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

INTERIM ORDER MO-2214-I

Appeal MA07-84

City of St. Catharines

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NATURE OF THE APPEAL:

The City of St. Catharines (the City) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> **COPIES OF** All records of information, regardless of how it is recorded." All *correspondence, including without limiting to; Computer entries/electronic records*, Hand written, unedited reports, meeting minutes, log books, records of inspection, daily diaries, call notes, emails, faxes, photographs, receipts, messages, accounts, (etc.) pertaining to the property known as 1164 Pelham Rd from Jan. 1, 2004 to the present". This is to include information obtained under or for the Waste by law, Property Standards and The Ontario building code. EXCLUDE ALL DOCUMENTATION ***SENT*** FROM [the requester] TO THE CITY OF ST. CATHARINES such as the submissions of evidence, the property standards appeal documentation and the applications for a building code hearing.

In response to the request, the City applied a fee of $271.30 and provided partial access to the responsive records, including the minutes of the Property Standards Committee meeting held on June 23, 2006 (the Minutes), photographs and inspection reports. Access to portions of the information was denied pursuant to the exemptions in sections 8(1) (law enforcement) and 14(1) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the City's decision.

During the mediation stage, the City clarified that with regard to the application of section 8(1), it was relying on section 8(1)(d) (confidential source).

Also during mediation, the appellant identified the following three concerns regarding the records that he received from the City:

1. The completeness of the Minutes - The appellant states that the Minutes reflect his participation at the meeting, but do not reference the participation of other individuals who were also in attendance. The appellant, therefore, believes that the Minutes are incomplete.

2. The quality and content of some of the disclosed photographs.

3. The quality and content of some of the disclosed inspection reports.

In addition, during mediation, the appellant confirmed that he is not appealing the application of sections 8(1)(d) and 14(1) of the *Act* to the withheld portions of the responsive information. Accordingly, the application of sections 8(1)(d) and 14(1) is no longer at issue in this appeal. The appellant also indicated that he is not pursuing his concerns with respect to the copy quality and content of the photographs and inspection reports. The appellant advised that the sole remaining issue is whether the City conducted a reasonable search, in regard to the completeness of the Minutes.

I scheduled an oral inquiry, to be conducted by teleconference, for July 17, 2007. Prior to the hearing the City provided me with a copy of the Minutes in question.

On July 17, 2007 I conducted an oral inquiry, by way of teleconference, into the reasonable search issue. The appellant represented himself at the inquiry. Participating for the City were the Assistant City Solicitor (the Solicitor), Deputy City Clerk and Freedom of Information Coordinator (the Coordinator), Chief Building Inspector (the Building Inspector) and the Secretary for the Committee of Adjustments and the Property Standards Committee (the Secretary).

DISCUSSION:

REASONABLE SEARCH

Introduction

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

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].

Parties' representations

I heard first from the appellant. The principle basis for the appellant's belief that further responsive records exist is the following statement that appears at the top of page 2 of the Minutes:

> PLEASE NOTE: The following is only a summary of the items discussed at the hearing and should not be interpreted to be a verbatim transcript.

The appellant submits that since the Minutes constitute only a summary of what transpired at the Property Standards Appeal Committee Meeting held on June 23, 2006 (the Meeting), there should exist a recorded audio transcript of the proceedings that was consulted and referenced in the preparation of the Minutes. The appellant points to the high level of detail in the Minutes as evidence that they could only have been prepared with reference to a taped recording of the Meeting.

However, while the appellant continues to maintain that the Minutes do not fully reflect what transpired at the Meeting, it became evident as the appellant delivered his evidence that their completeness is not really the issue in this appeal. Rather, the appellant's focus, based on the aforementioned statement taken from the Minutes, is that a recorded audio transcript of the Meeting should exist and that this transcript constitutes a responsive record to which he would like access.

