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

# ORDER MO-2385

## Appeal MA07-104

## City of Hamilton

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## NATURE OF THE APPEAL:

The City of Hamilton (the City) received a multi-part request from a law firm on behalf of two requesters under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The multi-part request was for access to all memoranda, email, letters, reports, discussion papers, facsimiles, notes, transcripts, studies, telephone messages, minutes of any meetings, or any other documents in any way related to, associated with or connected to:

1. The firing of three named individuals by the City;
2. A complaint filed with human resources in 2006 by an inspector in the licensing department (the Complaint);
3. The investigation into the Complaint that was carried out by an independent investigator;
4. Any internal investigation carried out by the City as a result of the Complaint;
5. The allegations made by a named inspector who submitted a complaint regarding [a named individual];
6. The ongoing probe by the Ontario Provincial Police (OPP) into the City's licensing department;
7. The OPP search warrant of fall 2006 seeking licensing documents from City Hall;
8. The court proceedings commenced by [a named individual] against another [named individual]; and
9. The operational review of the licensing department which the law firm understood was then being planned, discussed and/or carried out by the City.

In its decision letter, the City relied on the exclusion at section 52(3) of the *Act* (*Act* does not apply) to deny access to information relating to parts 1 through 5 of the request. The City also indicated that the information relating to parts 6 and 7 of the request were in the custody and control of the OPP. The City advised the requester to contact the OPP directly for records responsive to those parts of the request. With respect to part 8, the City advised that the named individual filed proceedings as a private citizen and that it had no records that were responsive to that part of the request. Finally, the City relied on the discretionary exemption at section 6(1)(b) of the *Act* (closed meeting) to deny access to Schedule "E" of Appendix "A" of report CM07007 (which the City identified as responsive to part 9 of the request) and the discretionary exemption at section 15(b) (record soon to be published) to deny access to the remainder of that report.

The requesters (now the appellants) appealed the decision.

At mediation the appellants advised that they did not take issue with the City's response to part 8 of the request. However, they took the position that the City should also have custody and control of records responsive to parts 6 and 7 of the request and that other records should exist that are responsive to part 9. In this regard, the adequacy of the City's search for responsive records is linked to its failure to comply with section 18(3) of the *Act*, both of which are addressed in more detail in the portion of this order dealing with the reasonableness of the City's search.

Finally, the appellants confirmed that they only sought access to Schedule "E" of Appendix "A" of report CM07007 (which the City withheld under the discretionary exemption at section 6(1)(b) of the *Act*) and that access was no longer being sought to the balance of that report. Accordingly, access to the balance of report CM07007 and the application of the discretionary exemption at section 15(b) are no longer issues in the appeal.

Mediation did not resolve the appeal and the matter was moved to the adjudication phase of the appeals process. A Notice of Inquiry setting out the facts and issues in the appeal was sent to the City, initially. The City filed representations in response to the Notice. A Notice of Inquiry along with the non-confidential representations of the City was then sent to the appellants. The appellants provided representations in response to the Notice. I determined that the appellants' representations raised issues to which the City should be given an opportunity to reply. In addition, I also determined that the City should be provided an opportunity to make submissions on the recent decision of the Divisional Court in *Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (*Goodis*). Accordingly, I sent a letter to the City seeking their reply submissions accompanied by the appellants' representations and a copy of *Goodis*. The City provided representations in response. I determined that the City's reply representations raised issues to which the appellants should be given an opportunity to reply. In addition, I also wished to provide the appellants with an opportunity to make submissions on *Goodis*. Accordingly, I sent a letter to the appellants inviting their sur-reply representations, accompanied by a copy of the City's non-confidential reply submissions and a copy of the *Goodis* decision. The appellants provided sur-reply submissions.

In the City's representations, it raises the possible application of sections 52(3)1 and 3 to Schedule "E", having already raised it for the other records mentioned in its decision letter, as referenced above. The appellants submit that the City raised the application of section 52(3) to Schedule "E" too late in the appeal process and should be barred from relying on it for that reason. The appellants submit that there should be no derogation from this office's policy on the timely raising of discretionary exemptions, in the circumstances of this appeal.

