



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1686

Appeal MA-030185-1

The Corporation of the City of London



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NATURE OF THE APPEAL:

In April 2002, the Corporation of the City of London (the City) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information, from the same requester. The first request was for information relating to departure agreements made between the City and individuals formerly employed by the City (Request 2002-17). The second was for information relating to compensation given to City managers during a strike by outside workers (Request 2002-18).

In response to Request 2002-17, the City denied access to some of the records which it identified as responsive to the request. The requester appealed the City's decision to deny access. He also appealed on the basis that additional responsive records beyond those identified by the City should exist. The appeal resulted in Order MO-1622 in which the Adjudicator partially upheld the City's decision to deny access, ordered the City to issue an access decision with respect to certain documents and ordered the City to undertake additional searches for responsive records.

In the case of Request 2002-18, the City provided records to the requester. The requester appealed on the basis that additional records responsive to the request should exist. During the inquiry stage of the appeal, the sole issue became whether certain records not disclosed to the appellant were responsive to the request. The Adjudicator issued Order MO-1618 in which he found the records to be responsive to the request and ordered the City to provide an access decision with respect to those records.

On March 31, 2003, the City received a request under the *Act* from the same requester for access to the following information:

- (1) Any documents, including, but not limited to emails, phone messages or phone logs, and any taped phone message prepared in response to requests for information made by [a named newspaper], specifically MFIPPA 2002-17 and 2002-18.
- (2) A chronology of all actions taken by the [named] Freedom of Information co-ordinator in response to the above-mentioned requests. If a chronology doesn't currently exist or is incomplete then [the Co-ordinator] should prepare one based on her knowledge. In either case the chronology should include (sic) the following elements:
 - a. The dates [the Co-ordinator] attempted to contact city officials or third parties, including phone messages and emails that were not returned.
 - b. The names and departments or outside parties [the Co-ordinator] attempted to contact.
 - c. The nature of what [the Co-ordinator] requested for each attempted contact, for example a request for return phone call, a request for specific documents, a general request for all

documents responsive to [the named newspaper's] request or a request for general or specific assistance.

d. The result of each attempted contact. Were phone calls or emails returned? How were requests for assistance responded to? How were requests for documents responded to?

(3) A copy of any submissions to the Information and Privacy Commissioner made by [the Co-ordinator] in which she described how city officials and third parties responded to her requests for assistance to respond to [the named newspaper's] requests.

In response, the City provided the requester with records and an index of the information that was found during the search of files relating to requests 2002-17 and 2002-18. The City informed the requester that a chronology of the files does not exist and that the Freedom of Information Co-ordinator does not record the calls she makes to other departments. With respect to the Co-ordinator's submissions to the Information and Privacy Commissioner, the requester was advised that her submissions were included in Order MO-1622. A copy of that order was provided to the requester.

The requester appealed the City's response on the basis that additional responsive records beyond those identified by the City should exist.

During the mediation stage of the appeal, the appellant narrowed the scope of the appeal to Item (1) of the request only. He continues to maintain that additional records should exist in response to Item (1).

In processing the request, the City interpreted Item (1) to cover records generated up to the time of the access decisions for requests 2002-17 and 2002-18. The City's access decision in response to the present request reflects that interpretation. During mediation, after the appellant clarified the scope of his request, the City agreed that Item (1) covers the time period up to the date of the present request, that is, March 31, 2003.

No further issues were resolved during mediation.

I sent a Notice of Inquiry to the appellant and the City informing them that an oral inquiry will be held to determine whether the City conducted a reasonable search for records that respond to the request. A date for the oral inquiry was set. The inquiry was conducted via teleconference. The City was represented by the Freedom of Information Co-ordinator. The appellant provided oral representations on his own behalf.

DISCUSSION:

REASONABLENESS OF 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/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.

According to the appellant, the current request is not just for records reflecting communications between the Co-ordinator and others within the City, but also records that might have been created from contacts between others within the City, but not involving the Co-ordinator.

The appellant provided a number of examples in support of his view that the City's search for responsive records was not reasonable.

He referred to a letter dated March 17, 2003 from the City's General Manager of Legal Services/City Solicitor to the Mayor and Members of City Council. The appellant had initially obtained the letter independently. The City subsequently disclosed a copy of this letter to the appellant after the City accepted the expanded interpretation of the request during the mediation stage of this appeal. The letter is dated two weeks before the appellant submitted the current request.

