

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-4486-I

Appeal MA20-00475

Corporation of the Municipality of Temagami

January 31, 2024

Summary: The appellant sought access to all records related to a harassment complaint she filed with the municipality, including the final investigation report and all invoices, emails and details of the investigation services provided. The municipality issued a decision granting the appellant access to some emails, in part, and stating that it did not locate any other records responsive to the appellant's request. The appellant challenged the reasonableness of the municipality's search for responsive records.

In this interim order, the adjudicator finds that the municipality did not conduct a reasonable search for records. She orders the municipality to conduct a further search for responsive records, and to issue a new access decision that addresses all the responsive records the municipality has located to date and any additional responsive records it locates through its further search.

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

OVERVIEW:

[1] The Corporation of 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 all records related to the investigation initiated by the municipality of the appellant's allegation of harassment against a named Councillor and another individual. In her request, the appellant specified that she sought access to all relevant

records, including emails, the final report to a named service provider (company A) from a named investigator (the investigator), all invoices and fees, and details of services rendered by company A and a second named service provider (company B).

[2] In response to the request, the municipality issued a decision granting access, in part, to certain records. In its decision letter, the municipality advised that it did not locate any records responsive to the appellant's request for information about company A's final report, invoices, fees and details of services. The municipality stated that the results of the investigation were never in its control and are not municipal records.

[3] The appellant was not satisfied with the municipality's decision and appealed it to the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal. During mediation, the appellant asserted that additional records responsive to her request should exist and should be in the custody or control of the municipality, including a copy of the final report. The appellant stated that the investigator told her, on February 1, 2020, that a copy of the final report was provided to the municipality.

[4] In response to the appellant's assertions, the municipality explained that it has no responsive records in its custody or control because there was no investigation of the appellant's harassment complaint. The municipality stated that after it received the appellant's complaint by email, it forwarded that email to its lawyer for consideration of whether an investigation under the *Occupational Health and Safety Act* (OHSA) should be commenced, and it was determined that the OHSA provisions did not apply to the appellant, who was a volunteer for the municipality. The municipality also stated that the report the appellant referred to from the investigator relates to a different matter: a harassment allegation by a staff member of the municipality that is unrelated to the appellant's harassment complaint. Accordingly, the municipality's position at the end of mediation was that, other than the original email from the appellant containing her harassment complaint, no records responsive to the appellant's request exist.

[5] After receiving the municipality's response following its further search, the appellant continued to challenge the reasonableness of the municipality's search. The appellant asked that this appeal proceed to the adjudication stage of the appeal process.

[6] I conducted an inquiry and received representations from the municipality and the appellant on the issues set out below. Some of the municipality's representations were confidential within the meaning of the IPC's *Practice Direction Number 7*, so I shared only the non-confidential representations of the municipality with the appellant. I also sought reply representations from the municipality, inviting it to address the appellant's representations on why she believes additional records responsive to her access request should exist.

[7] For the reasons that follow, I do not uphold the reasonableness of the

municipality's search and I order it to conduct a further search for responsive records and to issue a new access decision to the appellant.

DISCUSSION:

Did the municipality conduct a reasonable search for responsive records?

[8] Because the appellant asserts that additional responsive records exist, I must decide whether the municipality has conducted a reasonable search for records as required by section 17.¹ If I am satisfied that the municipality's search was reasonable, I will uphold the municipality's decision. If I am not satisfied, either because the municipality provides insufficient evidence of a reasonable search or because the appellant provides a reasonable basis for concluding that additional responsive records exist, I may order further searches.

[9] The appellant's stated reasons for challenging the reasonableness of the municipality's search are that the municipality must have responsive records because she was interviewed about her complaint and was told by the investigator that he had sent a report about her complaint to the municipality.

[10] In the Notice of Inquiry that I sent to the municipality, I set out the IPC's longstanding approach to determining whether an institution has conducted a reasonable search and I referred to previous IPC orders that explain this approach. I noted that the *Act* does not require the municipality to prove 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 all the responsive records in its custody or control. I explained that for a record to be responsive, it must be "reasonably related" to the request. I also explained that 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 that are reasonably related to the request.

[11] The Notice of Inquiry required the municipality to provide a written summary of all the steps it took in response to the appellant's access request. The search details that the municipality was told to provide, in an affidavit, were:

- the names of the individuals who conducted searches
- the places that were searched
- the individuals that were contacted in the course of the searches
- the types of files searched

¹ Orders P-85, P-221 and PO-1954-I.

- the results of the searches
- whether responsive records existed but no longer exist, and
- whether responsive records exist that are not in the municipality's possession.

