

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4668

Appeal MA22-00101

Niagara Region

June 19, 2025

**Summary:** The appellant requested access to certain emails under the *Municipal Freedom of Information and Protection of Privacy Act*. The Regional Municipality of Niagara gave the appellant partial access to responsive emails, withholding some information on the basis of several exemptions and an exclusion. The appellant then claimed that the municipality did not conduct a reasonable search for records responsive to his request.

In this order, the adjudicator agrees with the appellant that additional records should exist since the municipality did not search for records in a specific location where they were stored. She orders the municipality to search for responsive records in the specific location.

**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 determines whether the Regional Municipality of Niagara<sup>1</sup> (the municipality) conducted a reasonable search for records responsive to the appellant's request.

[2] The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to certain emails between three named individuals and

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<sup>1</sup> The name of the institution was Niagara Region when the file was opened.

from one named individual to any staff member of the municipality. The appellant clarified that he sought access to emails during a specific time containing either a specific subject line or specific keywords.<sup>2</sup>

[3] The municipality located records responsive to the request and issued a decision granting the appellant partial access to them. The municipality relied on several exemptions and an exclusion to withhold some records and information. The appellant was dissatisfied with the municipality's decision and its fee to provide access and filed an appeal with the Information and Privacy Commissioner of Ontario (the IPC).

[4] The IPC attempted to mediate the appeal. During mediation, the municipality issued a revised decision disclosing to the appellant some withheld information. The appellant confirmed that he no longer challenged the municipality's fee or its decision to withhold records. However, the appellant took the position that the municipality had not located all the records responsive to his request. In response, the municipality conducted another search for responsive records but did not locate any additional records. The appellant continued to challenge the reasonableness of the municipality's search.

[5] A mediated resolution of the appeal was not possible, and the appeal was moved to the adjudication stage of the appeals process. An IPC adjudicator decided to conduct an inquiry and obtained representations from the parties that were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction Number 7*. The appeal was then transferred to me to continue the inquiry. I reviewed the parties' representations and determined that I did not need to hear further from the parties before making my decision.

[6] For the following reasons, I find that the municipality's search for some responsive records was not reasonable and order it to conduct a further search for these records. I uphold all other aspects of the municipality's search.

## **DISCUSSION:**

[7] The appellant asserts that additional records exist beyond those found by the municipality. Therefore, at issue in this appeal is whether the municipality has conducted a reasonable search for records as required by section 17 of the *Act*.<sup>3</sup>

[8] 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.<sup>4</sup> The *Act* does not require the municipality to prove with certainty that further records do not exist. However, the municipality must provide

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<sup>2</sup> This is the clarified request that both the appellant and the municipality agree is the request being considered in this appeal.

<sup>3</sup> Orders P-85, P-221 and PO-1954-I.

<sup>4</sup> Orders M-909, PO-2469 and PO-2592.

enough evidence to show that it has made a reasonable effort to identify and locate responsive records;<sup>5</sup> that is, records that are "reasonably related" to the request.<sup>6</sup>

[9] 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.<sup>7</sup>

### **The municipality's representations**

[10] The municipality submits that its searches, following its clarification of the appellant's request, were reasonable. The municipality describes two searches it conducted in response to the appellant's request. It says that during its first search, members of IT Services searched on servers and backups; during the second search, the municipality re-ran all searches and searched backups. The municipality says that it searched for each email related to the request twice. It adds that it also broadened its search the second time but located the same records through both its searches.

[11] The municipality says that members of IT Services and the Office of the Deputy Chief Administrative Officer (Access and Privacy) conducted the searches. It explains that searches were conducted of a number of the municipality's records, including emails, texts, notes, communications, and other documents, on servers and backups, including tapes and disks.

[12] The municipality also describes its record maintenance policies and procedures to explain why some records that might have existed no longer exist. The municipality says that it differentiates between corporate and transitory records. The municipality explains that it considers a record to be transitory if the record has limited value and has no further use beyond an immediate need. The municipality says that transitory records might no longer exist if they were deleted.

[13] The municipality says that its IT Services has procedures for backups of electronic communications and shared drive contents: backups are stored on computer backup tapes and are retained based on a retention schedule; after the retention period, backup tapes are wiped and reused.

