Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4206

Appeal MA19-00212

Regional Municipality of Waterloo

May 31, 2022

Summary: The Regional Municipality of Waterloo received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to the appellant's property and requests to obtain fill from a construction site related to city's light rail transit system. The region issued an access decision granting the appellant partial access to records it located. The appellant appealed the region's decision to the Information and Privacy Commissioner of Ontario claiming that further records responsive to the request should exist. In this order, the adjudicator finds that the region conducted a reasonable search for responsive records and that records held by the construction company are not in the custody or under the control of the region. The appeal is dismissed.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1) and 17.

Orders and Investigation Reports Considered: Order PO-2103.

Cases Considered: *Canada (Information Commissioner) v Canada (Minister of National Defence)* 2011 SCC 25.

BACKGROUND AND OVERVIEW:

[1] This order addresses an access request submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Regional Municipality of Waterloo (the region) for records relating to a request by the appellant to obtain fill (for

its own use) from a light rail project construction site.

[2] By way of background, in March 2014 the region approved GrandLinq as the team to design, build, finance, operate and maintain stage 1 of its light rail project known as ION LRT.[1] GrandLinq is a group of companies with development, investment, construction and transportation expertise. The key members of GrandLinq are Plenary, Meridiam, Aecon, Kiewit and Keolis.[2]

[3] The construction companies Aecon and Kiewit are the companies primarily responsible for the design, construction and build of the LRT project. One of main issues in this appeal is the appellant's assertion that the record holdings of GrandLinq, Aecon and Kiewit, which may hold records responsive to the request, are under the control of the region for the purpose of section 4(1) of the *Act*, which I address below. The appellant uses the term "GrandLinq" or "consortium" throughout its submissions when referring to the companies responsible for the construction and build of the LRT project.

[4] The appellant submitted a request under the *Act* to the region for "any and all records" relating to itself, business and property and the importation or dumping of fill, importation of chemical fill, alteration of grade to the property and/or CN Rail or the railway line through the property. Further particulars of this request are set out below.

The first search

[5] The region located responsive records and granted the appellant partial access to the records.[3] Section 21(1) provides that the region must give written notice where there is a reason to believe that a record contains information that affects interest of another party. In this instance, the region notified the City of Kitchener who did not object to the release of information to the appellant.

[6] The appellant subsequently filed an appeal with the Information and Privacy Commissioner of Ontario (IPC) claiming that additional records should exist. However, the appellant did not appeal the region's exemption claims under the *Act*.[4]

[7] An IPC mediator was assigned to the file to explore settlement with the parties.

The second search

[8] During mediation, the region agreed to conduct another search based on specified search terms agreed upon by the parties (the second search). The parties agreed that the second search would be confined to records located in the region's

[1] Page 17 of the ION Story, updated Fall 2016, and located on the region's rapid transit website.
[2] Ibid., page 18.
[3] The region's initial decision letter is dated February 12, 2019.
[4] The region claimed that sections 8(1)(d), 14(2)(h) and the personal privacy exemption under section 14(1) applied to the withheld information.

Electronic Document Management System (DOCS) and email system using the following six specified terms: address of the property; appellant's name; name of appellant's business; name of a dump site; appellant's email address; and name of pit site. The parties also agreed that the second search would not include records relating to provincial offence court matters. Finally, the parties agreed that the appellant would pay a maximum fee of $1,200 for the second search.

[9] Following its receipt of a fee deposit, the region conducted its second search and located additional records. The region wrote to the appellant on September 19, 2019 identifying two records it takes the position are under the custody and/or under the control of the Grand River Conservation Authority (GRCA). In its letter, the region indicated that it transferred this portion of the request to the GRCA under section 18(3) of the *Act*. The transfer of that portion of the request to the GRCA is not at issue before me.

