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

ORDER MO-1528-I

Appeal MA-010143-2

City of Toronto

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NATURE OF THE APPEAL:

The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the City). The request was for information pertaining to the Riverdale Farm, and included:

1. records relating to *Occupational Health and Safety Act* (the *OHSA*), section 61 orders of an inspector concerning the City of Toronto or the union for its outside workers or Riverdale Farm on Winchester Street, Toronto
2. records relating to the City of Toronto Riverdale Farm as a farm operation according to the *OHSA*
3. records believed to be with the Parks and Recreation Department of all Rare Breeds of Canada leases of animals for any and all animals at the Riverdale Farm
4. records believed to be with the Parks and Recreation Department of any and all leases of any and all farm animals at Riverdale Farm and in particular

    a) the 2 Clydesdale horses known as Rooster and Dolly
    b) the White Park cow known as Blanca
    c) the Jersey cow known as Bella
    d) the Canadian cow known as Kyline
    e) the donkey known as Dusty
    f) any of the pigs, turkeys, chickens goats or sheep

5. records believed to be with the Parks and Recreation Department of any ownership for 4a) to 4d) inclusive at Riverdale Farm and in particular for the Clydesdale horses Rooster and Dolly

In his request letter, the appellant noted that he is an elected member of the Riverdale Farm Advisory Committee and that the committee is authorized to advise the Parks and Recreation Department on matters relating to Riverdale Farm. He further advised that the committee was to have received copies of the requested records from the Toronto Parks and Recreation Supervisor, but had not received them.

The City responded to the appellant's request, and granted access as follows:

- full access to 14 records relating to the *OHSA*, section 61 orders;
- full access to the leases for certain animals; and
- partial access to the leases for certain animals (owners names severed out), based on section 14(1).

In addition, the City indicated to the appellant that it does not have the following records:

- leases with Rare Breeds of Canada (The City indicated that it has lease agreements with individual farmers and not with Rare Breeds of Canada);

- leases for the Jersey cow (The City indicated that it is not yet in possession of the lease for the Jersey cow);
- lease for the donkey (The City indicated that it owns the donkey).

The appellant appealed the City's decision, in part on the basis that more records exist.

During mediation the mediator sought clarification of the records sought by the appellant. Additionally, during the mediation process, the City indicated that it was continuing to check for additional records and that it was considering releasing the names of the owners of the leased animals.

a) Clarification of Records Sought by Appellant

The appellant sent a letter on September 10, 2001 in which he indicated that he wished to access the following records, which had been referred to in the records provided to him, but were not furnished to him:

- Records arising out the consultation by the City with Rare Breeds Canada in 1999/2000 and Ontario Farm Safety Association in 1999/2000
- Copy of Ministry of Labour written order 844370 Order 02
- Records of consultation between City's Legal and Parks and Recreation South District departments
- Records of consultation/review of standard operating procedures with "Business Unit" Corporate Health and Safety Parks Joint Health Committee and staff in 2000
- Record Page 3a, Memo [between named individuals] dated February 27, 2001
- Records after February 26, 2001 relating to the removal of the White Park cow
- Records after February 26, 2001 concerning "in future no animals with horns be accepted at Riverdale Farm"

He also indicated that he wished to know whether the City considers the *OHSA* to apply to Riverdale Farm or only Riverdale Park outside the farm fences. He stated that he believes that there is a consultant's report to the City concerning the application of the *OHSA* to Riverdale Farm. He believes that there must have been a legal opinion prepared on this issue.

b) The location of additional records and the City's Revised Decision

Following its search for additional records, the City issued a revised decision letter to the appellant in which it:

a) granted access to the previously severed information contained in Records 15, 18-19 and 23-24 relating to the lease of the farm animals;
b) identified additional responsive records and then claimed that they fell outside the scope of the *Act* on the basis of section 52(3);
c) advised that no records exist which are responsive to the balance of the appellant's amended request.

