



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER MO-2282-I**

**Appeals MA-060119-2 and  
MA-060119-3**

**City of Toronto**



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I have decided to issue an Interim Order in Appeals MA-060119-2 and MA-060119-3 to address the City of Toronto's (the City) failure to provide a complete and effective Index of Records, as required by the complex circumstances surrounding these appeals.

## **BACKGROUND:**

There are a series of open appeals with this office that originated with two related requests submitted to the City in 2005 and 2006 under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) by the same requester. Both requests led to appeals with this office (MA-050410-1 and MA-060119-1). At issue in the appeals are records related to the maintenance of the City's street lighting, and the sale of the City's street and expressway lighting to, and servicing by, Toronto Hydro Street Lighting Inc.

This Interim Order is the third such order issued in these appeals and follows closely upon Order MO-2275 in Appeal MA-060119-4, issued by Registrar Robert Binstock on February 14, 2008 to address the City's failure to disclose records.

Appeals MA-060119-3 and MA-060119-4 were opened to address issues stemming from the City's non-compliance with the provisions of the December 7, 2007 decision letter issued by it consequent to the Interim Order (in letter form) issued by me in Appeal MA-060119-2 on November 13, 2007.

Appeal MA-060119-2 was opened to address the appellant's appeal of the February 5, 2007 decision letter issued by the City following Interim Order MO-2135-I issued by me on December 20, 2006 in Appeal MA-060119-1.

To the extent that this Interim Order refers to, or relies upon, the circumstances of, or my findings in, previous orders I have issued in these related appeals, I refer the parties to Interim Order MO-2135-I, and the November 13, 2007 Interim Order (in letter form).

## **NATURE OF THE APPEAL:**

The number of records identified as responsive to the appellant's January 3, 2006 request (Appeal MA-060119-1) has grown considerably since the time of the initial searches conducted by the City. Although the exact number of responsive records now at issue in Appeal MA-060119-3 is unknown, for reasons described briefly in this Interim Order, it is likely that the number exceeds 10,000 pages.

Previously, in Appeal MA-060119-2, I had been exploring issues of reasonable search and responsiveness of records, as well as the substantive exemption claims by the City with respect to the records then identified, which was approximately 275 pages. By August 2007, I had received initial representations from the City, including affidavits of search, and from the appellant. The appellant expressed cogent concerns about the adequacy of the City's searches in response to Interim Order MO-2135-I, and their description of many of the records they did locate as non-responsive. Accordingly, in a letter dated August 22, 2007, I shared these concerns with the City, and made the following request:

... I note that this office currently only has copies of the three records the City has

identified as responsive to the search parameters given in Order MO-2135-I. The information contained in the affidavits of search provided by the City as part of its first party representations indicates that a considerable number more records were located but deemed by the staff in Corporate Access and Privacy to be non-responsive, either to the request or the “parameter of the searches ordered by [me] in [my] interim Order”.

The issue of responsiveness is in dispute and before I can proceed with my inquiry into this appeal, I require copies of all of the records identified by the City through those searches.

At the time, the records deemed by the City to be non-responsive had not been counted, described or indexed. However, following the receipt of my August 22<sup>nd</sup> letter, the City submitted five boxes to this office containing approximately 12,145 pages of records. Based on the correspondence accompanying the records, I concluded that the City had conducted *additional* searches following the receipt of my August 22<sup>nd</sup> letter and had sent all of these records to me so that I could make a determination as to their responsiveness.

This led me to issue an Interim Order (in letter form) to the City on November 13, 2007. In this letter, I outlined the history leading up to the Interim Order in considerable detail. A central observation in the Interim Order letter was that City departments asked to conduct additional searches pursuant to Interim Order MO-2135-I had been provided with inaccurate, and under inclusive, search parameters by the Corporate Access and Privacy office. It appeared that the realization and correction of the search parameter error had resulted in the identification of the voluminous number of new records sent to this office. As I wrote in my November 13<sup>th</sup> Interim Order:

... the five boxes appear to contain records never before identified by the City as responsive to the request in Appeal MA-060119-1, as clarified in Interim Order MO-2135-I. It also appears from my review of the nearly 12,100 pages that there are records contained in these boxes which may be responsive to the appellant’s request in the related appeal referred to previously in this decision, Appeal MA-050410-1.