The municipality's representations on its search for responsive records

[12] In response to the Notice of Inquiry, the municipality provides comments on some of the background facts, and statements sworn by the municipal clerk. The municipality states that the appellant's harassment complaint "was never in the hands of staff" – it was forwarded to the municipality's lawyer by the mayor; there was an initial inquiry by the investigator, but nothing further. It adds that Council was notified during a close-meeting Council session about the determination that the complaint would not proceed.

[13] Regarding the appellant's assertion that the investigator told her a copy of the final report was provided to the municipality, the municipality states that it has not received any document regarding the report. It states that "the report was not provided to Council in writing. It was a presentation to Council session by [the municipality's lawyer] and the investigator." The municipality explains that Council decided not to write to the appellant because she is not an employee. The municipality states that this issue is addressed in a letter from the investigator to the municipality's lawyer and this letter is not a municipal record. Finally, the municipality asserts that no responsive invoices exist regarding the appellant's harassment complaint because "the invoice was never sent – it was written off."

[14] Attached to the municipality's representations are a copy of the appellant's harassment complaint, the municipality's decision and four emails, three of which are parts of longer emails strings, as follows:

- a one-page email dated August 31, 2020, between the clerk, the treasurer and the municipality's lawyer
- pages 5 and 6 of an email string from August 24, 2020, between the clerk and the municipality's lawyer
- one page of an email string between the clerk, the treasurer, the municipality's lawyer, and an individual from company A
- page 1 of an email string between the clerk, the treasurer and the IPC.

[15] Regarding its search for responsive records, the municipality states that the clerk asked the treasurer/administrator and the deputy treasurer and HR "if they have received a harassment complaint."

The appellant's responding representations

[16] In her representations, the appellant asserts that the municipality's responses to her request and appeal keep changing: first, it said the report "doesn't exist" then it said "it's not in the custody or control" of the municipality, then the municipality's lawyer has it, then "the report by [the investigator] pertains to a different investigation" and finally the appellant "was not entitled to an investigation under OHSA." The appellant's representations address the municipality's representations in considerable detail and attach supporting documents, including emails and an Ombudsman Report dated February 2021, titled "Investigation into complaints about closed meetings held by the Municipality of Temagami." Below, I summarize key points from the appellant's representations that lead me to conclude that further searches for records could yield additional responsive records.²

[17] The appellant explains that after she filed her harassment complaint with the city in July 2019, she received an email from company B telling her the name of the investigator; the investigator then called her in October 2019 and interviewed her for 48 minutes about her complaint. She states that the investigator told her, on February 1, 2020, that he had forwarded her report to the municipality; she attaches this email and other emails that support her position and statements, to her representations. The appellant notes that the municipality's representations on its search lack any mention of the clerk searching for records from companies A and B, which hired the investigator and conducted her interview, respectively. The appellant argues that there should be invoices from the two companies that are responsive to her request and that the municipality has in its possession. She also argues that the clerk's asking her two colleagues whether they have received a harassment complaint does not amount to reasonable or even adequate search for records responsive to her request.

[18] Finally, the appellant asserts that the municipality's representations point to the existence of the report that she seeks. She states that the email of August 24, 2020, between the clerk and the municipality's lawyer, indicates that a final report exists because the lawyer asks the clerk to let him know "if a copy of the final report was sent to [the appellant]." In further support of her position that responsive records exist, the appellant refers me to paragraphs 26 and 38 of the Ombudsman Report, which note that the Integrity Commissioner for the municipality and the investigator "provided Council with a detailed report on the findings of three investigations" and "extensively reported to Council on their findings and provided information to Council regarding the investigations."

² The appellant's representations include allegations beyond the scope of this appeal, issues not properly before me, and information not relevant to the reasonableness of the municipality's search. In this interim order, I refer only to the parts of the appellant's representations that are relevant to and necessary for my findings on the municipality's search.

The municipality's reply representations

[19] I provided the municipality with a complete copy of the appellant's representations and invited it to respond to the appellant's detailed arguments on the inadequacies of the municipality's search for records. I also invited it to address the inconsistencies in the municipality's position that the appellant notes.

[20] In its reply, the municipality suggests that there is continuing confusion between the appellant's harassment complaint – for which no investigation was conducted, and no subsequent reporting occurred – and a later harassment claim made by a staff member that was investigated and reported on. The municipality asserts that the appellant's complaint was dismissed at the preliminary stage and, because no investigation was ever started, there are no reports and no corresponding invoices from company A or B. The municipality explains that because the appellant was an unpaid member of a committee with governance functions when she filed her harassment complaint, she was not an employee of the municipality and she did not have standing to claim harassment under the OHSA.