The City specified that it was relying on sections 52(3)1 and 3, as it had prepared, collected, maintained or used the records for:

- proceedings or anticipated proceedings before a tribunal relating to the employment of an employee of the City. The City indicated that there has been a dismissal hearing as well as an ongoing arbitration relating to a number of the records;

- meetings, consultation and discussions relating to labour relations and/or an employment related matter in which the City of Toronto has interest, including the special Joint Health and Safety Committee meeting to discuss a work refusal.

Further mediation could not be effected and the appeal was moved into adjudication. I decided to seek representations from the City, initially.

The City submitted representations in response. After reviewing them, I decided to split the issues on appeal. In particular, I decided to place the issues relating to the application of section 52(3) to the records in category one (identified below) on hold pending the outcome of an application for leave to appeal made by this office to the Supreme Court of Canada. This application was made in response to the decision of the Ontario Court of Appeal in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2001] O.J. No. 3223, in which the court found that the Commissioner's interpretation of section 65(6) (the provincial equivalent to section 52(3)) was incorrect.

In order to address the remaining issue in a timely manner, I decided to proceed with the reasonableness of search issue at this time, and sought representations from the appellant on this issue only. I sent him a copy of the Notice of Inquiry, along with those portions of the City's representations that address the reasonableness of search issue. The appellant was asked to review these submissions, and, if satisfied with the City's response to this issue, to notify this office accordingly. The appellant did not contact this office, nor did he submit representations in response.

Based on the discussions held during mediation in which the appellant addressed his belief that more records should exist, I have decided to proceed with the reasonableness of search issue.

RECORDS:

The records at issue in the appeal are:

Category one records - those records identified by the City of Toronto as being subject to section 52(3), as per its revised decision letter (for which my decision on access has been deferred):

- Ontario Ministry of Labour Premise/Project forms 88270, 844367, 844368, 844369, 844370, 844372, and 844382.

- Letter from the Chair of the Joint Health and Safety Committee to CUPE Local 416 dated May 18, 2000
- Letter from the union to the Ministry of Labour
- Internal memo dated May 1, 2000
- Minutes of a special Joint Health and Safety Committee meeting held on May 17, 2000
- Undated compliance plan

Category two records - the remainder of those records identified in the appellant's September 10, 2001 letter, which the Ministry has indicated "do not exist."

DISCUSSION:

REASONABLENESS OF SEARCH

Introduction

Where a requester provides sufficient detail about the records he is seeking and the 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 responsive to the request. The *Act* does not require the City to prove with absolute certainty that further records do not exist. To properly discharge its obligations under the *Act*, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all responsive records (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

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

The City states that both the access and privacy officer assigned to the appellant's request file and the City employee who conducted the original search for records believed that the appellant's request as worded was clear and that they understood what he was looking for. The City indicates that it was not until the appellant appealed its decision that there appeared to be some confusion as to what was being requested in item 2 of the request, that is, records relating to Riverdale Farm as a farm operation pursuant to the *OHSA*. The City also notes that it was not until the appellant appealed its decision that he identified the consultant's report and legal opinion as forming part of his request. The City confirms, however, that these items were subsequently included within the scope of his request and a search was conducted for them.

With respect to the actual searches that were conducted, the City states that the initial search for responsive records was conducted by the Acting Manager, Parks and Recreation, South District – East Region. In searching for records responsive to item 2 of the appellant's request, the Acting Manager consulted the Senior Health and Safety Consultant (Sr. H&S Consultant) and another

Health and Safety Consultant (H&S Consultant), both with the City's Parks and Recreation Division of the Economic Development, Culture and Tourism Department.