### **The appellant's representations**

[14] The appellant submits that further responsive records exist. The appellant describes an investigation into a complaint that resulted in a confidential report. He says that the confidential report cites emails between three individuals named in his request (the confidential report emails). He argues that the confidential report emails are responsive to his request and relies on the confidential report as evidence of the existence

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<sup>5</sup> Orders P-624 and PO-2559.

<sup>6</sup> Order PO-2554.

<sup>7</sup> Order MO-2246.

of the emails. The appellant also argues that subject lines of the confidential report emails or their content indicate that further responsive emails exist (further responsive emails). In addition, the appellant submits that any communication, email and document that was gathered during the investigation into the complaint is responsive to his request.

[15] The appellant identifies another email, unrelated to the confidential report, that he says is responsive to his request.

[16] In addition to identifying further responsive records, the appellant raises concerns about some aspects of the municipality's searches. First, he says that while a request to conduct a search in response to his request was sent to the municipality's Chief Information Officer (CIO), a member of IT Services conducted the search. Second, he says that a form completed by the member of IT Services following their search indicates the search required 10 hours but does not indicate when the search was conducted or provide further details about the search.

[17] Third, the appellant identifies steps that the municipality should have taken during the searches. He says that the municipality should have searched backup images of the network, specifically for the confidential report emails. The appellant also says that the municipality should have contacted individuals who might have responsive records, such as those whose emails the appellant seeks, to ask them to provide responsive records. Further, he submits that the municipality should have asked individuals who might have responsive records about whether they used their personal emails to conduct the municipality's business; if they did, any such email should be in custody and control of the municipality.

### **The municipality's reply representations**

[18] In its reply representations, the municipality provides dates for both searches. Regarding the confidential report emails, the municipality says that it did not locate them during both searches it conducted in response to the appellant's request because the emails were not retained on its servers as they were deemed transitory. The municipality explains that the author of the confidential report obtained access to the same emails during their investigation into the complaint because the search for those emails was conducted elsewhere, not on the municipality's servers. The municipality says that due to active litigation, the confidential report emails were stored outside of normal practices – the member of IT Services who conducted the search in response to the appellant's request did not know about this. The municipality adds that the author of the confidential report made a request for emails relevant to the investigation to the CIO. In addition, the municipality says that the confidential report emails and further responsive emails would have all been captured by the search conducted in response to the request of the author of the confidential report.

[19] With respect to the final email that the appellant asserts ought to exist, the municipality says that it is outside the scope of the request.

[20] The municipality also addresses the appellant's other concerns about its searches. The municipality says that its CIO would not have conducted the search himself but would have delegated it to a member of the IT Services. The municipality also says that it conducted the searches based on the parameters set out in the appellant's request. With respect to the appellant's suggestion that the municipality should have searched backup images, the municipality says that the confidential report emails would not have been retained on the servers or backups because they would have been deleted as transitory records and would not have been located during its searches.

[21] On the issue of personal email accounts, the municipality says that all its Members of Council and staff are instructed to conduct the municipality's business using their municipal email accounts. It argues that if Members of Council conduct their business using their personal email accounts, the municipality does not have custody or control of such emails; it adds that if personal emails are used to communicate about the municipality's business and are sent to the municipal email accounts of municipal staff, such emails would have been located either as a result of the two searches conducted in response to the appellant's request or in response to the request of the author of the confidential report.

### **The appellant's sur-reply representations**

[22] The appellant submits that the author of the confidential report exercised their discretion to keep the report confidential; however, the emails themselves are not confidential and are subject to the *Act*.

[23] The appellant disagrees with the municipality's decision to classify the confidential report emails as transitory. He argues that the emails were not transitory, and they should not have been deleted. The appellant speculates that specific individuals must have deleted the emails after the municipality received his request and before it conducted its first search.

[24] On the issue of personal emails, the appellant submits that Members of Council were advised during an orientation session that emails are deemed corporate if they relate to municipal business, regardless of whether Members of Council use their work or personal emails.

### **Analysis and finding**

[25] I am satisfied that the municipality conducted a reasonable search except with respect to one aspect of the appellant's request.