[10] The region issued an access decision to the appellant on October 11, 2019, granting it partial access to responsive records located as a result of its second search. The region claimed that certain exemptions under the *Act* applied to the withheld portions of the records and the appellant again did not dispute the application of the exemptions applied by the region.[5] The region also provided the appellant and the IPC with a two- page Index of Records which identified the records disclosed to date, records determined to be non-responsive and records the region was prepared to disclose to the appellant after the expiry of time for a third party to file an appeal with the IPC. The third parties notified during the second search were the Ministry of the Environment (Canada), Ministry of Environment (Ontario), and Grand River Conservation Authority (GRCA). In addition, three companies with expertise in waste disposal, soil sampling and chemical testing were notified under section 21(1). Ultimately, no third party notified by the region appealed the region's access decision and the records identified in the Index of Records relating to these parties were disclosed in full to the appellant with the region's November 13, 2019 letter.

[11] The appellant wrote to the mediator on January 23, 2020 and indicated that it was not satisfied with the results of the second search. The appellant's January 23, 2020 letter did not raise questions about the application of exemptions claimed by the region, the region's position that some records located were non-responsive or the region's decision to transfer part of the request to GRCA. Accordingly, these issues will not be addressed in this order.

[12] However, the appellant asserted that the second search should have located additional records. The appellant attached a document list and chart to its letter to the mediator in support of its position that additional records exist. In that letter, the

[5] Sections 8(1)(d), 14(2)(h) and 12 of the *Act*. The region also told the appellant in its letter that the third party information exemption under section 10(1) may apply to some of the withheld information if the third parties notified by the region under section 21(1) appealed the region's access decision.

appellant states:

> Based on the disclosure received from the Region to date, it is our belief that there are still many more documents related to [the appellant's name, its property and] fill importation activities.
>
> In addition, we request that the third parties GrandLinq, Aecom and Kiewit conduct a second search of the main terms previously requested to ensure these documents are located.

[13] The companies identified in the appellant's January 23, 2020 letter were tasked with the design, construction and build of the light rail project. For the remainder of this order, I will refer to these three entities as "the construction companies" and the appellant's request that the region direct them to conduct a search as the appellant's follow-up request. None of the construction companies identified in the appellant's follow-up request were previously notified by the region under section 21(1) during the first or second search.

[14] The region responded by letter directly to the appellant on February 7, 2020 taking the position that the construction companies' records were not in its custody or under its control for the purpose of section 4(1) of the *Act*. The region also said it reviewed the documents attached to the appellant's letter and "revisited" the results of the second search but concluded no further records exist in its record holdings.

[15] No further mediation was possible. As the appellant continued to raise questions about the reasonableness of the region's search, the file was transferred to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry.

[16] I commenced my inquiry by inviting the representations of the region and the appellant. The parties submitted representations in response, including reply representations and sur-reply representations. The parties consented to their representations being shared with one another in accordance with the IPC's *Code of Procedure* and Practice Direction 7.

[17] In this order, I find that the construction companies' records that may be responsive to the appellant's request are not in the custody or under the control of the region. I also find that the region's search for responsive records in its custody or under its control is reasonable and dismiss the appeal.

PRELIMINARY ISSUE:

A. What is the scope of the request for records? Which records are responsive to the request?

[18] The circumstances surrounding the region's second search raise questions about the scope of the request which require clarification. Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

1. A person seeking access to a record shall,

    a. make a request in writing to the institution that the person believes has custody or control of the record;

    b. provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

. . .

2. If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[19] To be considered responsive to the request, records must "reasonably relate" to the request.[6] Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester's favour.[7]

[20] The first search the region conducted was in response to the appellant's initial request for:

> … any and all records from the date range of [January 1, 2009 to the date of the request, December 5, 2018] pertaining to the following:
>
> - [specified property];
> - [individual's name]; and/or
> - [business name].
>
> This is including, but not limited to, any and all records or documents related to:

[6] Orders P-880 and PO-2661.
[7] Orders P-134 and P-880.

- importation or dumping of fill;
- importation of chemical fill;
- alteration of grade to the Property; and/or
- CN Rail or the railway line flowing through the Property.