The letter speaks about an anticipated inquiry at the Council meeting scheduled for that evening, relating to recent media reports concerning the City's responsiveness to an access to information request. This letter clearly refers to one of the appellant's April 2002 requests. The last sentence of the letter reads, "With respect to this particular information request, although the City's FOI Co-ordinator is away from her office until March 24, we will nevertheless immediately contact inside and outside sources to ensure that the City meets the requirements for access under the *Act*". According to the appellant, this sentence suggests that the City's Legal Services has contacted City and outside sources about his earlier request, but records reflecting this have not been identified.

As an update, the appellant advised that in July of this year, the General Manager of Legal Services/City Solicitor, the author of the letter, assumed the duties of City Manager.

The City's Co-ordinator feels that the current request is somewhat unusual in that it asks for documentation relating to previous requests. She explained that she was one of the key people involved in processing the previous requests and her office's file contains documentation generated in response to those requests. These are the records which were identified based on her initial interpretation of the current request and which were provided to the appellant.

She explained that she did not initially identify the letter dated March 17, 2003 from the City's General Manager of Legal Services/City Solicitor as responsive because of her original interpretation of the request. She disclosed this document to the appellant when the request was clarified.

As mentioned above, the March 17, 2003 letter to City Council from the General Manager of Legal Services/City Solicitor discusses the appellant's 2002 request. According to the Co-ordinator, the author of the letter (currently the City Manager) informed her that there are, to his knowledge, no other records which respond to the current request. I have some difficulty accepting that this letter was created in isolation, that is, without any supporting or related documentation which would be used in its preparation. Although only one page in length, the letter refers to media reports about the City's responsiveness to the appellant's original request, describes the access request and how it was processed, summarizes a part of the Adjudicator's order provisions and provides information relating to the individuals whose information was the subject of the request. Furthermore, the author undertakes to immediately contact inside and outside sources. I was not provided with information regarding if and when contact was made, but an undertaking made to City Council to "immediately" take action would suggest some action would be taken within the two weeks between the date of the letter and presentation to Council and the date of the appellant's current request. If this is the case, records should exist to reflect the action taken.

The appellant referred to an August 26, 2003 fax cover page from the City's Co-ordinator to the appellant in which the Co-ordinator informs him that she has contacted the City Manager and the Director of Human Resources with respect to the current request. He feels that this does not constitute an adequate search. In his view, the subject of his April 2002 requests - severance packages, overtime pay and vacation pay - related to financial matters, yet apparently no one in the City's Finance Department or City Treasurer was contacted with respect to his current request.

The appellant then referred to a document entitled Review of Selection of Water Operations and Maintenance Contractor. According to the appellant, this report was commissioned by two Water Boards on which City representatives sit. The City's former City Manager was approached and asked to arrange a review of the circumstances which led to the signing of a water contract for the two Boards. The former City Manager hired an individual to conduct the investigation. The investigation included the role of a former City Engineer in the awarding of the contract and the arrangements made surrounding his subsequent departure from the City's employ. Information about this former City Engineer formed part of the appellant's April 2002 requests. The individual who was hired to conduct the investigation was subsequently hired as City Engineer,

replacing the City Engineer who was subject of the investigation. The appellant questions why the current City Engineer has not been asked to produce records in response to the current request.

The Co-ordinator explained that when processing the current request applying her initial interpretation of its scope, she identified records in her office only. Once the request was clarified, she contacted the City Manager/City Solicitor and the Director of Human Resources. Human Resources was contacted because the 2002 requests dealt with personnel matters. Both informed her that no additional records exist. She did not contact anyone else within the City to request a search for records. According to the Co-ordinator, these are the two individuals who would have an interest in this type of matter.

The Co-ordinator explained that searches were not conducted in the City's Finance Department or by the City Treasurer or City Engineer because they were not approached at any time in relation to Requests 2002-17 and 2002-18. Accordingly, in the Co-ordinator's view, it would not be reasonable to expect that these offices should be approached in response to the current request. I accept the Co-ordinator's reasoning and will not order searches of these offices.