[26] I accept that the employees who conducted both searches were experienced and knowledgeable in the subject matter of the request. The types of records searched and the municipality's confirmation that the searches were conducted based on the parameters (keywords, subject lines) set out in the request establish that the employees who conducted the searches made a reasonable effort to locate responsive records.

[27] However, I am not satisfied that the municipality searched in all locations where responsive records could be found. The municipality searched for responsive records only on its servers and backups. As explained below, while the municipality's search of its servers and backups was reasonable, some responsive records were located outside the municipality's servers and backups, and the municipality did not search in that location.

[28] I accept the appellant's evidence, which was not contradicted by the municipality, that additional responsive records exist, specifically, the confidential report emails. In addition, I accept the appellant's assertion that further responsive emails may exist.

[29] Based on the municipality's representations, I understand that the confidential report emails and further responsive emails were stored outside normal records practices due to litigation. Given that these emails are responsive to the appellant's request, the municipality should have searched for them in the location where they were stored. While the member of the IT Services who conducted the searches might have been unaware of the fact that some responsive records were located outside the municipality's servers and backups, the CIO was not; the CIO who received a request to search for records in response to the appellant's request knew that some responsive records were located elsewhere.

[30] The municipality says that the confidential report emails and further responsive emails would have been captured by the search in response to the request of the author of the confidential report and would have been included in the report. The appellant submitted a request under the *Act*. Regardless of the fact that the records responsive to the appellant's request were located as part of a different search (related to the confidential report) and were included in the confidential report, the municipality has a separate obligation to conduct a reasonable search in response to the appellant's request under the *Act*, and to disclose to the appellant all responsive records it locates, subject to any applicable exemptions and exclusions.

[31] With respect to the municipality's searches for the confidential report emails and further responsive emails on its servers and backups, I find that these searches were reasonable. I accept the municipality's evidence that the confidential report emails were classified as transitory records and, therefore, not retained as per the municipality's records retention policy. I also accept the municipality's explanation that, given the procedures at its IT Services, depending on when responsive emails were deleted, they would not have been saved on the servers and backups. While the appellant disagrees that the confidential report emails were transitory, the municipality's application of its policies is outside the IPC's jurisdiction.

[32] The appellant asserts that another email should exist and should be disclosed. If the record described by the appellant exists, it would not be responsive because it is not an email between specific individuals or from a specific individual named in the appellant's request. I find that if such a record exists, it is not responsive to the appellant's request and therefore the municipality is not obligated to search for it or disclose it.

[33] I do not find that the concerns raised by the appellant about the municipality's searches support a conclusion that the searches were unreasonable. It is reasonable for a CIO to delegate searches to members of the IT Services. While the form that was submitted by the member of the IT Services who conducted the first search did not contain details about the search, the municipality provided sufficient details about its searches in its representations. The municipality is only required to make a *reasonable* effort to identify and locate responsive records. The municipality was not required in this case to contact every individual who might have responsive records if such records could be located by other means.

[34] The appellant's assertion that the municipality should have asked individuals who might have responsive records whether they used personal email accounts is based on speculation that personal email accounts contain responsive records. Speculation is not sufficient to establish a reasonable basis for concluding that further records exist. While both parties make representations on whether emails in personal accounts are in custody or control of the municipality, I do not need to make a finding on this issue because it is not the issue before me.

[35] With respect to the appellant's assertion that the records gathered during the investigation into the complaint should have been deemed responsive to his request, I disagree. The appellant's request only sought emails between specific individuals and from a specific individual. While the appellant's request, in part, seeks the same records gathered during the investigation into the complaint, the appellant's request does not seek the package of records that was gathered for the purpose of the investigation.

## **ORDER:**

I order the municipality to conduct a search for responsive records in the location where it says it stored the confidential report emails outside the municipality's servers, and issue, in accordance with all applicable provisions of the *Act*, an access decision to the appellant regarding any records located in its further search(es), treating the date of this order as the date of the request for administrative purposes. To be clear, the municipality should issue a decision even if no records are located as a result of the search(es) conducted in compliance with this order.

Original Signed by: \_\_\_\_\_

Anna Kalinichenko  
Adjudicator

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June 19, 2025