Such documents include, but are not limited to, any:

- plans;
- drawings;
- licenses;
- applications;
- drafts;
- hand-written notes;
- permits or letters of permission;
- letters;
- e-mails;
- internal correspondence;
- correspondence with the Township of North Dumfries;
- correspondence with Aecon Group;
- correspondence with Grandlinq;
- correspondence with the Grand River Conservation Authority; or
- correspondence with any transportation companies.

[21] The region conducted a search for responsive records and granted the appellant partial access to the records. The appellant appealed the region's access decision to the IPC claiming that additional records should exist.

[22] As noted above, during mediation, the region agreed to conduct a second search for responsive records. The parties agreed that the region would search its DOCS and email system for responsive records and that the following six specified terms would be used:

- Address of the property;
- Appellant's name;
- Name of appellant's business;
- Name of a dump site;
- Appellant's email address; and
- Name of pit site.

[23] The region's July 26, 2019 specifying the parameters of the second search, also confirmed the parties' agreement that no records held by the region's Provincial Offences Court would considered responsive "as there is a routine disclosure for obtaining those records."

[24] The appellant subsequently paid the fee deposit the region requested in its July 26, 2019 letter and the region reported the results of the second search in its letter to the appellant, dated October 11, 2019. The letter indicates that additional responsive records were located as a result of the region's search of its DOCS and email systems using the six specified search terms. The appellant was granted partial access to the located records along with an Index of Records.

[25] In response, the appellant took the position that additional records should exist. The appellant set out its reasons why it believed that additional records should exist in its January 23, 2020 letter. In that letter, the appellant attached a list of documents and chart (document list). Later in this order, I will review the appellant's document list and determine whether the appellant has demonstrated a reasonable basis for concluding that additional records exist.

[26] The appellant also requested, in its January 23, 2020 letter, that the construction companies "conduct a second search of the main terms previously requested to ensure these documents are located" (the appellant's follow-up request).

[27] The region responded by letter directly to the appellant on February 7, 2020 taking the position that the construction companies' records were not in its custody or under its control for the purpose of section 4(1) of the *Act*. Accordingly, before I determine whether the region conducted a reasonable search I must determine whether the construction companies records which may respond to the request are in the custody or under the control of the region.

[28] For the sake of clarity, I find that no records held by the region relating to Provincial Offences Court, which includes complaint matters, are responsive to the request. As noted above, the parties agreed during mediation that records relating to provincial offences matters would not be considered responsive. However, there are a

few instances in the appellant's representations in which it appears that the appellant makes arguments that records relating to complaint matters should have been located in the region's record holdings. However, no further mention of these types of records will be made in this order but for the appellant's argument that the construction companies have these types of records in its record-holdings and the region should be ordered to direct the companies to search for such records.

ISSUES:

A. Are the construction companies' records which may respond to the appellant's request "in the custody" or "under the control" of the region under section 4(1) of the *Act*?

B. Did the region conduct a reasonable search for responsive records in its custody or under its control?

DISCUSSION:

A. Are the construction companies' records which may respond to the appellant's request "in the custody" or "under the control" of the region under section 4(1) of the *Act*?

[29] Section 4(1) provides for a general right of access to records that are in the custody or under the control of an institution governed by the *Act*. It reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[30] Under section 4(1), the right of access applies to a record that is in the custody **or** under the control of an institution; the record need not be both.[8]

[31] There are exceptions to the general right of access set out in section 4(1).[9] The record may be excluded from the application of the *Act* by section 52, or may be subject to an exemption from the general right of access.[10] However, if the record is not in the custody or under the control of the institution, none of the exclusions or exemptions need to be considered since the general right of access in section 4(1) is not established.

[32] The courts and the IPC have applied a broad and liberal approach to the custody

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[8] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC172 (Div. Ct.).
[9] Order PO-2836.
[10] Found at sections 6 through 15 and section 38 of the *Act*.

or control question.[11] In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.[12]

[33] In this case, the appellant does not dispute that the region's assertion that it does not have custody of the construction companies' records. However, the appellant takes the position that responsive records in the construction companies' record holdings are under the control of the region. The appellant seeks an order from the IPC ordering the region to require the construction companies to conduct a search of their record holdings for responsive records.