In response, the Solicitor states that it is not the City's ordinary procedure to record public hearings, including the type of meeting at issue in this case. She indicates that the Meeting would have taken place in Council Chambers and that she is not aware of the existence of audio recording equipment in this space.

The Solicitor states that the usual recording procedure would see the Secretary take handwritten notes and that sometimes someone from the City's planning staff would also attend and take notes. Minutes would then be created from these notes. The Solicitor submits that minutes are not intended to be a record of every word spoken at a meeting. Rather, minutes are intended to be a synopsis of what the arguments were on the issues addressed at a meeting so that there is a sufficiently detailed record of the proceedings in the event of an appeal. The Solicitor states that there is neither a requirement to produce minutes nor a policy governing what they should contain.

The Solicitor states that in this case the Secretary took handwritten notes, which she referred to in the preparation of the Minutes of the Meeting. The Solicitor submits that to the best of her knowledge there is no audio recording of the Meeting.

The Solicitor acknowledged during the course of the inquiry that the notes taken by the Secretary, while not part of the City's formal record or file, are likely responsive to the appellant's request. However, the Solicitor states that there is no requirement that notes be kept and what the Secretary does with the notes is not governed by the City's record retention by-law and practices. Therefore, according to the Solicitor, any notes created may be destroyed after minutes have been prepared.

The Secretary provided evidence regarding her note taking at the Meeting. The Secretary states that she took approximately five pages of notes, which she continues to retain in her file. During the course of the inquiry the City offered to provide the appellant with a copy of the Secretary's

notes. The Secretary also submits that during the Meeting notes were being taken by a stenographer with the City's Planning Department. She states that it is the Planning Department's practice that notes taken by the stenographer are destroyed once minutes have been created. Therefore, the Secretary believes that, in this case, the stenographer's notes no longer exist; however, she is not certain. She states that she referred to both her notes and those prepared by the stenographer to prepare the Minutes.

The Secretary also indicates that other records responsive to the appellant's request may have been created by other staff in her office in various formats, which may still exist. However, if such records do exist, they would be in the hands of these other staff and not in her formal file. The Secretary also added that she was never asked to conduct a search for records responsive to the appellant's request. In fact, the Secretary states that she was never advised that a freedom of information request had been made for the information sought.

In light of the Secretary's evidence, I asked the Coordinator to lead me through the process the City followed in responding to the appellant's request. The Coordinator states that when a request is received his office tries to identify the departments that might have records that are responsive to the request. The Coordinator's office then sends the request to those departments to enable their staff to conduct searches for responsive records. The Coordinator states that it is up to the individual departments to consult with their staff, collect the responsive records and then forward them to his office. In this case, the Coordinator states that the following departments were notified and asked to conduct searches for responsive records:

- Planning
- Legal
- Fire
- Transportation and Environmental Services (which includes Building and Zoning)

The Coordinator states that he believes each of these departments would have then asked their staff to search their files for responsive records. However, he is not sure from department to department how and to what extent these searches would have been conducted and which staff would have completed the searches. Regarding the Secretary's admission that she was not asked to conduct a search, he states that he assumes this is the standard practice of the Planning Department. He indicates that he relies on the staff in each of the departments to search their record holdings. He views his role as identifying the departments to be notified, coordinating the notification process, assembling the responsive records identified by each department and then making an access decision.

I then heard from the Chief Building Inspector, who is with the Transportation and Environmental Services Department, Building Section. He states that that the Building Section encompasses the offices of the Property Standards Inspector and By-Law Enforcement. The Chief Building Inspector states that he conducted an actual search for responsive records. He states that his department has had a history with the appellant and his properties so he wanted to complete as thorough a search as possible. With this in mind, the Chief Building Inspector submits that he collected all of the files involving this particular property and searched through

each of the files, keeping in mind the scope of the appellant's request. He states that in some cases he also spoke to his By-Law Enforcement Officers, as well as the Property Standards Inspector, to determine whether there were records relating any telephone conversations with the appellant relating to his request. The Chief Building Inspector indicates that he consulted with all of the staff that he believes had contact with the appellant.

