Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1397

Appeal MA_000208_1

City of Mississauga

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NATURE OF THE APPEAL:

This is an appeal under the provisions of the *Municipal Freedom Information and Protection of Privacy Act* (the *Act*), from a decision of the City of Mississauga (the City).

As background to the request, in July of 1999 the requester (now the appellant) made a complaint about the conduct of an employee of the City to the General Manager of Mississauga Transit. Following this complaint, the appellant engaged in a lengthy correspondence with the City in which he asked for information as to the measures taken by the City in response to his complaint, and other related information. In May of 2000, the appellant requested access under the *Act* to "all information available to the City of Mississauga inclusive of Hydro Mississauga and Mississauga Transit" with respect to the incident.

In response to the request, the City located two letters, and provided the appellant with copies of both. Further, the City notified him that if he wished to obtain records from Hydro Mississauga, he should "submit a request directly to the Hydro Freedom of Information Coordinator". The appellant filed this appeal alleging, among other things, that further responsive records exist. During the initial stages of the appeal, the City located three additional letters. Subsequently, the City located further records, and provided them to the appellant.

All of the records which have been located and provided to the appellant consist of correspondence either from the appellant to City officials, or from City officials to the appellant, relating to his complaint of July 1999 and his requests for information following that complaint.

The appellant still maintains that additional records should exist. Further, in this appeal, the appellant seeks a finding that Hydro Mississauga is an "institution" under the *Act*. He asserts that the City was required, pursuant to section 18 of the *Act*, to forward or transfer his request to Hydro Mississauga. Additionally, the appellant claims that the City has violated the intent of section 4(1) of the *Act*, by failing to disclose the records upon receiving his request and at subsequent opportunities.

I sent a Notice of Inquiry to the City, initially, inviting its representations on the issues raised by the appeal. The City provided representations, which were shared with the appellant. The appellant, has in turn, provided representations in response to those of the City.

CONCLUSION:

The appeal is dismissed.

DISCUSSION:

REASONABLE SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the City has conducted a reasonable search for the records as

required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the City will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he is seeking and an institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the City to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the City must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the City's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

As I have indicated, this request has its genesis in a complaint made by the appellant in July of 1999 about the conduct of an employee of Mississauga Transit, in relation to an alleged unlawful use of Hydro Mississauga property. In response to this complaint, the City Commissioner of Transportation and Works indicated that the matter was discussed with the General Manager of Hydro Mississauga, the matter was investigated and the appropriate action taken by Hydro Mississauga. Further, it is indicated that the City Commissioner discussed the matter with the employee concerned.

The appellant was not satisfied with this response and wrote again to the Commissioner asking for information, amongst other things, as to the "measures" taken in reference to the incidents of which he had complained. These initial letters formed the beginning of a long series of correspondence between the appellant and the City, through either the Commissioner or its Senior Legal Counsel, most of which concerned the appellant's request for more information. During the course of this correspondence, the appellant requested the "actual detailed account of all investigations and recommendations (including all reports, memos, etc.) that have been conducted by the City of Mississauga, Mississauga Transit, Hydro Mississauga, Office of the Mayor, and/or any of their affiliated offices and proxies ..."

In response to the appellant's requests for information (all of which have, as described thus far, preceded the date of the request under the *Act*), the City's Senior Legal Counsel stated at one point that, with respect to the request for "actual detailed" accounts of the City investigations, the City would not provide that information to him, and that he had been advised of the outcome of that investigation.

The City also informed the appellant that it had no control over or access to information in the possession of Hydro Mississauga.

The appellant made his request under the *Act* in May of 2000, for "[a]ll information available to the City of Mississauga inclusive of Hydro Mississauga and Mississauga Transit on diversion of our public services for private use of [a named individual] ...". In response, the City located two letters, one to the appellant from the Commissioner, and another from its Senior Legal Counsel

to the appellant. In his appeal, the appellant noted that he had exchanged more than two pieces of correspondence with officials of the City on this issue.

During the course of responding to this appeal, the City identified three further pieces of correspondence to the mediator assigned to this file from this office, all of which were described to the appellant. Later, during the course of mediation, the City agreed to and did conduct a further search for records, and located a further eight letters.

In this appeal, the City submitted an affidavit signed by its Freedom of Information Co-ordinator (FOIC) and Acting Deputy Clerk, who is also the Manager of Administration and Records. In this affidavit, the FOIC states that after this appeal was filed, a further search to locate records responsive to the request was conducted. Files held by the Transportation and Works Department, as well as the City Solicitor's Office were search. This search resulted in the location of the additional records which were disclosed to the appellant during August, 2000. The affidavit also states that "[t]here are no written accounts of the investigation conducted into the incident which precipitated the request by [the appellant] as the investigation consisted of discussions/telephone conversations between City officials and staff." Further, it also states that "[n]o further records exist in connection with this request."