Factors relevant to determining "custody or control" when another individual or organization holds the record

[34] The Supreme Court of Canada has adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?

2. Could the government institution reasonably expect to obtain a copy of the document upon request?[13]

[35] Through its caselaw, the IPC has developed a list of additional factors that may be relevant where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[14]

- Is the individual, agency or group with physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record?[15]

- Who paid for the creation of the record?[16]

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[11] *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada* (*Minister of Public Works*), 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.
[12] *City of Ottawa v. Ontario,* 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).
[13] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.
[14] Order PO-2683.
[15] Order M-315.
[16] Order M-506.

- What are the circumstances surrounding the creation, use and retention of the record?[17]

- Are there any contractual provisions between the institution and the individual who created the record that give the institution the express or implied right to possess or otherwise control the record?[18]

- Was there an understanding or agreement—between the institution and the individual who created the record or any other party—that the record was not to be disclosed to the institution?[19] If so, what was the precise undertaking of confidentiality given by the individual who created the record, to whom was it given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? Did the agent have the authority to bind the institution?[20] If so, please explain the scope of that agency, and whether it gave the institution the right to possess or otherwise control the record.

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[21]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[22]

[36] As noted above, additional records were located as a result of the second search, but the appellant was not satisfied with the search results. The appellant subsequently wrote the mediator on January 23, 2020 and requested that the construction companies conduct a search of their own record holdings for records that would respond to the second search.

[37] The region responded by taking the position that the construction companies' records are not in its custody or under its control. In its February 7, 2020 letter, the region stated it "has no custody or control of the third parties' records. It is suggested

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[17] Order PO-2386.
[18] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*,1999 CanLII 6922 (BC SC).
[19] Orders M-165 and MO-2586.
[20] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v. Ontario (Informationand Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).
[21] Order MO-1251.
[22] Order MO-1251.

that you contact the third parties directly requesting the records."

The parties' representations

[38] In support of its position that responsive records in the construction companies' record holdings are under the control of the region, the appellant states:

> By way of background, the Region is the leader of a construction consortium that it created in order to facilitate a project pertaining to the [ION LRT]. This construction consortium is comprised of the Region, Aecon Group Inc., Kiewit Corporation, and Grandlinq Contractors. My client was previously in discussions (via e-mail) with agents or employees of members of the consortium in relation to the importation of fill created by the project to [a specified property].
>
> Quite simply, reasonable inquiries ought to be made with members of the Region's construction consortium for documents that may not be in the institution's direct possession but that relate and are responsive to the FOI request. Otherwise, a governmental authority could always simply state that because it is not in direct possession of a certain set of documents that they have satisfied their search obligations. This may be true where a governmental authority is not involved in a matter pertaining to third parties, but in this case, the Region was the creator and impetus behind the construction consortium for the Light Rail Transit system.
>
> The Region has failed to provide sufficient evidence that it has conducted a reasonable search to identify records which are no longer in its possession.
>
> The Region has failed to provide any evidence that it has made inquiries to its third-party contractors in an attempt to reconcile the gaps in its own documentary records in relation to its own projects and the LRT construction consortium.

[39] The appellant suggests that the following types of records should exist in the construction companies' record holdings:

- email communications exchanged between the construction companies and the appellant "in relation to the importation of fill created by the project" to the appellant's property;
- responsive records that are no longer in the region's possession that would reconcile gaps in the region's own record-holdings; and
- records related to complaints the region received about the appellant's property.

[40] The appellant says that a review of the document list it provided demonstrates that further responsive records, as described above, should exist in the construction companies' record-holdings and that these records are under the region's control.