However, this is not for me to determine in the first instance.

I continued by noting that section 39(1) of the *Act* provides for a right of appeal by a person of “any decision of a head under this *Act* to the Commissioner.” In other words, the jurisdiction of an adjudicator to conduct an inquiry under the *Act* is predicated on there being a decision by the head of an institution from which to appeal. In the circumstances, I found that the City had failed to meet its obligations under section 19 of the *Act*, and had effectively placed itself in a deemed refusal situation pursuant to section 22(4) because it had not issued a decision to the appellant with respect to nearly 12,100 pages of records. Accordingly, I issued the following order to the City:

1. I order the City to issue a decision letter to the appellant regarding access to the

approximately 12,100 pages of records contained in the five boxes recently submitted to this office, with the exception of those pages numbered L182, L187 - L191a, and L229 - L264, in accordance with the *Act* including a fee decision **no later than Friday, December 7, 2007.**

2. **I order the City to prepare an Index of Records to accompany the decision letter sent to the appellant pursuant to Provision 1, above. Specifically, the Index of Records should clearly describe each record, state whether access to each record or portion of a record is granted or denied, and for each record or portion of a record to which access is denied, identify the exemption (including the applicable subsection(s) where an exemption has more than one subsection) that is claimed for that record or portion of a record [emphasis added to original].**
3. I remain seized of this matter in relation to an appeal of the City's new decision by the appellant and with respect to all other outstanding issues in Appeal MA-060119-2.

...

I subsequently received a copy of the City's December 7, 2007 decision letter to the appellant which stated, in part:

Access is granted in full to a number of records as described in the enclosed index of records. Due to the limited time provided by the IPC's Order to produce this index, it not [sic] up to our usual standard, and we apologize.

The letter further indicated that notice was being provided to a third party regarding certain records pursuant to section 21 of the *Act* and that a decision on those records would follow by January 4, 2008. The City also informed the appellant that the fee for records to be disclosed in full was \$180.00. The appellant then paid this fee. Ultimately, issues related to the City's failure to disclose all of the records identified for disclosure in the Index of Records became the subject of Appeal MA-060119-4 and Order MO-2275, as mentioned previously.

However, in the meantime, the appellant contacted the City to request rectification of problems with the Index of Records provided to him relating to missing or illegible pages. The City sent the appellant some substitute pages in an attempt to address these concerns. However, the appellant was not satisfied that he had received a complete Index of Records, and was, in fact, concerned that the City had prepared a new index due to apparent changes in the numbering of records subsequent to the December 7<sup>th</sup> decision letter. Consequently, the appellant wrote to this office on January 2, 7 and 9, 2008 to request, among other things, expedited relief in the form of an order for a "legible and complete" Index of Records.

On my behalf, Adjudication Team Leader Donald Hale contacted the City to convey the appellant's concerns with the existing Index. The City's response to the Team Leader's inquiry

was subsequently summarized in a letter, dated January 8, 2008, in which CAP Director stated:

As mentioned [to Mr. Hale], this office does not have a complete “new” index to provide to the appellant. Given that 11 pages of the original index contained illegible pages, this office went back to the program area, author of the index, and worked with them to obtain legible pages. ...

[W]e created a chart that identified a number of pages which correspond to the illegible pages in the original index which was provided to the appellant. The pages were numbered – “page # (new)” for ease of reference. When forwarding the revised pages to the appellant, we advised that there were several additional pages as a result of the revisions to the index.

The following discussion contains a summary of the progress of this appeal following receipt of the January 8, 2008 letter from the City, including a review of the existing Index of Records, past orders of this office dealing with such documents and my findings in relation to it, including the remedy ordered.

## **DISCUSSION:**

### **INDEX OF RECORDS**

#### **Introduction**

Appeal MA-060119-3 remains at the Mediation stage of the appeal process for the purpose of pursuing resolution of the substantive issues between the parties; including possible constructive discussion about the application of the exemptions claimed to deny access to the voluminous records newly at issue.

In my view, the parties would be greatly assisted in the successful resolution of the issues between them by the provision by the City of a more useful and comprehensive Index of Records than currently exists. Moreover, I am satisfied that I have authority to order the City to produce a new Index of Records because I remain seized of all outstanding issues in this series of appeals, and, more generally, pursuant to my authority under sections 43(1) and (3) of the *Act*.