This office does have a policy regarding the timely raising of discretionary exemptions (see section 11 of the *Code of Procedure*), but section 52(3) is not a discretionary exemption. Rather, it excludes records from the scope of the *Act*, and is therefore jurisdictional in relation to whether a record is accessible under the *Act* and whether this office has the authority to order its disclosure. The City did raise this section in its decision letter, and although its decision to also claim it for Schedule "E" might have been made earlier than it was, I am obliged to consider its possible application to Schedule "E". I note that the appellants have had an opportunity to provide full submissions on whether it applies, and have done so.

## RECORDS:

The records remaining at issue in this appeal consist of the records the City identified as responsive to parts 1 through 5 of the request, including e-mails, letters, interview notes, policies, procedures, training materials, newsletters, memoranda, minutes, agendas, reports, investigation

reports resolutions, by-laws, job descriptions, personal resumes, performance appraisals and other personnel file content, as well as Schedule "E" of Appendix "A" to report CM07007 (Schedule "E"), which the City identified as being responsive to part 9 of the request.

## DISCUSSION:

### LABOUR RELATIONS AND EMPLOYMENT RECORDS

The City takes the position that section 52(3) of the *Act* operates to remove from the ambit of the *Act* the records responsive to parts 1 through 5 of the request as well as Schedule "E".

Sections 52(3)1 and 3 of the *Act* provide:

> Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

Section 52(3) is record-specific and fact-specific. If section 52(3) applies to a record, it has the effect of excluding the record from the scope of the *Act*. If that is the case, I do not have jurisdiction to consider the issue of the denial of access by the City and whether the record qualifies or does not qualify for exemption under the *Act*.

Section 52(4) provides exceptions to the section 52(3) exclusions, none of which apply to the records at issue here.

I will first consider section 52(3)3.

#### Section 52(3)3: matters in which the institution has an interest

For section 52(3)3 to apply, the City must establish that:

1. the records were collected, prepared, maintained or used by the City or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultation, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

If section 52(3)3 applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

The records that the City identified as responsive to parts 1 through 5 and part 9 of the request fall within the following general categories:

a) Contents of employee personnel files including resumes and performance appraisals as well as advertisements and job postings;
b) Emails, correspondence and reports regarding employee matters, generally;
c) Emails, correspondence and reports regararding employee discipline matters,
d) Emails and correspondence regarding job changes;
e) Emails, correspondence and documentation regarding employee terminations;
f) Interview notes, correspondence and background materials pertaining to the Investigation Report regarding a complaint about City employees;
g) Interview notes, correspondence and background materials pertaining to the Investigation Report regarding a complaint about City Councillors;
h) Interview notes, correspondence and background materials pertaining to engagement of the investigator and communications between the investigator and City;
i) City By-laws, Reports to City Committees and City Council and Minutes;
j) Agendas;
k) Seminar materials and related correspondence;
l) Papers and presentations;
m) Policies and related correspondence;
n) Employee Newsletters;
o) Emails regarding operations;
p) City letters, bulletins and notices;
q) Schedule "E" of Appendix "A" of report CM07007.

*The Representations of the Parties*

The City submits that the records responsive to parts 1 through 5, as well as Schedule "E", fall within section 52(3)3. The City submits that the records were collected, prepared, maintained or used in relation to the investigation into allegations made in a complaint regarding the workplace conduct of a number of employees of the City. The City submits that it has an interest in investigations having to do with complaints and worker performance. It further states that all of the records are found within investigation files. The City submits that as an employer, it has an

inherent interest in the records as it works to manage its staff and to affect appropriate disciplinary measures.

The City further submits that the records responsive to part 9 of the request concern employee-related matters in which the City has an interest, namely, "management practices in and structure of the Licensing and Standards Division."