The City submits that it is the practice of its departments to file any documents relating to any staff person in the official Human Resources file. The Manager of Human Resources for the Transportation and Works Department was therefore the appropriate person to conduct the search of the Transportation and Works Department records. The City also submits that as one member of staff, the Senior Legal Counsel in the City Solicitor's Office is responsible for issues involving City staff, the request was forwarded to this individual to conduct the search.

The appellant asserts, among other things, that "the institution has not been credible in this appeal". He submits, in essence, that the actions of the City in failing to locate all records at the outset and in locating further records at several stages in the process, provide good reason to doubt its position that no further documents exist. The appellant requests, among other things, that the City be required to submit an affidavit in a form and in response to specific questions which he proposes. The appellant also submits that by refusing to provide the "actual detailed" account of the City's investigations, the City's Senior Legal Counsel (in correspondence preceding the request under the *Act*) has "conceded" the existence of such an account and, further, that his failure to state clearly that there were no further documents should be taken to mean further documents exist.

This appeal is notable for the number of times the City searched for and provided documents in response to the request for access, as well as the lengthy correspondence preceding the request. It is clear that the appellant has become deeply suspicious of the City's good faith in responding to his requests for information. On my review of the matter, however, I conclude that the City has demonstrated that it has conducted a reasonable search in response to the appellant's request under the *Act*.

Clearly, the search conducted by the City in its initial response to the appellant was inadequate, as was even a second search at the time the City was notified of this appeal. However, I am satisfied that the City has now shown, taking into account the totality of the searches and information it has provided, that it has made reasonable efforts to locate any responsive records.

It is true, as I have detailed, that there have been missteps in the City's response to the request. Records which should have been located at the outset were only identified later in the process. However, I have no reason to conclude that there was either malice or deliberateness in these missteps which might cast doubt on the City's position in this matter. It should be noted that the records which the City failed to identify initially were all known to the appellant, having either been sent from him or to him. It would hardly have been of any advantage to the City to deliberately conceal these letters. Further, to the extent that the City's earlier responses reflect a mishandling of the matter, this was corrected by its later actions.

The appellant has provided a copy of a letter which he states constitutes proof of his assertion that more records exist. I have examined the letter, and am not convinced that it is evidence of this assertion. The letter is one of the further documents which were located by the City and provided to this office once it was notified of this appeal. This letter, sent by the City's Senior Legal Counsel to the appellant, was described to the appellant by the mediator, and referred to in subsequent correspondence from the appellant to both the mediator and the City. The existence of this letter has been well known to the appellant throughout, and was also identified by the City early during the course of processing this appeal. The appellant refers to the fact that this letter was omitted from a list of records sent to him by the City on August 28, 2000, which records are referred to in its affidavit. In my view, this omission is not significant, given the parties' prior knowledge of the existence of this letter. It does not constitute proof, as the appellant claims, that the assertions in that affidavit are false.

I also do not agree with the appellant that correspondence from the City's Senior Legal Counsel (preceding the request under the *Act*) in essence "conceded" the existence of further records or that counsel's failure to state clearly that there were no further documents should be taken to mean further documents exist. These conclusions are unnecessary, and in all the circumstances, unreasonable.

Other factors which I have considered in my determinations on this issue are the City's conclusion that there was no wrongdoing by a member of its staff, and that the matter concerned Hydro Mississauga property. The appellant is clearly dubious of the claim that the City's investigation did not generate any records beyond the correspondence to him. However, in the circumstances, it may simply be that the "investigation" by the City was more informal and truncated than the appellant expected. It is not implausible that the matter was handled verbally by the City and that no written records of an "investigation" exist.

Finally, it is worth addressing the appellant's position that the City ought to have submitted its affidavit in this matter in the specific form which he proposes. The appellant suggests that the City's failure to adopt his proposed wording demonstrates a disregard for the *Act*. He also requests that his proposed affidavit "become the only acceptable format for the institution's future affidavits". In my view, there is no basis for either drawing any negative inferences against the City, or requiring it to adopt the appellant's proposed affidavit. I have found, on balance, that the City's materials bear out its position in this matter, and there is no reason to require further evidence from it.

In sum, I find that the City has demonstrated that it has conducted a reasonable search for records responsive to the request.

ISSUE OF "INTENT" UNDER SECTION 4(1)

The appellant has submitted that the City has violated the "intent" of section 4(1) of the *Act*, which is the part of the *Act* providing for the general right of access to information.

