

Information and Privacy Commissioner,
Ontario, Canada



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

Final ORDER MO-4259-F

Appeal MA19-00010

The Nation Municipality

September 29, 2022

Summary: This final order disposes of an appeal that was partially upheld in Interim Order MO-4111-I. In the Interim Order, the adjudicator ordered the municipality to conduct further searches. The municipality conducted further searches and provided additional information. The appellant argued that more records should exist. In this order, the adjudicator upholds the municipality's search as reasonable.

Order Cited: Order MO-4111-I.

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

OVERVIEW:

[1] This order follows on Interim Order MO-4111-I (the interim order), in which I ordered the Nation Municipality (the municipality) to carry out further searches for records.

[2] By way of background, in 2016 the municipality planned to develop a sports facility using a public-private partnership arrangement (described and defined further below as the "P3 Project"). The P3 Project was discussed at (at least) two meetings of the municipality's council (the council).

[3] In 2018, a requester (now the appellant) submitted a multi-part access request

under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the municipality for records relating to the P3 Project. The only portion of the request that remains at issue in this appeal is part one, which is (emphasis added):

1. Copies of all agreements or memorandums of understanding entered into between [a named company] and [the municipality] related to the development of a sports facility/community centre in [specified location]. (Such as but not limited to MOU referenced in minutes of 27 June 2016 council meeting)

[4] I will refer to the named company as Company X in this Order.

[5] The municipality issued an initial access decision stating that no documents would be disclosed because of the solicitor-client privilege exemption at section 12 of the *Act*.¹ The appellant appealed the municipality's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC).

[6] As explained in more detail in the interim order, during mediation, the municipality issued revised and supplemental access decisions. In the revised access decision, the municipality stated that access could not be granted to a "Memorandum of Understanding" because no responsive records exist.²

[7] The appellant asserted that responsive records should exist and maintained that view throughout. Specifically, the appellant stated that a memorandum of understanding or agreement should exist, based on the minutes of meetings held by the municipality's council on June 27, 2016 and June 26, 2017. Also at this stage of the mediation, the appellant advised the mediator that he did not wish to appeal further the municipality's decisions regarding the other parts of the request, meaning that only part 1 (reproduced above) remained at issue.

[8] In response, the municipality maintained its position that no agreement or memorandum of understanding was entered into by the municipality and Company X for the development of a sports facility/community centre in the specified location and as such, the municipality did not have records responsive to part one of the request.

[9] The appellant maintained that an agreement or memorandum of understanding must exist, meaning that the sole issue under appeal was whether the municipality conducted a reasonable search for records responsive to the appellant's request.

[10] Just prior to the file being transferred to adjudication, the municipality issued the supplemental access decision, in which it partially disclosed a draft document titled,

¹ This decision pertained to all parts of the access request.

² The municipality also granted the appellant access to a council resolution and identified two other records that it did not disclose claiming the section 12 exemption for solicitor-client privilege (an executive summary and a different resolution of council). Neither of these records are agreements and the appellant did not pursue access to them in this appeal.

“Memorandum of Understanding” (the Draft MOU). The municipality’s decision to withhold access to some information in the Draft MOU became an issue in the appeal.

[11] The appeal proceeded to the adjudication stage of the appeal process.

[12] In the interim order I found that the Draft MOU is outside of the scope of the request and it was therefore not necessary for me to consider the municipality’s exemption claims. However, I also found that the municipality did not conduct a reasonable search and I ordered it to carry out further searches and provide a written explanation of the steps taken to carry out its further searches.

[13] The municipality carried out further searches, which it says did not yield any responsive records. The municipality also provided an affidavit to explain the steps that it took to carry out the further searches.

[14] I decided to share the affidavit with the appellant to obtain his views. The municipality objected to portions of the affidavit being shared with the appellant, claiming that some of the information was confidential. After considering the IPC’s *Code of Procedure* and *Practice Direction 7*, I determined that some but not all of the information that the municipality objected to sharing with the appellant should be shared. I notified the municipality of my intention to share this information with the appellant. The municipality stated its ongoing objection to my decision.