In summary, the City submits that the records:

- were collected and/or contain information collected by the City itself or investigators for the City;
- were prepared by the City itself, or by investigators for the City;
- were maintained or used by the City, or on behalf of the City, for the purpose of the investigation of employee conduct;
- constitute consultations, discussions and communications about employment-related matters concerning the City and the employees, in which the City has an interest;
- were prepared, maintained and used in relation to meetings, consultations, discussions and communications about employment-related matters concerning the City as employer and its employees, in which the City has an interest;
- consist of information that is clearly employment-related, dealing with workplace conduct and performance matters, all of which are integral to the employment relationship between the employees and the City.

The appellants submit that any connection between the contents of the records and meetings, consultations, discussions or communications is too remote to support a finding that the collection, preparation, maintenance or use of the records was "in relation to" employment-related matters. The appellants further take the position that the records at issue do not have a "fairly substantial connection" with the activities listed in section 52(3)3. The appellants submit that "simply because a record may touch upon employment-related matters in a general way, is not sufficient to bring the record within the application of 52(3)3." They also submit that section 52(3)3 does not apply to records responsive to part 9 of the request, as these records fall within the context of an operational or organizational review. The appellants refer to Orders M-941 and P-1369, in support of their position and submit that:

> … this appeal relates to, *inter alia*, an operational review carried out to determine opportunities and efficiencies that would enhance service delivery to internal/external customers, promote accountability, ensure compliance with statutory regulations and policy directives and provide consistent and uniform

> enforcement and inspection. Appendix "A" to Report CM07007 simply provides more in depth information under the sub-hearings of Introduction, Key Findings and Recommendations.
>
> The facts on this appeal are strikingly similar to those in Orders M-941 and P-1369 and the approach adopted in those appeals should be applied here. As conceded by the City, Schedule "E" of Appendix "A" to Report CM07007 was prepared as part of the operational review of the Standards and Licensing Section. It is submitted that Schedule "A relates primarily to the operations of the Section or the workplace environment rather than labour relations or employment-related matters. The report at issue in Order M-941 also contained employee concerns. Notwithstanding this, the report was more appropriately characterized as relating to the "efficiency and effectiveness of the operation" than to labour relations or, employment related matters and was subject to the *Act*.

For its part, the City takes the position that:

> … the very wording of Parts 1 through 4 of the access request supports the City's position that the records relate to the relationship between the City, as employer, and its employees, including the three named individuals.
>
> With respect to [Schedule "E"], the record at issue relating to Part 9 of the access request, while prepared as a result of the operational review undertaken by the City of its Standards and Licensing Section of the Planning and Economic Development Department, and while scheduled to an appendix to the Report, the content of Schedule "E" does not itself constitute an operational or organizational review.
>
> …
>
> In the instant case, it is obvious that the City of Hamilton has an interest in the Schedule "E" record which deals with employment-related matters involving its Standards and Licensing [] and employees. The record at issue does not comprise a general "operational review" as described in Orders P-1369 and M-941. Indeed, those Orders are distinguishable on a number of grounds: In Order P-1369, the institution itself admitted that the subject report there "was created for the purpose of setting policy and direction for future management of the LCBO". The IPC held that the report was "a broadly-based organizational review which touches occasionally, and in an extremely general way, on staffing and salary issues". In the within appeal, the City has made no such admission and, to the contrary, submits that the record at issue does not "set policy and direction for future management" nor does it constitute "a broadly-based organizational review". Rather, Schedule "E" specifically details comments, concerns and complaints expressed by staff respecting the Standards and Licensing Department …

…

> The record at issue in Order M-941 was a report of an operational review of the subject institution's Department of Public Works. The IPC found that the report was "primarily an organizational review of the department and contains summaries of management's areas of concerns, employee's concerns, department goals, summary of a survey conducted on efficiency of service delivery mechanisms of the department". The IPC held that it was "more appropriately characterized as relating to the 'efficiency and effectiveness of the operation' than to labour-relations or employment-related matters". Again, the City submits that that is a very different type of report than the Schedule "E" record at issue. The matters dealt with in Schedule "E" are on a detailed and specific level, and relate specifically to the workplace environment existing in the Standards and Licensing Department as a result of the conduct and performance of identifiable individuals,… Schedule "E" is plainly concerned with labour relations and employment-related matters.