The "intent" of an institution in making access decisions under the *Act* is generally not a focus of inquiries by this office. In a case such as this, where the reasonableness of a search for records is at issue, I must determine, regardless of "intent", whether the City has shown that it has made a reasonable effort to identify and locate records responsive to the request. Having found that it has, I see no purpose in inquiring further. It is unlikely that section 4(1) provides an independent basis for a remedial order and, in any event, in the case before me, any questions about the reasonableness of the City's actions in responding to the appellant's request for access are dealt with in my discussion of whether it has conducted a reasonable search.

ACCESS PROCEDURE UNDER THE *ACT*

The appellant has also submitted that as Hydro Mississauga is an "institution" under the *Act*, the City was required, pursuant to section 18 of the *Act*, to forward or transfer his request to Hydro Mississauga.

Section 18 of the *Act* provides, in part:

> (1) In this section, "institution" includes an institution as defined in section 2 of the *Freedom of Information and Protection of Privacy Act*.
>
> (2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
>
> (a) forward the request to the other institution; and
>
> (b) give written notice to the person who made the request that it has been forwarded to the other institution.
>
> (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

Section 142 of the *Electricity Act, 1998* states, in part:

> (1) One or more municipal corporations may cause a corporation to be incorporated under the *Business Corporations Act* for the purpose of generating, transmitting, distributing or retailing electricity. 1998, c. 15, Sched. A, s. 142 (1).
>
> (2) Not later than the second anniversary of the day this section comes into force, every municipal corporation that generates, transmits, distributes or retails electricity, directly or indirectly, shall cause a corporation to be incorporated under subsection (1) for the purpose of carrying on those activities. 1998, c. 15, Sched. A, s. 142 (2).
>
> (6) A corporation incorporated pursuant to this section shall be deemed not to be a local board, public utilities commission or hydro-electric commission for the purposes of any Act. 1998, c. 15, Sched. A, s. 142 (6).
>
> (7) Despite the definition of "institution" in subsection 2 (1) of the *Municipal Freedom of Information and Protection of Privacy Act* and despite subsection 2 (3) of that Act, a corporation incorporated pursuant to this section shall be deemed not to be an institution for the purposes of that Act and shall be deemed not to be part of a municipal corporation for the purposes of that Act. 1999, c. 14, Sched. F, s. 3.

Section 142(1) permits municipalities to establish corporations "for the purpose of generating, transmitting, distributing or retailing electricity". Section 142(2) *requires* the establishment of such corporations by municipalities, and the City has done this, with the incorporation of Hydro Mississauga in December of 1999. The appellant acknowledges that Hydro Mississauga was "converted" under section 142(2) in 1999. Therefore, under section 142(7), Hydro Mississauga, as a corporation incorporated pursuant to section 142, is deemed not to be an institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act*.

Both the appellant and the City have referred in their submissions to the part of the *Electricity Act, 1998* which states that the new hydro corporations are not "hydro-electric commissions" for the purposes of any act. It appears that both parties have confused sections 142(6) and 142(7) of the *Electricity Act, 1998*. Section 142(6) refers to a "hydro-electric commission"; section 142(7) does not. Whatever may be the effect of section 142(6), section 142(7) is clear. Hydro Mississauga is deemed not to be an institution for the purposes of the *Act*.

As set out above, section 18 of the *Act* provides for the forwarding or transfer of a request made under the *Act* to another *institution*, in specified circumstances. Since I have found that Hydro Mississauga, as a corporation incorporated under the provisions of section 142, is deemed not to be an institution for the purposes of the *Act*, the City was not required to forward or transfer the appellant's request to Hydro Mississauga.

The appellant asserts that the City itself believed that Hydro Mississauga was an "institution" under the *Act* since in response to the appellant's request, it suggested to the appellant that he submit a request directly to the "Hydro Freedom of Information Coordinator". This does not alter the effect of the statutory provisions, nor my conclusions above. Whether or not the City was operating under any misapprehension about Hydro Mississauga's status (and I do not rule out the possibility that an entity which is not covered by the *Act* may nonetheless have a Freedom of Information Co-ordinator), its actions were consistent with its obligations under the *Act*.

The appellant also submits that the "conversion" of Hydro Mississauga under section 142(2) of the *Electricity Act, 1998* "does not entitle any entity to presuppose that Hydro Mississauga does not have to offer any records w.r.t. cases that have occurred and were fully investigated by Hydro Mississauga prior to the conversion." I take the appellant's submission to be that, despite the incorporation of Hydro Mississauga and despite any change in the applicability of the *Act* as a result of this incorporation, records which were created prior to incorporation are nevertheless subject to the *Act*. I do not agree. If Hydro Mississauga is not an "institution" for the purposes of section 18, the City is not obliged under that section to forward or transfer the appellant's request to it, regardless of when the relevant records may have been created.

ORDER:

I conclude that the City has made a reasonable effort to locate records responsive to the request, and I dismiss this appeal.

Original signed by: February 15, 2001
Sherry Liang
Adjudicator