The appellant referred to Order MO-1622 mentioned above, the order resulting from Request 2002-17. In that order, Adjudicator Donald Hale states:

In addition, because it appears that outside counsel may also have copies of responsive records, I will order the City to retrieve the file maintained by such counsel in order to determine if additional records responsive to the request exist.

This requirement also forms part of Provision 3 of that order. The appellant submits that in order for the City to have complied with the provision, it is reasonable to assume that there was documentation generated between the City and outside counsel. This documentation would be responsive to the current request. The appellant explained, and this was not contradicted by the Co-ordinator, that outside counsel was retained by the City to deal with the severance and overtime issues that were the subject of Requests 2002-17 and 2002-18.

The Co-ordinator explained that to comply with Order MO-1622, she met with the City Manager and outside counsel to determine whether any records existed in the counsel's possession in response to Request 2002-17. The City Manager, who until very recently was also the City Solicitor, was the contact for the outside counsel. Documents responsive to that request were identified and dealt with in accordance with the order. No documents were created as a result of that meeting. She did not contact outside counsel with regards to the current request.

I believe that on balance, it is probable that some records may have been generated to at least arrange and prepare for that meeting and possibly to reflect the outcome. Such records would not only be held by the City, but also by outside counsel. I will order the City to conduct a search for responsive records in the outside counsel's office.

In Order MO-1622, Adjudicator Hale ordered the City to conduct searches of the record holdings of its City Solicitor, Legal Department, City Clerk's Office and outside counsel's file for records responsive to Request 2002-17. According to the City's Co-ordinator, the City Clerk's Office was not asked to conduct a search for records responsive to the current request. I have not been provided with a list of the records which were initially disclosed to the appellant in response to the current request. These are the records which were located in the Co-ordinator's office. It may be that her files contain a complete record of all communications with the Clerk's Office prepared in response to Request 2002-17, but I do not know that this is the case. Furthermore, it is possible that there was internal recorded communication within the Clerk's Office in which the Co-ordinator was not involved. Considering that the City Clerk's Office was specifically named in Order MO-1622 as an office whose record holdings were to be searched for records responsive to Request 2002-17, I believe that it would be reasonable to expect that those holdings would be searched for records responsive to the current request. I will therefore order the City to conduct a search within the City Clerk's Office for records responsive to the request.

After the current request was clarified during mediation, the Co-ordinator contacted the City Manager and asked him whether there were any other documents generated with respect to the present request, other than the March 17, 2003 letter to Council. The City Manager informed her that to his knowledge, no other records were created, including records which would respond to the clarified request.

As stated above, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. The information provided at the oral inquiry with respect to the City Manager's involvement in the search for records is somewhat vague. The Co-ordinator is unsure to what extent the City Manager conducted searches and in fact, whether actual searches were conducted of the City Manager's Office or the City Solicitor's Office and Legal Services Department. The Co-ordinator is unsure whether his response to her was based on memory or on actual searches. The City Manager assumed that position relatively recently and there may be some question as to how familiar he would be with the City Manager's records in such a relatively short period of time, particularly if no actual search was conducted.

The Notice of Inquiry asked the City to have all individuals who conducted searches available for the oral inquiry. The City Manager was not present at the inquiry. The City Manager's evidence would have provided more insight into any searches that he or staff within the City Manager's and City Solicitor's Offices may have conducted. A number of questions remain unanswered. Without his information, which would shed more light on his involvement, I am not persuaded that reasonable searches were conducted in the City Manager's and City Solicitor's Offices and Legal Services Department. Accordingly, I will order the City to conduct searches within these offices to determine if additional responsive records exist.

ORDER:

1. I order the City to undertake additional searches of the record holdings of its City Manager's Office, the City Clerk's Office, the City Solicitor's Office, the Legal Services Department and outside counsel's office for records which respond to the request.
2. If searches of the offices mentioned in Provision 1 above result in the identification of other areas within the City where responsive records may exist, I order the City to conduct searches in those areas.
3. I order the City to provide the appellant with information as to the results of these further searches in accordance with the requirements of sections 19 and 22 of the *Act*, without recourse to a time extension under section 20 of the *Act*, using the date of this order as the date of the request.

Original signed by: _____
Alex Kulynych
Acting Adjudicator

September 11, 2003 _____