[15] I then shared the non-confidential portions of the affidavit with the appellant to invite his representations. The appellant made representations in response, which were shared with the municipality. At that time, I also invited further representations from the municipality in response to the appellant’s representations and to specific parts of the interim order that, in my view, it had not yet addressed.

[16] The municipality provided additional representations, which were shared with the appellant. The appellant provided additional representations in reply. I did not find it necessary to seek the municipality’s views about the appellant’s reply representations; however, I shared them with the municipality. The municipality requested that it be able to respond to the appellant’s reply representations, which I allowed. I provided the municipality’s further reply representations to the appellant but did not request any response.

[17] In this order, I find that the municipality has conducted a reasonable search and I dismiss the appeal.

DISCUSSION:

[18] The only remaining issue in this appeal is whether the municipality carried out a reasonable search. 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 The *Act* does not require the institution to prove with absolute certainty that further records do not exist.⁴

Background context

[19] The following chronology of events is based on parties' non-confidential representations.

[20] In 2016, the municipality issued a request for proposal (RFP) for a public private partnership for the development of a sports facility. In its representations, the municipality refers generally to the public private partnership as a "proposed public/private partnership agreement," "the P3 Agreement" or, "the project." As noted above, in this order I will refer to this project, in general, as the P3 Project.

[21] According to minutes of proceedings of the municipality's council, one RFP submission was received from Company X for the design, construction, financing and operation of a domed or permanent sports structure. Staff for the municipality recommended that the council approve the commencement of discussions for the P3 Project with Company X.⁵

[22] The P3 Project was discussed at the June 27, 2016 meeting of council, which is the meeting referred to in the request. These minutes state,

9. Unfinished Business from Previous Meetings

Approval of P3 Dome executive summary

Whereas The Nation Municipality is interested in entering into a Public Private Partnership (P3) with [Company X] for the purpose of building a sports dome;

Therefore **be it resolved** that the Municipality approve the terms of the executive summary and authorize the entry into a Memorandum of Understanding incorporating the substantive provisions contained in the executive summary and;

Be it further resolved that the Municipality authorize the entry into the project agreement based on the terms outlined in the executive summary.

[23] The sports dome is then referenced in the June 26, 2017 minutes of council (which the appellant has also referred to throughout his appeal to the IPC); these minutes state:

³ Orders P-85, P-221 and PO-1954-I.

⁴ Orders P-624 and PO-2559.

⁵ According to a May 9, 2016 Administration Report of the Municipality (Number AD-02-2016), included with the appellant's representations.

9.3 Sports Dome in [...]

...

Be it resolved that Council approves to sign a contract for the construction of a sports dome and community centre that meets the conditions stipulated in the confidential report AD-04-2017.

[24] In July 2019, the municipality announced a new plan for a sports facility that involves different entities and is unrelated to the P3 Project that was explored previously.

The request

[25] The request is:

1. Copies of all agreements or Memorandums of Understanding entered into between [Company X] and [the municipality] related to the development of a sports facility/community centre in [a specific location]. (Such as but not limited to MOU referenced in minutes of 27 June 2016 council meeting)

The interim order (MO-4111-I)

[26] In the interim order, I found that the municipality had not conducted a reasonable search. I explained the reasons why as follows,

[56] First, the municipality appears to have restricted its search only to documents labelled or titled "memorandum of understanding." I reach this conclusion in consideration of the confidential evidence provided by the clerk and the precise wording used to describe the search undertaken. In my view, this is an overly narrow and inappropriate way to interpret the request. Part one of the request, when viewed in its context, seeks access to *any* agreement related to the P3 Project. Although the request refers to minutes of a council meeting in which a "memorandum of understanding" was discussed, it is clear that the appellant included this information not to narrow the scope of the request but rather to provide explanatory information and hypotheses about when and how such agreements were entered into.