#### **Concerns with the Existing Index of Records**

The appellant has provided this office with several different summaries cataloguing the alleged deficiencies of the existing Index of Records. He refers to missing pages, illegible pages, substitute pages that cannot be inserted, replacement pages that either start or end in the middle of a record entry, non-consecutive page numbering, duplicate page numbering, and apparent revisions to the numbering of records.

In the version of the Index of Records provided to this office with the December 7, 2007 decision letter, there are page inserts to mark pages “lost due to reformatting of Index”. Additionally, as the appellant notes in his January 9, 2008 letter to this office:

The original page numbers run from 1 to 285, but there are no pages numbered 42-64, 122-136, 147-153, 174-182, 190-196, 207-210 and 216-221. There are two consecutive pages numbered 227. The result is a 215-page index.

The appellant submits that completeness and legibility were implicit in provision two of the November 13, 2007 Interim Order letter, which is set out on page three, above.

In Order MO-2275, Registrar Robert Binstock described the difficulty encountered by the City in preparing records for release to the appellant pursuant to the December 7, 2007 decision letter and accompanying Index of Records. He wrote:

On February 4, 2008, the Intake Analyst was informed by the City that the appellant’s list of undisclosed records had been provided to the individual who prepared the index of records. The City advised that it was working to identify the missing records, but that this task was complicated by the deficiencies of the index of records.

In a letter dated February 7, 2008, the City advised the appellant of the following:

...

With regard to the list of records you have provided to the IPC that you claim you are entitled to, which contain entries such as “unnumbered records, rows 9-11...” the index of record [sic] did not contain a number for the record because it was **not possible to determine which record the entry referred to**. As explained to you in our letter responding to your December 6, 2007 letter, “due to the limited time provided by the IPC’s Order to produce this index it is not up to our usual standard.” Given the fact that this office received a very large volume of records very late in the appeal process, we endeavoured to do everything possible to avoid further delay to your appeal. Thus, our priority was to provide categories of records to **enable an informed decision** [emphasis added].

### **Analysis and Findings**

A complete and effective Index of Records can be an extremely useful tool in mediating or resolving the issues in an appeal. Indeed, this view formed the basis for the inclusion of provision 2 in my November 13, 2007 Interim Order.

IPC Practices 1 (*Drafting a Letter Refusing Access to a Record*) is a document that has previously been provided to the City, and to all provincial and municipal institutions that fall under this office's jurisdiction. Item 2 outlines the general expectation held by the Commissioner's office that an index of records will be provided to the requester with the decision letter, particularly where the appeal involves a large number of records. Item 2(b) describes the characteristics of an effective index, or list of records, in the following manner:

Assign a document number to each record and provide a general description of each record. The description should provide enough detail so that the requester has an understanding of the type of information contained in it.

In Order MO-2200 (The Corporation of the Township of Tay), Adjudicator Catherine Corban canvassed the issue of the adequacy of a decision, including the preparation of an Index of Records, where there was one five-page record at issue. She wrote:

The use of an index of records is not consistent in the access to information process. In some instances, institutions will send out an index of records along with a decision letter to better explain what exemptions are being claimed for what records. In other instances, institutions are asked to provide an index of records during mediation in order to clarify the records and issues on appeal and to facilitate the mediation process. Sometimes, particularly where there are a large number of records and/or exemption claims and an index has not been provided, institutions are ordered by an adjudicator to provide an index of records to allow for a proper inquiry to be conducted. However, neither section 22(1)(b), nor any other provision of the *Act* stipulates that an institution must provide the appellant with an index of records in response to a request for access to information.

...

In my view, the purpose of the inclusion of information outlined in section 22(1)(b) in a notice of refusal 22(1)(b) is to **put the requester in a position to make a reasonably informed decision on whether to appeal the head's decision** (Orders 158, P-235 and P-324). Having some understanding of why an exemption applies assists an appellant during the mediation stage of an appeal.

I must acknowledge, as did Adjudicator Corban in Order MO-2200, that there are no specific requirements set by the *Act* requiring that an institution prepare an Index of Records. In addition, I agree that it would not be reasonable or appropriate for this office to hold an institution to a standard of perfection in the creation of such an Index.