[41] In support of its argument that responsive records in the construction companies' record holdings are *under the control* of the region, the appellant asserts that the region hired the companies to perform the ION LRT project construction work and, as a result, the region has "ownership over these documents in the possession of the third parties" or "likely has the right to access and possess these documents pursuant to their contractual arrangements". The appellant argues that the region "was an integral part of the daily decision-making process" related to the ION LRT project. The appellant also asserts that the construction companies acted as the region's agents and received payment in exchange for the creation of the requested documents. The appellant argues that the region has a statutory duty to manage public work projects and that the records would not have been created if the region did not enter into a contractual arrangement with the construction companies to build the ION LRT project. Finally, the appellant refers to an email exchange in its document list in which it was told by one of the construction companies that it is aware that the region received a complaint about the appellant's property. The appellant takes the position that it follows that the construction company should have in its record holdings information about this complaint.

[42] The region did not specifically address the "control" issue in its representations. The region simply stated "[t]here are no further records in the Region's custody and control."

Decision and analysis

[43] I have reviewed the appellant's submissions and document list and am satisfied that the subject-matter of the emails the appellant exchanged with the construction companies was the appellant's request to the construction companies to obtain fill from the project site. The appellant's own submissions confirm that its dealings with the construction companies were solely confined to the exchange of emails in relation to its request to obtain fill. Accordingly, I am satisfied that any records in the construction companies record-holdings that may respond to the request are related to the appellant's request for fill.

[44] The appellant cites Order PO-2103 in support of its argument that responsive records in the construction companies' record holdings are *under the control* of the region. In Order PO-2103, Senior Adjudicator David Goodis found that the records of a private business providing animal pound services by contract to several municipalities were not under the control of the Ministry of Agriculture, Food and Rural Affairs. Senior Adjudicator Goodis arrived at that conclusion after considering a number of factors and finding that the only factor that weighed in favour of an "under the control" finding was the ministry's statutory inspection powers under the *Animals for Research Act* to

demand the production of pound records. However, Senior Adjudicator Goodis assigned only moderate weight to this factor and found that it could not overcome the overwhelming factors weighing against a control finding in the circumstances of that appeal and stated:

> In my view, this limited right does not lead to the conclusion that the Ministry in any generalized way has the right to possess the records as would be the case, for example, where an agent is carrying out a statutory function on the Ministry's behalf [see, for instance, my Order MO-1251]. The opposite view would lead to an absurdity, suggesting for example that the Ontario Human Rights Commission has control over all records in Ontario, simply because pursuant to its powers it may seize records held by anyone in the province, as long as certain conditions are met. In my view, there is a qualitative difference between an organization's powers to possess records pursuant to its regulatory mandate, and its powers to possess records for other reasons, such as the fact that it owns them or they were created on its behalf.

[45] However, Senior Adjudicator Goodis did comment at the end of the decision that the outcome in Order PO-2103 "might be different in the context of a request to a municipality for similar records. Municipalities would appear to have more direct responsibility for the operation of pounds, and the accountability concerns expressed by the appellant may be more relevant in that context."

[46] The appellant appears to take the position that in the circumstance of this appeal, the region has a statutory power or duty to carry out public works projects. The appellant also argues that the region "likely has the right to access and possess these documents pursuant to their contractual agreements." The appellant however did not provide an explanation as to how the region's role in supervising the build and construction of light rail project translates into a statutory power or right of possession to obtain the types of records being requested.

[47] The IPC has consistently applied the Supreme Court of Canada's two-part test from *National Defence* in determining the "control" question and I adopt it for the purposes of this appeal. Both parts of the test must be met for there to be a finding of control.

[48] Part one of the Supreme Court of Canada's two-part test asks whether the contents of the document relates to a departmental (i.e. region) matter. I find that in this case, the subject-matter of the records the appellant has requested does not relate to a region matter. In my view, there is insufficient evidence before me to establish that any records the construction companies may have in its record holdings regarding communications it had with the appellant about the importation of fill to the appellant's property relates to the region's role in overseeing the ION LRT project. Accordingly, I find that part one of the two-part test has not been met.

[49] Part two of the two-part test for determining control asks whether the region could reasonably expect to obtain a copy of requested records. The listed factors (mentioned above) are relevant in determining this question.