[21] The municipality also notes that Council often requests a summary of legal fees that provides the general nature of the matters covered. It states that names are not disclosed in such reports to Council or in the minutes; file numbers are used instead. The municipality reiterates that it has no record of a report on the appellant's harassment complaint because none was created; the report that was investigated and discussed at Council was about another harassment complaint filed by a staff member and that report is in the custody and control of the municipality's lawyer.

Analysis and finding

[22] Having reviewed the parties' representations, I find that the municipality has not provided sufficient evidence of a reasonable search for responsive records. To the contrary, the evidence provided by the municipality, that the clerk asked the treasurer/administrator and the deputy treasurer and HR "if they have received a harassment complaint," is evidence of an unreasonable search.

[23] The appellant's access request was for "all records" of the municipality regarding her harassment allegation against a Councillor and another individual. The appellant specified that her access request included all paper or electronic (email) records, invoices, fees and details of services from companies A and B, and the final report prepared by the investigator. By its own account, the municipality searched only for the appellant's harassment complaint and did not search for all records reasonably related to the appellant's request. This approach was too narrow and destined to fail to locate all responsive records.

[24] To begin, the municipality should have used key words and searched the email accounts of the clerk, treasurer/administrator, the deputy treasurer and HR, the

mayor's office and contact@temagami.ca. These are the email accounts of individuals who appear to have been involved in some aspect of the handling of the appellant's complaint – the filing and processing of it, communications with the municipality's lawyer and external service providers (companies A and/or B) about the outcome of the complaint etc. In light of the municipality's evidence that its lawyer and an investigator were involved, it should have asked these parties, and any other relevant third parties, to canvass whether they had any records.

[25] In addition, the appellant's representations – about the information she received from the investigator and the Ombudsman Report's reference to Council being provided with a detailed report on the findings of three investigations – provide a reasonable basis for concluding that additional responsive records exist, such as documents describing the reports to Council from the investigator.

[26] Furthermore, the municipality's representations refer to existing records that could reasonably relate to the appellant's request, including minutes of Council's meeting of November 7, 2020. The municipality's representations also include parts of emails (described above in paragraph 14) that are responsive to the appellant's request. Although the municipality has disclosed these partial emails to the appellant, it has not addressed the withheld parts of those emails. As these partial emails are responsive records, the municipality must acknowledge this and address the complete emails in an access decision. If the municipality decides that some information in these emails should be withheld, it should state which exemptions it claims over that withheld information.

[27] For the preceding reasons, I do not uphold the reasonableness of the municipality's search, and I will order the municipality to conduct a further search for records responsive to the appellant's request. I will also order the municipality to issue a new access decision to the appellant once it has completed its further search.

[28] Having reviewed the responsive records that the municipality has already identified in this appeal and disclosed to the appellant as attachments to its representations, I anticipate that the municipality's new access decision may include claims of exemptions in the *Act*. That is fine. The municipality has discretion it may exercise with respect to certain exemptions. It also has obligations under the *Act* that it must satisfy, including conducting a reasonable search for records responsive to the appellant's request, and locating and identifying all responsive records, and issuing a decision addressing the appellant's right of access to those responsive records.

ORDER:

1. I order the municipality to conduct a further search, and to provide the IPC and the appellant with an affidavit containing details about this ordered search, **within 30**

days of the date of this order (March 1, 2024). At a minimum, the affidavit should include the following:

- the names and positions of the individuals who conducted the search, and their knowledge and understanding of the subject matter and the scope of the request
- the dates the search took place and the steps taken in conducting the search, including:
 - the places that were searched
 - the individuals that were contacted in the course of the search
 - the types of files searched (electronic and paper records, including emails, council agendas and council minutes)
 - the results of the search
 - whether responsive records existed but no longer exist, and
 - whether responsive records exist that are not in the municipality's possession.

2. I order the municipality to issue a new access decision to the appellant **within 30 days of the date of this order (March 1, 2024)**. At a minimum, the municipality's new access decision should address access to all the responsive records that the municipality located and disclosed to the appellant initially (when she filed her access request) and during this appeal (i.e. the complete versions of the partial emails, described in paragraph 14, that are responsive to the appellant's request). It should also address access to any additional responsive records found through its further search. Specifically, the access decision should identify all the responsive records in an index that describes each record and sets out any exemptions the municipality claims for withholding information in each responsive record.

3. I remain seized of this appeal to deal with issues arising from order provision 1.

4. To verify compliance with this order, I reserve the right to require the municipality to provide me with a copy of the access decision referred to in order provision 2, and any records disclosed with that access decision.

Original signed by: _____
Stella Ball
Adjudicator

January 31, 2024