[57] Second, as discussed [...], I disagree with the municipality that records are only reasonably related to the request if they are agreements with Company X. The plain and obvious objective of the appellant's request is to access information about the financial and other obligations between the municipality and any other parties involved in the P3 Project, which could include Company X or other parties engaged in it.

[58] Third, I am compelled by the appellant's argument that because the P3 Project appears to have come to an end and the municipality has moved in a different direction, it is reasonable to conclude that there were agreement(s) that gave rise to obligations between the municipality and other parties involved in the P3 Project that may have needed to be resolved.

[59] Fourth, there is the disclosed information contained within the Draft MOU. Although it is not responsive to the request before me, it includes information about the P3 Project. The disclosed portions of the MOU refer to several agreements that may be reasonably related to the request. For instance, there is a section titled, "Project Agreements," which states, "The Project is governed by a number of agreements, including..." Later, there is also reference to an umbrella Project Agreement. In my view, there is a reasonable basis for me to conclude that these agreements may be reasonably related to the request and should therefore be included within the scope of the search.

[60] Lastly, there is other confidential information before me that has led me to conclude that there is *at least* a reasonable basis to conclude that there are other agreements that are responsive to the request.^[6] I have decided not to elaborate further on this information in this order as it is the municipality's view that it is confidential.

[27] I ordered the municipality to conduct a further search in response to the appellant's request, including for "final agreements involving the P3 Project, other than settlement agreements." For clarity, I stated that "P3 Project" as defined in the interim order and that this could include agreements between the municipality and Company X or other entities and are not restricted to documents titled, "memorandum of understanding."

[28] The municipality carried out additional searches and provided affidavit evidence to describe its search efforts and the results.

Representations

[29] As outlined in the Overview, there were several exchanges of representations between the parties. I also invited the municipality to respond specifically to the concerns I outlined in the interim order. The representations exchanged focused on two main topics: the parties' positions about the sufficiency of the municipality's electronic searches; and, the municipality's response to the specific concerns I outlined in the interim order.

[30] I will first summarize the municipality's initial representations and then I will

⁶ That is, information contained in or appended to the municipality's confidential affidavit evidence.

summarize the parties' representations in relation to each of the areas of focus noted in the paragraph above.

The municipality's initial representations (affidavit evidence)

[31] The municipality's Chief Administrative Officer and Clerk (the clerk) explains that she and the deputy clerk conducted a search of the municipality's physical files for "all signed agreements relating to the P3 Project." She says, "except for documentation relating to the settlement of the P3 project, no final agreements were located." The clerk says that no records "pertaining to the P3 Project have been destroyed," and enclosed a copy of the municipality's records maintenance policy.

[32] The clerk also instructed the Network Administrator to conduct searches of the municipality's servers and electronic files for the time period January 2016 to December 31, 2018.

[33] The Network Administrator carried out the searches of the municipality's servers and electronic files (the municipality's "M-Files," a records management platform), using a list of phrases.

[34] The searches of the servers yielded two documents, which the clerk described in the affidavit and which she determined were not responsive to the request. The searches of the M-Files also yielded several records, which the clerk determined were "not responsive" to the request.

[35] For each of the search phrases used, the municipality provided screenshots of Windows file viewer showing the output of the search and screenshots of the M-File platform showing the output of the search.

Sufficiency of electronic searches

[36] The appellant asserts that the search methodology used by the municipality to search the servers and the M-Files was technically flawed. To respond to these concerns, the municipality arranged for its Network Administrator to provide further details about the how it carried out the searches and as explained below, it conducted further searches. These views and responses are summarized below.

Search terms

[37] Citing several examples, the appellant submits that the search terms used by the municipality were "unnecessarily complex strings of text" that he says were unlikely to yield results. The appellant suggests that more effective searches would have used quotation marks and Boolean connectors, for instance. In response, the municipality reiterated that it searched all of the enumerated search terms individually.