[50] The appellant's position is that the region's role in overseeing the ION LRT project includes supervising direct inquiries made to construction companies from members of the public to obtain fill from the project site. The appellant argues that the region is the "directing mind of the consortium" and that although it may lack physical custody of the construction companies' records, it is in a position to exert control of their records.

[51] The purpose of the consortium was to design, build, finance, operate and maintain ION Stage 1 LRT. As noted above, there is no dispute that the appellant's direct dealings with the construction companies were confined to inquiries related to its request to obtain fill from the project site.

[52] I considered the submissions of the parties, along with the listed factors in the context and in light of the purposes of the *Act* and am not satisfied that region could reasonably expect to obtain a copy of the construction companies' records that would respond to the request. I have considered the appellant's submissions and am not satisfied that there is sufficient evidence establishing that the region was a party in the transactions between the appellant and the construction companies regarding the importation of fill on the appellant's property. Furthermore:

- There is no dispute between the parties that the records are not in the physical possession of the region, but that of the construction company;

- The parties appear to agree that the records were created as a result of the appellant's making direct email inquiries with the construction companies and that these companies are not "institutions" for the purposes of the *Act*;

- There is insufficient evidence before me to conclude that the region paid for the creation of the emails or that the records were created or used for a purpose related to the region's role in overseeing the light rail project;

- There is insufficient evidence before me to conclude that the construction companies in responding to the appellant's email request to obtain fill were acting as agents on behalf of the region. In addition, evidence that the construction companies became aware that the region received a complaint about the appellant's property does not establish that the region supervised the importing and dumping activities between the appellant and the construction companies;

- There is insufficient evidence before me to conclude that there was an understanding, agreement, contract, practice, procedure or circumstance establishing that the region had a right to possess or otherwise control the

construction companies records relating to fill requests or the retention or disposal of these types of records; and

- Finally, I was not provided with evidence establishing that contractual provisions between the region and the construction companies exist which gives the region the express or implied right to possess or otherwise control emails communications between the construction companies and members of the public making direct inquiries for fill.

[53] Having regard to the above, I find that it is not reasonable for the region to expect to obtain copies of email communications related to the appellant's direct inquiries to the construction companies to obtain fill.

[54] Accordingly, I find that part two of the test for control under *National Defence* has not been met as I am not satisfied that the region could reasonably expect to obtain a copy of the records requested by the appellant.

[55] For the reasons above, I find that the construction companies' record holdings which may respond to the appellant's request are not *under the control* of the region under section 4(1). As noted above, there is no general right of access under the *Act* to records not in the custody or under the control of an institution and, given my finding, it follows that the region was under no obligation to search for responsive records held by the construction companies.

C. Did the region conduct a reasonable search for records in its custody or under its control?

[56] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[23] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[24]

[57] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[25] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[58] The majority of the appellant's representations address its submission that the region's search for records responding to the request was not reasonable and asks that I order the region to conduct a further search.

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[23] Orders M-909, PO-2469 and PO-2592.
[24] Order MO-2185.
[25] Orders P-85, P-221 and PO-1954-I.

The parties' representations

[59] The appellant makes three arguments regarding why the region's searches should have located additional records.

[60] First, the appellant argues that the region's evidence falls short of explaining its search efforts, including who conducted the searches and what areas were searched. The appellant asserts that the region provided "virtually no information" about its first search in its representations and that the lack of information should be considered a factor in my determination of whether the region conducted a reasonable search.

[61] Second, the appellant submits that the region's failure to provide information about records that may have been intentionally or unintentionally destroyed or its retention policies for staff emails and other internal/external documents in its representations to the IPC is "suspect." The appellant argues that the reasonableness of the region's searches cannot be "adequately assessed" in the absence of retention or destruction policies.

