



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

ORDER MO-1730

Appeals MA-020300-1 and MA-030107-1

City of Toronto



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEALS:

The City of Toronto (the City) received two requests pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to two minor variance applications made to the City by a named property owner (the affected person). In the first request, the requester identified the application by file number, street address and the affected person's name, asking for the following information:

... the certified land survey ... including the documentation, measurements, plans, photographs, illustrations and calculations by the applicant, his agent, or by the City and its agents, to substantiate the claimed tableland area ... stated on the applicant's building plans, as filed on the Committee of Adjustments ...

In the second request, the requester sought access to:

... the certified land survey... including sketches, drawings etc., pertaining to the claimed tableland area. The request includes any documentation, measurements, plans, photographs, illustrations, and calculations by the applicant, his agents, or by the City and its agents pertaining to the claimed tableland area of the property. It includes any notes, check-lists and sign-offs related to the internal processing, review and acceptance of the claimed tableland area and description.

In its decision letter respecting the first request, the City denied access to the responsive records in full. For the second request, the City located some 40 records in its Committee of Adjustment file and granted partial access to them. In denying access in both appeals, the City relied on section 14(1) of the *Act* stating that the release of the undisclosed information would constitute an unjustified invasion of the affected person's privacy.

The appellant appealed the decisions to this office. In his letters of appeal, the appellant provided information as to the circumstances surrounding his request and the basis for his appeal and cited sections 14(2)(a) and 14(2)(d) of the *Act* as factors weighing in favour of the disclosure of the records. He also maintains that additional records responsive to both requests ought to exist. This office opened Appeal Number MA-020300-1 for the first appeal and MA-030107-1 for the second.

Mediation stage of the appeals

During the mediation stage of Appeal Number MA-020300-1, the City explained that since the events of September 11, 2001, the City has taken a more restrictive approach to releasing records relating to building plans and surveys on the basis of safety and security concerns. The appellant clarified that he was not interested in obtaining copies of the building plans, but was interested in a survey of the tableland and any documents and/or records relating to the calculation of the gross tableland area. The building plans were, therefore, removed from the appeal.

The appellant maintains that additional records relating to certain calculations in a sketch of the tableland ought to exist. During the mediation of Appeal Number MA-020300-1, the City conducted a further search and provided the appellant with an explanation as to why no additional records exist regarding the tableland area calculation. The appellant was not satisfied with the explanation provided and indicated his wish to continue the appeal on the basis that the searches undertaken were inadequate because additional records should exist.

With respect to Appeal Number MA-030107-1, the appellant also states that additional records beyond the 40 records identified by the City ought to exist. Specifically he is seeking access to:

1. Responses received by the City to Record 34 from any of the 21 organizations contacted by the Committee of Adjustment.
2. Documentation or correspondence relating to certain errors identified by the appellant which are contained in the records.
3. Copies of the "[Toronto Region Conservation] Authority's Flood Plan and Fill Regulation line map, sheet no. 2".

As further mediation of the appeals was not possible, they were moved into the adjudication stage of the process.

Adjudication stage of the appeals

In Appeal Number MA-020300-1, the Commissioner's office initially sought representations from the City on the reasonable search issue as well as the application of sections 14(1) and 17 and from an affected party on the application of section 14(1) only. The affected person consented to the disclosure of the sketch of the tableland to the appellant and the City provided the appellant with a copy on March 19, 2003. As a result of this disclosure, the City withdrew its reliance on section 14(1) as all of the records which it identified as responsive have been disclosed to the appellant. The appellant's representations on the reasonable search issue were also solicited and received. These representations were shared with the City, which then made additional representations by way of reply.

In Appeal Number MA-030107-1, I sought the representations of the City solely on the issue of whether its search for responsive records was reasonable. The City provided representations, which were shared, in their entirety, with the appellant. I also received submissions from the appellant and shared them with the City, who then made further representations in reply.

As it appears that the issues to be addressed in both of these appeals are very similar, involving the same parties and the same subject matter, I will resolve both appeals through the issuance of a single order.

DISCUSSION:

REASONABLE SEARCH

In appeals involving a claim that further responsive records exist, as is the case in these appeals, 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/she is seeking and the City indicates that further records do not exist, it is my responsibility to ensure that the City 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.

Representations of the parties

Appeal Number MA-020300-1

The City states that "the sketch of the tablelands was done by an outside professional surveyor and provided to the City (West District, Urban Development Services – Buildings Department) by [the affected person]. The Buildings Department advised that "they routinely accept calculations of a professional surveyor and do not as a matter of course, conduct their own review to confirm if figures supplied to them are in fact correct." The City also states that Building Department staff checked their files and found no additional records supporting the calculations contained in the sketch. The City concludes this portion of its submissions by stating that ". . . since staff did not do their own calculations to confirm if the calculations provided by the professional surveyor were correct, there are no other responsive records" and that "a reasonable search for additional records has been conducted."

The appellant provided an explanation as to why he believes that information relating to the calculations contained in the tableland sketch ought to exist, given their importance in the whole development process. He points out the Gross Floor Area allowed for a particular development is dependent on the area of the tableland and that it stands to reason that these calculations are accurate and verified by the City. The appellant's other submissions relate to the existence of additional records responsive to Appeal Number MA-030107-1.

