(s) the further searches by **August 10, 2020** describing its search efforts. The affidavit(s) should include the following information:
 - a. the names and positions of the individuals who conducted the searches;
 - b. information about the types of files searched, the nature and location of the search(es) and the steps taken in conducting the search(es);
 - c. the results of the search(es); and,

- d. if the search described in order provision 2 does not yield any further results, an explanation.
4. The information should be provided by way of representations with the affidavit that may be shared with the appellant unless there is an overriding confidentiality concern.
5. If the town locates additional responsive records as a result of its further search, I order it to issue an access decision to the appellant in accordance with the requirements of this *Act*, treating the date of this order as the date of the request.
6. I reserve the right to require the town to provide me with a copy of the information it discloses to the appellant in accordance with this order.
7. I remain seized of this appeal to deal with: any outstanding issues arising from order provisions 1 to 3; and, if the parties are unable to resolve them, any additional time that may be required by the town to comply with the order due to the current COVID-19 situation.

Original Signed by: _____
Valerie Jepson
Adjudicator

_____ July 7, 2020