[62] Third, the appellant submits that the region failed to locate records it has a reasonable basis for concluding exist. In support of this argument, the appellant references the document list attached to its January 23, 2020 letter. The appellant states that these documents identify "certain documents received to date that lead us to believe that more documents exist," such as:

- Follow-up emails between a region employee and a consultant company regarding a proposed zoning by-law change for the appellant's property in 2010. The appellant says that other than a June 1, 2010 email no follow-up emails, including internal emails exchanged with region employees, were located;

- Emails or invoices which predate a March 1, 2018 internal email responding to a complaint about the condition of a road that references past issues the region has resolved with the appellant on a co-operative basis. The appellant says that the region should have located emails for the timeframe of 2013 to 2019 documenting its interactions with the appellant along with any invoices regarding monies the appellant paid for clean up;

- Follow-up emails exchanged between the region, the construction companies involved in the LRT project and a township relating to potential charges against vehicle operators. The appellant says that an April 15, 2016 email was disclosed to it which was exchanged between the region and township regarding a vehicle operator issue. The appellant takes the position that other emails exchanged between the region, construction companies and township about this issue should have been located;

- Follow-up emails relating to the appellant's request to obtain fill from the project site. The appellant says that the only email disclosed to him was the initial email,

dated April 15, 2016 but that it was in contact with the construction companies "throughout April and May 2016." The appellant says that additional emails about its permit, confirmation that the appellant was accepting fill, updates as to whether fill was still being delivered should have been located;

- Contract details or additional emails relating to permits, past issues and suitability of the appellant's property accepting fill from other project sites in 2017-2018. The appellant says that the region's search should have located emails exchanged between region employees and/or other entities regarding the suitability of the appellant's property for the fill from these projects along with other emails addressing past issues, permits or contracts;

- Records that predate the region's email request to the Grand River Conservation Authority (GRCA) to look into issues related to the appellant's property. The appellant says that a July 2019 record was disclosed to him which asks GRCA for an update about an issue related to its property. The appellant says that region employees should have exchanged emails with one another before its request to GRCA and that the region's search should have located those records.

[63] The region provided representations regarding its search efforts and takes the position that its second search, which located additional records, was reasonable. The region submits that its Information Technology (IT) Services Department system administrators searched its DOCS and the Outlook email system (including inbox, sent folders, deleted email folder and archived emails) using the agreed upon search terms. The region submitted three affidavits from IT staff setting out that:

- A search of the region's electronic document management system was performed by a Systems Administrator/ Database Analyst using the six agreed upon search terms;

- A search of the region's electronic mail system was performed by a Supervisor of Unified Communications and Desktop Support using the six agreed upon search terms; and

- A search of the region's electronic mail archives was performed by a Network Security Programmer Analyst using the six agreed upon search terms.

[64] Though the region did not provide a copy of its retention policy with its representations, it provided a copy of its Legal Hold policy which directs staff to preserve any record subject to a legal hold. The region said that responsive records located as a result of its search efforts were placed under a legal hold, until the resolution of this appeal, and as a result no records identified as responsive have been destroyed.

[65] The region also provided the appellant and me with a copy of its electronic document management system policy. This policy informs the reader of the operating

principles and details regarding documents stored in DOCS, which is the region's official repository of its record holdings.

[66] In its sur-reply representations, the appellant continues to raise questions about the reasonableness of the region's searches. The appellant also says that the region's record holdings are incomplete and that the region should have contacted the construction companies identified in its follow-up request to "ensure that all relevant documents were disclosed."

Analysis and decision

[67] I have considered the evidence of the parties and for the reasons stated below find that the region conducted a reasonable search for records which would be responsive to the request.

[68] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[26] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[69] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[27]

[70] The appellant asserts that additional records must exist given its assessment that the records disclosed to it or otherwise in its possession suggest there are gaps in the region's record holdings. The appellant provided a document list in support of its position which I reviewed. The appellant refers to emails it received and makes the argument that the existence of these emails support its argument that other emails should have been created for the purpose of the region being kept advised about the status of certain matters or document the region's response or decision-making process.

[71] In my view, the appellant's assertion that written records should have been created in response to certain events or communications is speculative. For instance, the appellant takes the position that the region should have emails in its record holdings documenting its past co-operative interactions with the appellant. However, the only evidence the appellant offers is a region's employee's comment in a March 1, 2018 email about unrelated matter that he has had past success with resolving issues with the appellant.

