Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4104-I

Appeal MA19-00447

Municipality of Temagami

September 24, 2021

Summary: The Municipality of Temagami (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the installation of a punch lock on the door of its public works office. The municipality granted access to one responsive record. The appellant claimed further responsive records should exist. In this order, the adjudicator finds that the municipality did not conduct a reasonable search for responsive records and orders 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.

OVERVIEW:

[1] The Public Works Department of the Municipality of Temagami (the municipality) installed a punch lock on its office door. After the lock change, an allegation was made on a Facebook page[1] that the punch lock's installation was the result of an incident or complaint involving an intruder on the premises – an allegation the municipality denies. The municipality then received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the alleged incident and the installation of the punch lock. Specifically, the request was for access to:

[1] Not the municipality's Facebook page.

"…all records in the possession of and/or accessible to the Municipality:

- either in print or electronics (i.e. emails) between and among:
    - [named individual 1]
    - [named councillor 1], [Mayor]
    - T/A [named individual 2],
    - [named councillor 2], [named councillor-elect 2], [named Council candidate 2];[2]
    - Public Works Superintendent [named individual],
    - Public Works Clerk [named individual] and
    - Public Works Committee Members;
- and including notes and reports made by and/or held by Administrators and/or managers of departments of the Municipality in such as journals [sic];
- and including confirmation of any discussion regarding this issue in a Council public or closed session;

all of which as they pertain to [named individual 1's] allegations that a false accusation was made by a former Public Works Committee member regarding and surrounding the reasons for the installation of a punch lock on the Public Works office; within the following time period:

1. between the dates of September 27, 2018 to March 20, 2019.

And further, the undersigned also requests correspondence and or notes and such as [sic] journal entries made by and/or held by Administrators and/or managers of the Municipality of the alleged incident surrounding the installation of the punch lock, as well as those of the Public Works Clerk, including the date of the alleged incident; and within the following time period:

2. between the dates of the alleged incident and March 20, 2019.

And further, the undersigned requests a copy of the letter from the Municipality that [named individual 1] alleges to have received and that [named individual 1] purports in his words in a Facebook post,

[2] This part of the request names the same individual acting in different capacities.

> subsequently posted by [named councillor 2] to his Facebook Group Page (Temagami Talk), "clearing me of any wrongdoing at the Public Works office".

[2] The municipality asked the requester for clarification, and the parties exchanged correspondence in an effort to clarify the request. The municipality also asked the requester to provide a specific date of the alleged incident referred to in the request.

[3] The municipality issued a decision stating that no responsive records exist, and that it had deemed the request to be frivolous or vexatious.

[4] The requester, now the appellant, appealed the municipality's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The parties participated in mediation to explore the possibility of resolution. During mediation, the municipality withdrew its claim that the request was frivolous or vexatious. That issue is therefore not before me in this appeal.

[5] The municipality also conducted a further search, and located one responsive record to which it granted access.

[6] The appellant, however, continued to raise concerns about the reasonableness of the municipality's search for responsive records, and maintained that additional responsive records should exist to which the municipality did not grant access.

[7] With no further mediation possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry, during which I received representations from the appellant and the municipality that were shared between them in accordance with the IPC's *Practice Direction 7* on the sharing of representations.

[8] In this interim order, I find that the municipality did not conduct a reasonable search for responsive records. I order the municipality to conduct a further search.

DISCUSSION:

[9] The only issue in this appeal is whether the municipality conducted a reasonable search for records that are responsive to the appellant's request.

[10] 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.[3] 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.

---

[3] Orders P-85, P-221 and PO-1954-I.

[11] 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 it has made a reasonable effort to identify and locate responsive records.[4] To be responsive, a record must be "reasonably related" to the request.[5] 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.[6]

[12] 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.[7]

Representations

[13] Both parties described in their representations some of the history of their interactions relating to the appellant's request, and their respective positions about the reasons for the installation of the punch lock. The municipality provided copies of correspondence exchanged with the appellant about the steps taken to clarify the request. The appellant included emails relating to Facebook comments about the alleged incident that she says led to the punch lock's installation, and other matters such as the municipality's social media policy and the implementation of a municipal code of conduct. Although I have reviewed all of the parties' representations and attachments, I have only summarized portions of the representations relevant to the issue of the reasonableness of the municipality's search for responsive records, which is the sole issue before me.

The municipality's representations

[14] The municipality says that the appellant's request was focused on correspondence relating to the alleged incident involving individual 1 (which the appellant says resulted in the installation of the punch lock). According to the municipality's representations, its initial searches did not locate responsive records, even after the request was first clarified. However, the municipality says that after further clarification, it searched for and did locate a responsive record that it eventually disclosed to the appellant. The record was a letter to an individual named in the request (individual 1) which stated, among other things, that the installation of the punch lock was not the result of any actions by that individual.[8]

---

[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2649 and PO-2592.
[7] Order MO-2185.
[8] According to the municipality's representations, the municipality initially denied access to this record on the basis that once it had sent the letter, it was no longer in its custody or control. The municipality later revised its position and granted access to the letter.

[15] The municipality submits that it has spent considerable time on the request, conducted numerous searches, and that the only responsive record created (and located) is the letter that has been disclosed to the appellant.