The City submits that Orders PO-2057 and MO-1264 are more applicable decisions when dealing with records of the sort at issue in the present appeal.

***Analysis and Findings***

The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions in the context of the institution's possible vicarious liability in relation to those actions, as opposed to the employment context. (See, *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 Div. Ct. (*Goodis*))

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a review of "workload and working relationships" [Order PO-2057]

- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]

- litigation in which the institution may be found vicariously liable for the actions of its employee [Order PO-1905 (upheld in *Goodis*)]

In addition, this office has held that there is no employer-employee relationship between a city and its Councillors. [Order MO-1264]

With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Goodis* that:

> In *Reynolds v. Ontario (Information and Privacy Commissioner*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,
>
> > It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "(w)hether or not a particular record is 'employment-related' will turn on an examination of the particular document." (see paragraph 29)

I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

I note, however, that although *Goodis* reinforces the requirement that each record must be examined before a determination is made under section 52(3), it is evident in this case, from the wording of the request, that there is a high probability that any record responsive to parts one through four would be subject to section 52(3)3. The request in those parts is for records relating to firings, investigations and complaints, all of which occurred in an employment context. Therefore, by definition, any responsive record would likely relate to a complaint about employee conduct or be human resources information, which, in similar circumstances as discussed above, this office and the Courts have consistently found to be excluded by section 52(3)3 of the *Act*.

That said, I now turn to an analysis of the constituent parts of the section 52(3)3 test.

**Part 1: collected, prepared, maintained or used**

I have reviewed the responsive records at issue and find that all of them were collected, maintained or used by the City, or on its behalf. Accordingly, I am satisfied that part one of the test has been met.

**Part 2: meetings, consultations, discussions or communications**

The City submits that all of the records are found within investigation files that arose out of a complaint in an employment context. I have reviewed the records and the parties' submissions and in my opinion, the records were prepared, maintained or used by the City, or on its behalf, in relation to meetings, consultations and communications about the investigations arising out of a complaint involving the conduct of employees as well as workload and other human resources matters.

As a result, I find that part two of the test under section 52(3)3 has been satisfied.

**Part 3: labour relations or employment related matters in which the City has an interest**

In my view, the records were prepared, maintained or used by the City, or on its behalf, in relation to meetings, consultations and communications about the investigation of complaints involving the conduct of its employees as well as other human resources matters. In that regard, even the records relating to the investigations of the conduct of Councillors fall within that category because the information about the Councillors in those records is so closely intertwined with the information pertaining to the investigation of a complaint involving employee conduct.

I have also examined Schedule "E" to determine whether it is excluded under section 52(3)3 of the *Act*. I also reviewed the previous orders of this office which examined records of this nature. As the appellants point out, records that are essentially organizational reviews are generally not excluded from the *Act* under section 52(3)3. However, if the creation of the record was initiated in response to workload and other human resources concerns raised by institution employees (as was the case in Order PO-2057), the records could be found to deal with the overall management

of its workforce and excluded from the *Act*. I have carefully reviewed Schedule "E" and find that it falls within this category because it was initiated in response to workload and other human resources concerns raised by institution employees, and it reflects an analysis of workload and working relationship issues within a City department.

I am therefore satisfied that all of the records responsive to parts one through five of the request, as well as Schedule "E", relate directly to "employment-related matters" for the purpose of section 52(3)3.