In its reply representations, the City submits that the appellant narrowed the scope of his appeal in MA-020300-1 to include only records relating to the calculations of tableland area contained in the sketch provided to him. As such, the City states that it only undertook to search for records fitting that description. The City submits that it undertook a further examination of the Committee of Adjustment records identified as responsive in Appeal Number MA-030107-1 and determined that none of these records contained information relating to the tableland area calculations. The City states that it also contacted two employees identified in the appellant's representations to determine if they maintained any records relating solely to the tablelands area calculations. Both employees indicated that any such records would be included in the Building Department's files which were already searched. The City also submits that a final search of the Building Department's files relating to this variance application was again conducted and that this search generated no additional record beyond the tableland sketch and site plan identified earlier.

The City concludes its reply submissions by reiterating that no records relating to the calculation of the tableland area exist beyond those already identified.

Appeal Number MA-030107-1

The City indicates that it wishes to rely on the representations provided to this office in response to the Notice of Inquiry in Appeal Number MA-020300-1 and responds to the three grounds for appeal raised by the appellant as follows:

1. Replies to the Committee of Adjustment's request for comments.

The Manager/Deputy Secretary-Treasurer of the Committee of Adjustment states that every Committee of Adjustment application is circulated to a number of commenting agencies, internal and external [to the City]. Record 34 is a standard memo listing all the agencies to which the Committee routinely circulates information about applications. The Manager states that this is not a *Planning Act* requirement.

The agencies are not required to file written comments. The circulation of the application also serves the purpose of informing the agencies of the fact that an application has been made. Only agencies that have a comment or concern will respond. If there is no comment, the Committee interprets this to mean there is no concern with the proposal. It is quite common to have a low return rate, usually around 5 per cent. It is page 40 of the record.

2. Documentation relating to errors contained in the record.

. . . The City relies on the searches knowledgeable staff have conducted for any and all records that may relate to this application before the

Committee of Adjustment as evidence that it has conducted a reasonable search. . .

3. Copies of the Flood Plain map referred to in Record 40

The City made a request to the program area to attempt to locate the “print part of the [Toronto Region Conservation] Authority’s Flood Plain and Fill Regulation line map”. The map was not, however, located.

The appellant points out that the details of the errors in the application were contained in a letter which he provided to the Mediator on August 5, 2003 as Attachments A and B, pages 6 and 7. He submits that the City has not responded to his requests for records relating to these errors and inconsistencies. Finally, the appellant argues that the City ought to be able to “reconstitute the Authority’s flood plain map from its map archives or from the Authority.”

Findings

Appeal Number MA-020300-1

I have reviewed in detail the representations of the City and the appellant with respect to this appeal and conclude that the City has conducted a reasonable search for records which are responsive to the appellant’s request, as narrowed. During the mediation stage of the appeal, the appellant significantly reduced the scope of this request to include only those records relating to the tableland area calculations contained in the area sketch which was later provided to him.

The City indicates that multiple searches were conducted of its Building Department files, Committee of Adjustment record-holdings and that two employees were also requested to conduct searches of their records in order to locate the requested information. The City has also provided a detailed explanation as to why no records relating to the verification of the tableland area calculations provided by the surveyor exist. Based on those submissions, I am satisfied that the City has properly undertaken a detailed search for responsive records and was unable to locate additional documents responsive to the request. I will, accordingly, dismiss Appeal Number MA-020300-1.

Appeal Number MA-030107-1

The first ground for appeal of the City’s decision in this appeal was concerned with the City’s search for additional responses received by it from various stakeholders who were notified of the application through the issuance of Record 34. I find that the City’s representations adequately address the issue of the reasonableness of its search for such records and I need not address it further in this order.

The second ground for appeal is concerned with the appellant’s argument that a number of “errors and inconsistencies” in the application to the Committee of Adjustment were identified by him and records relating these ought to exist. The appellant communicated these concerns to

the City and the Mediator on August 5, 2003 during the mediation stage of the appeal. I note that these concerns address mainly the appellant's disagreement with the calculations contained in the documentation which accompanied the application to the Committee of Adjustment "as it pertained to the critical parameter of Tableland Area or Net Lot Area, and the Lot Coverage and Floor Space Ratios".

The City has provided me with very detailed representations concerning the nature and extent of the searches undertaken for records relating to both of these appeals, including extensive searches of its Committee of Adjustment files. In my view, the City has conducted an adequate search for records relating to the "errors and inconsistencies" identified by the appellant. I am satisfied, based on the representations of the City respecting the searches it has undertaken, that any such records simply do not exist in the City's record-holdings.

The third ground for appeal in Appeal Number MA-030107-1 relates to the existence of a Flood Plain and Fill Regulation Map prepared by the Toronto Region Conservation Authority and included as part of the Committee of Adjustment application. I find that the City has not conducted a reasonable search for this document and I will order it to do so. Its representations on this ground were vague and incomplete and I am not satisfied that it has met its obligations under section 17 in responding to this part of the request.

ORDER:

1. I order the City to conduct a search for a copy of the Toronto Region Conservation Authority "Flood Plain and Fill Regulation line map, sheet no. 2" and to issue the appellant a decision respecting access to this record under section 19 of the *Act*, using the date of this order as the date of the request.
2. I uphold the City's search for responsive records in Appeal Number MA-020300-1 and the remaining portions of Appeal Number MA-030107-1 and dismiss these grounds for appeal.

Original Signed By: _____

Donald Hale
Adjudicator

December 19, 2003 _____