[38] In reply on this point, the appellant points out that the municipality's response

did not address the concerns that he raised. Using a particular search phrase and one of the records identified in the search of the M-Files as an example, the appellant points out that it is difficult to accept that all of the searches undertaken would have only yielded a single result, particularly because the P3 Project was such a significant undertaking of the municipality.

[39] In further reply on this point, the appellant points to two documents that he downloaded from the municipality's "old website." These documents contain phrases that were searched (according to the municipality) but that do not appear as search results. The appellant says that the fact that these documents are not included in the results of the searches carried out by the municipality illustrates that the methodology used by the municipality was flawed. The appellant acknowledges that these documents might have been stored elsewhere but, if this is the case, it gives rise to other concerns about the municipality's record keeping.

Search locations

[40] The appellant also questions whether the municipality in fact searched the locations that it says that it searched. In particular, the appellant questions the reliability of the screenshots provided by the municipality to demonstrate its search efforts of the servers. Drawing on his understanding of the Microsoft operating system, the appellant submits that the screenshots do not demonstrate what the municipality says that they do. In response, the municipality provided additional information about the version of Microsoft operating system that it operates and provided other examples of how its servers are configured.

[41] The appellant also questioned why the municipality did not conduct searches of a Microsoft Exchange Server, which the appellant believes is used by the municipality to manage its email. In response, the municipality stated that it did search its Microsoft Exchange Server and it provided the IPC with the results.

[42] In reply on this point, the appellant remained dissatisfied with the municipality's explanations.

[43] As a general response to the appellant's concerns about the search terms and the search locations, the municipality offered to allow the IPC access to its servers to carry out searches.

Municipality's further searches in response to the appellant's concerns

[44] Although I did not seek or require further representations from the municipality of the appellant's reply to its responses to the appellant's concerns, the municipality requested that it be provided the opportunity to do so. I received and considered those representations. In further response to the appellant's continued dissatisfaction with the electronic searches, the municipality undertook further searches. It says (emphasis added):

The [appellant] was also of the opinion that the search strings used by the [municipality] 'resulted in a horribly flawed search.' In response to the [appellant's] statements and in the interest of resolving this matter, the [municipality] has conducted additional searches as suggested by the [appellant]. ... [The Network Administrator] can confirm that the [municipality] performed searches on over 764 GB of data (being 509,145 files within 58,864 folders). Additionally the [municipality] conducted a search within its exchange server, being a database of 374 GB of data over 138 mailboxes. No responsive records were found.

[45] The municipality did not provide screenshots or other similar evidence of its searches; however, it renewed its invitation to the IPC to conduct further searches itself.

Concerns raised in the interim order

[46] As outlined above in greater detail in the interim order and reproduced above at paragraph 26, the following concerns formed the basis for my decision to order the municipality to carry out further searches in the interim order:

- That the municipality had, in my view, restricted its searches, paper and electronic, to a "memorandum of understanding" with Company X only.
- It was my view, that based on the background circumstances, it was reasonable to suspect that there are agreement(s) that gave rise to obligations between the municipality and other parties involved in the P3 Project.
- That there are references to "agreements" in the Draft MOU and other confidential information before me that gave me a reasonable basis to conclude that other responsive records exist.

[47] In response to these issues, the municipality stated, respectively:

- As a result of the searches carried out in response to the interim order, it has now carried out an appropriately broad search.
- The municipality submits that my concerns and my decision to order it to carry out the additional searches in the manner outlined in the interim order expanded the scope of the appeal and the search beyond what was set out in the mediation of this appeal. However, it also says (emphasis added):

We can confirm that the P3 Project has come to an end and that the municipality has moved in a different direction as confirmed by [the municipality's earlier representations]. As such, we can confirm that there was no formal agreement between the municipality and Company X or any other party for that matter with respect to the P3 Project and that all

obligations that arose in the absence of a formal agreement were settled as between the parties.