Following notification that an appeal had been filed, the City indicates that further searches were conducted as follows:

- Following the receipt of a copy of the appellant's letter of June 7, 2001, [the Acting Manager] conducted another search and located additional responsive records, including the five MOL Premise/Projects Forms. [The Acting Manager] stated that she had not originally located the MOL reports because they had been tied up in a labour relations dismissal hearing (see issue A) that had since been concluded;

  With respect to the appellant's position that records should exist regarding consultations with Rare Breeds of Canada and the Ontario Farm Safety Association in 1999/2000 and the review of standard operating procedures with the Business Unit, etc., [the Acting Manager] advised that this matter had been dealt with verbally and there were no written records of the discussions.

  [The Acting Manager] also advised that similarly, there had been only verbal negotiations regarding the finding of a suitable home for the White park cow. She stated, however, that she had provided an overview of the verbal exchange to the Advisory Council of which the appellant was a member. The only record relating to this matter was the receipt, a copy of which had been disclosed to the appellant.

- On August 17, 2001, the Corporate Access and Privacy Office's Senior Policy & Compliance Officer (Senior Policy Officer) contacted the [Sr. H&S Consultant] for clarification of the application of the *OHSA* to Riverdale Farm (further to item 5 of the appellant's letter of appeal). [The Sr. H&S Consultant] advised that the City has never made a distinction vis-à-vis Riverdale Farm and farm operations pursuant to the *OHSA*. [The Sr. H&S Consultant] advised that for the simple reason Riverdale Farm is a workplace, it is covered by the *OHSA*. He said that since no such delineation has ever been made, there is no corresponding documentation on file.

The City states further that its Senior Policy Officer contacted both the H&S Consultant and the former supervisor of Riverdale Farm, both of whom indicated that they were not aware of the existence of any consultant's report or legal opinion.

The City indicates that its Senior Policy Officer also contacted the City's Employment Law Solicitor who had represented the City in the arbitration of the grievances filed by a Farm attendant, and obtained copies of two MOL orders.

The City states that further searches were conducted for the consultant's report and legal opinion after it received the Notice of Inquiry. In particular, the Senior Policy Officer contacted the City's Employment Law Solicitor who advised that he was not aware of any consultant's report concerning the application of the *OHSA* to Riverdale Farm, and that he had no recollection of providing any legal advice in this regard, written or otherwise. In addition, the Human Resources Manager, Occupational Health, Safety & Workers' Compensation was also contacted. The City indicates that she advised that she is neither in possession of nor is she aware of any consultant's report or legal opinion.

Further, the City indicates that the Acting Manager spent a number of hours searching again for additional records and notes that one additional record was located. This record, the registration for the Jersey cow, was previously not available. The City indicates that it is prepared to disclose this record to the appellant in its entirety. In the event that it has not already done so, I will include an order provision to that effect.

In conclusion, the City states:

> In support of its position that the consultant's report and legal opinion do not exist, the City further submits that it has always complied with any MOL's directives pursuant to the *OHSA* with respect to Riverdale Farm. Since the City has never questioned the *OHSA's* applicability, there would have been no reason for it to have sought a consultant's report or to have a legal opinion prepared on this issue.

The City states that the Riverdale Farm falls under the "City Property" section of its records retention schedule, and confirms that no files have been ordered destroyed pursuant to the schedule.

Based on the City's representations outlining the steps taken by its staff to search for and locate responsive records as well as its explanations with respect to the non-existence of additional records, I am satisfied that the City has made a reasonable effort to locate records responsive to the appellant's request. Accordingly, I find that the City's has conducted a reasonable search and this portion of the appeal is dismissed.

ORDER:

1. The City's search for responsive records was reasonable and this portion of the appeal is dismissed.

2. Unless it has already done so, I order the City to provide the appellant with a copy of the record it located pertaining to the Jersey cow by **May 3, 2002**.

3. In order to verify compliance with this interim order, I reserve the right to require the City to provide me with a copy of the material sent to the appellant in accordance with Provision 2.

4. I remain seized of the outstanding issues in this appeal.

Original signed by: April 15, 2002
Laurel Cropley
Adjudicator