Analysis and findings

Both the appellant and the City, represented by the various staff who participated in this inquiry, have been forthcoming in providing their evidence. I thank everyone for their co-operation and assistance.

As stated above, the issue for me to determine is whether the City has completed a reasonable search for records responsive to the appellant's request. In addressing this issue, I must be satisfied that the searches carried out by the City out were reasonable in the circumstances. If I am not satisfied that the City's search efforts were reasonable then I can order further searches.

In this case, weighing all of the evidence before me, I am not satisfied that the City has conducted a reasonable search for records responsive to the appellant's request. While I was impressed with the thoroughness and clarity of the Chief Building Inspector's evidence regarding his own search efforts completed on behalf of the Building Section of the Transportation and Environmental Services Department, the evidence given by the other City employees indicates that there is confusion as to

- what constitutes a responsive record under the *Act*
- who was consulted for the purpose of conducting searches
- what searches were actually conducted

The term "record" is defined in section 2 of the *Act* as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

On my review of the City's evidence, I find that it has taken an unreasonably restrictive view of what constitutes a record. In turn, this has a direct impact on the reasonableness of its search efforts. The Solicitor acknowledged in her evidence that the Secretary's notes, while not part of the City's formal file, are likely responsive to the appellant's request. However, the fact that the Secretary's notes do not form part of the City's formal file, with regard to proceedings between the appellant and the City, is irrelevant to the question of whether they constitute a record under the *Act*. I find that the Secretary's notes clearly qualify as a record under the *Act*, as they constitute a "record of information" in "printed form". Accordingly, I will order the City to make an access decision under the *Act* regarding the disclosure of the Secretary's notes.

In my view, the City's evidence also points to some confusion regarding the steps it is required to take in processing a request, including the completion of searches for records responsive to a request. The Coordinator provided evidence regarding the steps that would have been taken in this case. He indicated that four City departments would have been notified of the appellant's request and asked to conduct searches. However, it is not clear to me on the evidence (with the exception of the search completed by the Chief Building Inspector) who within these departments was contacted, who conducted the searches and what searches were actually undertaken. My concerns are magnified by the Secretary's statement that she had no knowledge of the appellant's request prior to this inquiry and was never asked to conduct a search for records responsive to his request. I also note the Secretary's submission that other records responsive to the appellant's request may have been created by other staff in her office in various formats and that these records may still exist. Again, this raises questions regarding the adequacy of the City's search processes and the extent to which it has completed a reasonable search in the circumstances of this case.

In conclusion, based on my review of all of the evidence before me, I have serious questions regarding the City's search processes generally and its search efforts in this case specifically. I am not satisfied that the City has conducted a reasonable search in this case and I will order it to conduct further searches for responsive records.

ORDER:

1. I order the City to provide a decision letter in accordance with the *Act* with regard to access to the Secretary's handwritten notes, considering the date of this order as the date of the request.

2. I order the City to conduct further searches for responsive records, whether in printed form, on film, by electronic means or otherwise, in each of the City's Planning, Legal, Fire and Transportation and Environmental departments, as well as within the offices of the Committee of Adjustments and the Property Standards Committee. In conducting these searches, the City is requested to consult all staff employed within these departments and offices that may have records responsive to the appellant's request. With regard to this provision, I order the City to provide me with affidavits sworn by the individuals who conduct the searches within 21 days of the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:

(a) information about the employee(s) swearing the affidavit describing his or her qualifications, position and responsibilities;

(b) a statement describing the employee's knowledge and understanding of the subject matter of the request;

(c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

(d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;

(e) the results of the search;

(f) if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

3. If further responsive records are located as a result of the searches referred to in Provision 2, I order the City to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

4. The affidavits referred to in Provision 2 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*, which is available on our website.

5. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Original Signed by: July 31, 2007
Bernard Morrow
Adjudicator