In my view, however, there is a minimal standard to be met in order for an Index of Records to be useful and effective for the purposes of processing an appeal. There are a number of factors that must be incorporated into a useful Index. Central to the creation of an Index of Records is that each page/record is clearly identified and described. Furthermore, in my view, it is very important that each record be identified in such a way that it can be easily located again as required for the various purposes of an appeal, from Intake, to Mediation, to Adjudication. An

Index in which the records are not clearly described, catalogued or numbered is of limited assistance to the parties and to this office. Further, the obstacles to a successful resolution of an appeal posed by a deficient index are particularly pronounced where there are voluminous records. This is one such appeal.

There has already been more than one instance demonstrating that the existing Index of Records does not adequately serve its intended purpose, that of assisting the parties in better understanding the issues in the appeal and resolving them through mediation. For example, I refer to the City's February 7, 2008 letter to the appellant in Appeal MA-060119-4, as outlined in Order MO-2275 above. The City itself evidently encountered difficulty in identifying those records to which full access was intended to be given due to the deficiencies in the existing Index, including the fact that some pages were not numbered and could not be located.

In my view, it is not currently possible to tell from the existing Index of Records how many pages or records are at issue. Program staff from this office have advised me that the boxes sent by the City in response to the request for records in Appeal MA-060119-3 contained records that are out of order, and which cannot readily be sorted due to the aforementioned deficiencies in the existing Index of Records, and the numbering of the records themselves. As there are no page or record numbers assigned to many records, it remains unlikely that staff from this office will be able to sort out what City staff could not. In my view, this is unsatisfactory.

I also note that the record descriptions provided in the existing Index of Records are not uniformly useful. While some descriptions are sufficiently meaningful to assist the appellant in making an informed decision about appealing the denial of access, many descriptions are not adequate for this purpose.

Therefore, having carefully considered the existing Index of Records, and in light of the appellant's submissions and the City's statements with respect to it, I find that the existing Index of Records is inadequate for the purposes of the timely and complete processing of this appeal.

Section 43 outlines the powers of the Commissioner in disposing of the issues raised by an appeal under the *Act*. I refer to subsection (3) in making this order, which reads:

Subject to this *Act*, the Commissioner's order may contain any conditions the Commissioner considers appropriate.

While section 43(3) does not provide for unlimited remedial power, it manifests the intention of the Legislature to provide the Commissioner and her delegates with the flexibility to create remedies that will resolve issues in a fair and effective manner in accordance with the fundamental purposes of the *Act* [Order M-618].

With these principles in mind, I have decided to exercise the authority granted to me by section 43(3) of the *Act* to order the City to prepare a new Index of Records. In my view, a new Index of Records is required to better meet the needs of the parties, and this office, in addressing the myriad issues and voluminous records in this appeal. This remedy contemplates correction of



deficiencies with page and record numbering, and it also contemplates the correction of inconsistent or missing record descriptions.

I acknowledge that the preparation of a new Index of Records, pursuant to the provisions below, will pose a challenge. Accordingly, I strongly encourage the City's Legal Division, which prepared the original Index, to closely collaborate with the Corporate Access and Privacy office, to implement the provisions of this Interim Order.

**ORDER:**

1. I order the City to prepare a revised index of all responsive records at issue in Appeal MA-060119-3, pursuant the City's December 7, 2007 access decision, and following the model in IPC Practices No. 1 (enclosed with the City's copy of this order), and to send the new Index of Records to the appellant **no later than Tuesday, March 25, 2008.**
2. For greater clarity as to the format of the Index of Records, I order the City to prepare the Index with four columns titled "Record Number", "Record Description", "Decision", and "Exemption(s) Claimed". I also order the City to number all of the pages of all of the records in a consecutive and complete manner, without reference to the "series" used in the former Index of Records, and also to number the pages of the Index itself in such a manner.
3. If the appellant, after receiving the new Index of Records, wishes to reduce the scope of his appeal in Appeal MA-060119-3, he may do so by advising the City and this office, in writing, no later than **Tuesday, April 8, 2008.**
4. I order the City to provide this office with a copy of the new Index of Records at the same time it provides it to the appellant and also to assist this office in cross-referencing and cross-matching the version of the records currently with this office with the new Index of Records.
5. I remain seized of this matter to address the issues that may arise between the parties and/or between the City and this office while these provisions are carried out.

Original signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

February 27, 2008 \_\_\_\_\_