The next question under part 3 is whether the employment-related matters are matters in which the City "has an interest." The meaning of this phrase was addressed in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to the S.C.C dismissed [2001] SCCA No. 509 [*Solicitor General*]. The Court stated (at paragraph 35):

> … Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce.
>
> …
>
> Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". …

The Court also indicated that the word "interest" must refer to "more than mere curiosity or concern." (see paragraph 34)

In view of these statements by the Court, it is clear that the records were created or maintained in relation to the institution's own investigation file into a complaint about its employees and related human resources issues. In this situation, I am satisfied that the context of the investigation is one in which the institution was acting as an employer, and terms and conditions of employment or human resources questions were at issue, as referenced by Swinton J. in the *Goodis* case, cited above, and therefore, these were employment-related matters in which the City "has an interest" within the meaning of section 52(3)3.

In addition, because of the way the request was framed in this appeal, even copies of records such as employee newsletters, City By-laws, Reports to City Committees and City Council and Minutes that are found within the investigation files, are subject to exclusion under section

52(3)3 even though, if requested in another context, and therefore searched for and found in a different location, these same records might be subject to the *Act* (see Orders M-927, MO-2131 and PO-2678).

Schedule "E" although, in my opinion, related only peripherally to the investigation, is nevertheless a communication about employment-related matters in which the City has an interest. I reach this conclusion because, as I discussed above, Schedule "E" was initiated in response to workload and other human resources concerns raised by institution employees and it reflects an analysis of workload and working relationship issues within a City department.

I therefore conclude that the City has an interest in the employment-related matters that are the subject of all the records that have been identified as responsive in this appeal.

Accordingly, I find that part three of the section 52(3)3 test has been met.

In summary, I find that the City has established all of the requirements of section 52(3)3; the records were collected, maintained and used by the City in relation to communications about employment-related matters in which the City has an interest. Also, it is clear that none of the exceptions in section 52(4) applies. Accordingly, I find that the records fall within the parameters of section 52(3)3 and are, therefore, excluded from the scope of the *Act*.

I will now consider the reasonableness of the City's search for responsive records.

## REASONABLE SEARCH

*Submitting and Responding to a Request*

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> .....
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Where an appellant 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 within its custody or control. [Orders P-85, P-221, PO-1954-I]

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

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

*Forwarding and Transferring Requests*

Section 18 of the *Act* sets out the framework to forward or transfer a request to another institution. Section 18 reads, in part:

> (2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
>
> (a) forward the request to the other institution; and
>
> (b) give written notice to the person who made the request that it has been forwarded to the other institution.
>
> (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

> (4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,
>
> (a) the record was originally produced in or for the other institution; or
>
> (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

For the purposes of section 18 "institution" includes an institution as defined in section 2 of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent of the *Act*).

*The Representations of the Parties*

In support of its assertion that it conducted a reasonable search for responsive records, the City relies on:

- a general assertion in the affidavit provided by the City that the deponent "communicated the access request to the affected departments within the City … being the Planning and Economic Development Department, the Human Resources Department and the City Manager's Office and asked that they undertake a search for responsive records and then advise [her] of the results of their search",

- its position that because the OPP was conducting an investigation and had issued the requested warrant, any records that were responsive to parts 6 and 7 of the request would be in the custody and control of the OPP.

- its position that the appellants confirmed at mediation that access was only being sought to Schedule "E" of Appendix "A" to report CM07007 and not to the balance of that record.

The City explains that after the deponent of the affidavit received the request, she determined that the City did not have custody or control of records responsive to parts 6 and 7. Upon receiving notice of the appeal, however, it was determined that the City might, in fact, have a copy of the responsive warrant, which was then located and disclosed to the appellant. The City submits that while the timing of the search and location of the warrant "may not be ideal, the City undertook the search of its own accord and acted in good faith".

The appellants submit that the affidavit tendered by the City only addresses its efforts relating to the search warrant and not other potentially responsive records. The appellants submit in particular that:

… [the affidavit provided by the City] fails to establish that the City has made reasonable efforts to identify and locate records responsive to Part 9. [The deponent] fails to provide details of any searches carried out. She merely states that she "communicated the access request to the affected departments within the City", "asked that they undertake, a 'search for responsive records'" and then advise her of the results of their search. [The deponent] fails to advise who conducted any searches, what types of files were searched and of the results of any searches. No affidavit has been provided by the person(s) who purportedly conducted the searches.