[16] The municipality submits that its legal counsel had telephone conversations with the clerk, mayor, and clerk-treasurer, and that each advised that they searched their records electronically and in hard copy and confirmed that they have no other records relating to this matter.

The appellant's representations

[17] The appellant submits that she made a request for access to documentation as it pertained to the installation of the punch lock, and "to obtain records as they pertained to [individual 1's] allegations that a false accusation was made by a former Public Works Committee member regarding and surrounding the reasons for the installation of a punch lock as well as to acquire a copy of the letter from the Municipality that [individual 1] alleges to have received."

[18] The appellant says that, in 2018, individual 1 posted a comment on a Facebook page, to which the appellant says she replied with a comment that individual 1 was the cause of the punch lock's installation. The appellant submits that she had numerous communications, oral and by email, with various municipal representatives about the reasons for the lock's installation, including the treasurer/administrator and mayor. She submits that the account originally conveyed to her about the lock – that an unknown intruder (later identified as individual 1) barged into the public works office and verbally intimidated an employee – eventually "morphed" into a story that the lock was simply upgraded to better suit the building's needs.

[19] The appellant submits that it was only through mediation that she eventually received access to the record disclosed to her (the letter from the municipality to individual 1). She submits that she continues to believe "that there are further responsive records that have not been sought by the Municipality, that there was only one search made and that it is likely that the search in question was very narrow in scope."

[20] The appellant also submits that the municipality did not provide all details of its searches, as it was asked to do in the Notice of Inquiry, and that it has not explained whether it searched for emails or notes from Public Works Committee members or from members of council during the time frame set out in the request.

The municipality's reply representations

[21] In its reply representations, the municipality submits that the treasurer/administrator sent a request to the mayor, a councillor named in the request, and two public works employees asking for any notes or correspondence about individual 1's allegation that a Public Works Committee member had falsely accused

individual 1 about the reason for the installation of the lock.

[22] The municipality also says that the deputy treasurer "had a conversation" with the public works superintendent, who informed her that it was not a specific incident that led to the lock's installation and that the lock was installed as a safety measure since the office is left vacant at times and sometimes there is only one employee in the building. According to the municipality's representations, there was no complaint or report of an incident that led to the installation of the lock.

Analysis and findings

[23] The onus is on the municipality to provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. While the municipality states in its representations that multiple searches were conducted, the municipality did not provide details of those searches or sufficient evidence to demonstrate that it has conducted a reasonable search.

[24] As I have noted above, the *Act* does not require the municipality to prove with absolute certainty that further records do not exist. However, the municipality must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[9]

[25] In the Notice of Inquiry sent to the municipality, I asked it to respond to a number of questions with respect to the search conducted, including the following:

> Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

[26] The municipality's representations state that it conducted multiple searches and has no other records relating to this matter. The municipality states that its legal counsel had "numerous telephone conversations" regarding this appeal with the clerk, mayor and clerk-treasurer, who searched their records electronically and in hard copy. The municipality also submits that the treasurer/administrator had conversations with municipal employees and sent an email asking individuals named in the request to search their records. Although the municipality has provided a copy of this email, its representations do not include details about the searches, by whom these searches were conducted, the places or types of files searched, or the results, except that one letter was sent to individual 1 and was eventually disclosed.

[27] The appellant's request was for hard-copy or email communications exchanged between and among a list of individuals, including the mayor, councillors, employees

[9] Orders P-264 and PO-2559.

and Public Works Committee members, as well as correspondence, notes or journal entries relating to the alleged incident surrounding the installation of the lock. It may well be that the lock's installation was not precipitated by the incident described by the appellant, or that no formal complaint was ever filed before the lock was installed. However, the appellant provided the IPC with copies of emails she exchanged with municipal representatives and employees, including those identified in her request, discussing the lock and the incident she believes was the catalyst for its installation, but that appear not to have been located by the municipality's searches. In these circumstances, I am satisfied that the appellant has provided a reasonable basis for her belief that further responsive records may exist.

[28] For these reasons, and based on the municipality's representations, there is insufficient evidence before me on which to find that the municipality has conducted a reasonable search for responsive records. I therefore order the municipality to conduct a further search.

ORDER:

1. I order the municipality to conduct a further search for responsive records.

2. I order the municipality to provide me with an affidavit sworn by the individual who conducts the search within 21 days of this Interim Order. At a minimum, the affidavit should include:

    a. information about the employee swearing the affidavit and a statement describing the employee's knowledge and understanding of the subject matter and scope of the request;

    b. the date(s) the person conducted the search and the names and positions of any individuals who were consulted in conducting the search;

    c. information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;

    d. the results of the search;

    e. whether it is possible that responsive records existed but no longer exist. If so, the municipality must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and,

    f. if, as a result of the further search, it appears that no further responsive records exist, a reasonable explanation for why further responsive records do not exist.

3. If the municipality locates additional records as a result of its further search, it must provide a decision letter to the appellant regarding access to those records, including the exemptions claimed, if any, to deny access, in accordance with the *Act*. The municipality shall treat the date of this order as the date of the request for the purpose of the procedural requirements for responding to the request.

4. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1 and 2 of this order.

Original signed by: September 24, 2021

Jessica Kowalski
Adjudicator