[72] The appellant also makes the argument that the region's employees should have

[26] Orders P-85, P-221 and PO-1954-I.
[27] Order MO-2246.

documented certain issues related to its property. For example, the appellant says that he was provided with a July 2019 email from the region to GRCA asking for an update about an issue relating to its property. The appellant takes the position that there should exist a paper trail of the region's employees exchanging emails with one another before the region asked for an update. Again, the appellant speculates that written records should have been created to document the region's decision to ask for an update.

[73] The appellant also says that the region's searches should have located emails exchanged between the region and third party entities about the appellant's request to obtain fill from project sites. The project sites the appellant identifies in support of this argument are the LRT project site and two other unrelated project sites it obtained fill in 2017-2018. With respect to the appellant's fill activities related to the LRT project site, the appellant says that the region should have in its record holdings additional emails relating to its request to the construction companies for a copy of the appellant's permit along with follow-up emails regarding updates as to whether fill was still being delivered to the appellant's property. With respect to appellant's fill activities related to two other project sites, the appellant says that additional emails exchanged between the region's employees and/or the entities associated with these project sites about the suitability of the appellant's property to accept fill should have been located. In both cases, the appellant says that the region located records created at the start of its fill activities but says that the region should have located follow-up emails. In my view, the appellant's own evidence that the process to obtain fill from project sites requires him to deal with the relevant construction company directly undermines its argument that additional records of this nature exist in the region's record holdings.

[74] However, I accept the appellant's argument that if he paid monies to the region for clean up charges or applied for a proposed zoning change that a written record of those activities should have been created. I also accept the appellant's argument that if he applied for permits from the region that copies of those permits should exist in the region's record holdings. However, the *Act* does not require the institution to prove with certainty that further records do not exist.

[75] Instead, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[28] that is, records that are "reasonably related" to the request.[29] For the reasons below, I am satisfied that the region's search was reasonable and that it searched in areas where permits and records of monies paid would be held, if they still exist.

[76] As noted above, a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate

[28] Orders P-624 and PO-2559.
[29] Order PO-2554.

records that are reasonably related to the request.[30] I have reviewed the evidence of the parties and am satisfied that the region's second search was coordinated by an experienced employee knowledgeable in the subject matter of the request and that the region made a reasonable effort to locate records. The individual coordinating the second search directed IT staff to conduct searches in its DOCS and email system using the specified terms agreed upon the parties. In addition, I am satisfied that the region's decision to search its DOCS and email system amounts to a reasonable effort to locate records which would respond to the request.

[77] I find that the region provided satisfactory details about the second search carried out along with details of who conducted the second search, the places, who was contacted in the course of the search and the types of files that were searched. The appellant asks that I make a finding that the region's first search was not reasonable. However, the region does not take the position that its first search was reasonable. In fact, the parties agreed to search terms to be used in the second search in an effort to remedy any perceived deficiencies in the in the results of the first search.

[78] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[31] In this case, I am satisfied that the region has provided satisfactory evidence to show that it made a reasonable effort to identify and locate responsive records within its custody or control.

[79] In addition, I am not persuaded by the appellant's argument that specific information regarding the region's retention and disposal of records is required in the circumstances of this appeal to determine whether a reasonable search took place. I note that the Notice of Inquiry sent to the parties included the question of whether it was possible that responsive records existed but no longer existed. The region did not provide a specific answer to that question or provide a copy of its retention schedule. However, in my view the absence of this evidence does not negate my finding that the region demonstrated a reasonable effort to locate records that are reasonably related to the request. The region conducted two searches for responsive records and worked with the appellant in its second effort to locate additional records, which were located and disclosed to the appellant.

[80] For these reasons, I uphold the reasonableness of the region's search, and dismiss the appeal.

ORDER:

I uphold the reasonableness of the region's search, and dismiss the appeal.

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[30] Orders M-909, PO-2469 and PO-2592.
[31] Order MO-2185.

Original Signed By: May 31, 2022

Jennifer James
Adjudicator