A review of Report CM07007 itself makes it abundantly clear that there are voluminous documents which the City has failed to disclose. For example, the Report refers to status reports accepted by a 5 member subcommittee, employee surveys, reports which were reviewed, as well as interviews, consultations and observations for which notes must have been generated (Please see Report CM07007 [included in the appellant's representations]). It is absurd to suggest that the only records relating to an operational review of an entire City department over approximately a year and a half is the final report. It is obvious that further records exist and have not been disclosed by the city.

Furthermore, there is a reasonable basis for concluding that records exist given that, *inter alia*:

> a) on July 13, 2005, City Council approved a motion that the City Manager be directed to initiate an internal operational review of the Licensing and Property Standards division. (Please see City Council Minutes dated July 13, 2005, [included in the appellant's representations]);
>
> b) on July 27, 2005, the Audit Services Division of the City Manager's Office delivered a report recommending that:
>
> > i. a Licensing and Property Standards Operational Review Sub-Committee, reporting to the Planning and Economic Development Committee, be established to oversee the operational review, and
> >
> > ii. the Sub-Committee be comprised of 3 members of Council (Please see Report dated July 27, 2005, [included in the appellant's representations]); and
>
> c) on October 30, 2007, the Building and Licensing Division Operational Review Sub-Committee delivered Report 07-002

> (Please see Report 07-002 [included in the appellant's representations]).

The appellants submit that the City is obliged to conduct its own search for responsive records and that it is not sufficient for it to simply redirect the request for records to the OPP. Furthermore, in sur-reply the appellants correctly point out that under the heading of issues remaining in dispute, on page 3 of the Amended Mediator's Report it is set out that "the appellant believes that records responsive to sections 6, 7 and 9 of her request should exist".

***Analysis and Finding***

Although bodies other than the institution receiving a request may have a greater interest in responsive records than the institution which receives a request, responsive records relating to these other bodies are still considered to be responsive records in the hands of the institution. Depending on the nature of these records, the institution may choose to transfer the request under section 18 of the *Act*, or issue its own access decision. However, absent a transfer, an institution cannot treat responsive records in its custody or under its control as non-responsive to the request.

In proceeding the way it did, the City misconstrued its obligation to search for responsive records. Although the City's search ultimately located a copy of the requested warrant that was responsive to part 7, the City did not undertake any search for other records within its custody and control that were responsive to part 6 of the request. In the absence of a transfer to the Ministry of Community Safety and Correctional Services (of which the OPP is a part) under section 18(3) based on greater interest, this does not constitute compliance with the City's obligations under the *Act*. I also consider that the reference in the Amended Mediator's Report that sets out that the appellants believed that records responsive to sections 6, 7 and 9 of her request should exist, demonstrates that there was no agreement on the part of the appellants to limit the scope of the search as suggested by the City. Finally, while the City's supporting affidavit discusses how the searches were commenced, in my view, it does not adequately set out the manner in which the searches for records responsive to parts 6 and 9 of the request were conducted, or for that matter, completed. I therefore find that the City has not provided me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to parts 6 and 9 of the request under section 17 of the *Act*. As a result I will therefore order that the City conduct a further search for records within its custody and control that are responsive to those parts of the request.

## ORDER:

1. I find that the *Act* does not apply to Schedule "E" of Appendix "A" of report CM07007 or to the copies of the records in the City's investigation files.

2. I order the City to conduct further searches for records responsive to parts 6 and 9 of the request. If, as a result of the further searches, the City identifies any additional records responsive to the request, I order the City to provide a decision letter to the appellants regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

3. In order to verify compliance with provision 2 of this order I reserve the right to require the City to provide me with a copy of any decision letter provided to the appellant.

Original signed by: January 23, 2009
Steven Faughnan
Adjudicator