- Regarding references in the Draft MOU to agreements, the municipality says that these:

were never finalized and were never executed by [the municipality] or by any of the [relevant entities] or any other corporation, individual, trust, partnership, association or cooperative as stated... In any event, draft agreements were included in the minutes of settlement related to this matter and are subject to settlement privilege.

[48] Reiterating his reasons why he believes additional records exist, the appellant states:

In the failed Sports Dome project, the [municipality] engaged in informal discussions with [Company X]. The [municipality] then published a Request For Proposals for the project. The [municipality] had one compliant bidder, [Company X]. The [municipality] then resolved to 'authorize entry into a Memorandum of Understanding...'. Some time after that, the [municipality] resolved to hire the services of [specified company] to conduct a feasibility study for the sports dome project. Several months after that, the [municipality] further resolved 'that Council approves to sign a contract for the construction of a sports dome and community centre...' Some time after that, the [municipality] changed their direction and announced that the P3 sports dome project was cancelled, and a new project would begin, entirely funded by the municipality. Lastly, some time after that, it appears that the Municipality quietly settled litigation over the cancellation of the sports dome project. Yet, the [municipality's] solicitor insists that over the course of the 30 months it took all of the above to transpire, no MOU or agreements were entered into, despite the [municipality's] own records stating that there were. Better yet – liability was somehow incurred resulting in an apparent financial settlement, in the complete absence of any MOUs or agreements.

[49] In reply, the municipality reiterates that notwithstanding the June 2016 council resolution, an "MOU was never finalized or signed by either of the parties, nor was there any other agreement finalized or signed between the parties." It also stated that (emphasis added),

there were no agreements or Memorandums of Understanding entered into between [Company X] and the [municipality] related to the development of a sports facility/community centre. All agreements in relation to this matter were in draft form and were in negotiations between [Company X's] lawyer and the lawyers for the municipality.

Analysis and findings

[50] 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.⁷ 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.⁸

[51] I am satisfied that the municipality conducted a reasonable search and that further searches will not yield any responsive records. I have reached this conclusion for the reasons below.

[52] As explained in the interim order, I was concerned that the municipality had construed the appellant's request in a way to avoid identification of records that would be reasonably related to the request. I was concerned about this because of the municipality's focus on a search for documents labelled "memorandum of understanding" and only involving Company X. Based on the information provided by the municipality about the steps taken to search its paper and electronic records, I am now satisfied that the municipality searched for any final agreements pertaining to the P3 Project, regardless of their label or signatories.

[53] My concern also arose because the municipality had not, in my view, provided an answer to the appellant's basic question: if the municipality was required to enter into a settlement of some kind, what was the basis for the underlying liability, if any?

[54] The municipality has now provided an explanation to this question. As I understand it, the basis for any underlying liability between the municipality and any other entities pertaining to the P3 Project is not found in any final, signed, *written* agreements but rather other "obligations that arose in the absence of a formal agreement." I have no reasonable basis to doubt the municipality's explanation and I accept it. Because the municipality is indicating that there are no formal, finalized written agreements, I am satisfied that further searches would not yield further responsive records.

[55] Regarding the disagreement over the electronic search, I share the appellant's concerns and found his arguments to be persuasive about the unreliability of some of the search methods used by the municipality – particularly in respect of the search terms used. However, given the narrow focus of the request and the explanation provided by the municipality that I accept, I am unable to conclude that further searches would yield any responsive records.

[56] Considering the searches undertaken and the explanation provided by the municipality, I find that the municipality has conducted a reasonable search for records

⁷ Orders M-909, PO-2469 and PO-2592.

⁸ Order MO-2246.

responsive to the appellant's request.

ORDER:

I dismiss the appeal.

Original Signed By: _____
Valerie Jepson
Adjudicator

September 29, 2022 _____