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

ORDER MO-2399

Appeal MA08-238-2

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> All emails generated/received by, [a City employee], for the period 2003 & 2004.

In its decision, the City advised that it had conducted a search and that because of its email deletion policy, some records responsive to the request may not exist. The City indicated to the requester that any records that were located would be exempt under section 14(1) (personal privacy) of the *Act*.

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

At the beginning of mediation, the City clarified that it had not actually done a search for records responsive to the request. During a conversation with the mediator, the appellant narrowed his request, advising he would be satisfied to receive all work related emails generated/received by [the named person] for 6 or 7 months in both 2003 and 2004.

Also during mediation, the City explained that, after 90 days, any employee emails that are not saved are removed from an employee's personal account and are transferred to the City Server back up tapes. The City further explained that although the retention schedule for City Server back up tapes is two years, as a practice the City keeps the current year plus back up tapes for October, November and December from the previous calendar years. The City requested that the appellant further narrow his request for records.

In response, the appellant narrowed his request to include only:

> …10 to 15 work related emails from the months of October, November and December for 2003, and 10 to 15 work related emails from the months of October, November and December 2004.

The City advised the mediator that it had not yet conducted a search. The City requested that the appellant narrow his request further, by stating, for example, what specific topic, issue or case that the City should search for. The appellant was unwilling to narrow his request further. The City was unwilling to do a search for responsive records based on the appellant's narrowed request.

At the close of mediation, the City still had not conducted a search for responsive records and the file was moved to adjudication.

Initially, I sent a Notice of Inquiry to the City setting out the facts and issues on appeal, seeking its representations. As I was unclear as to whether the City had not conducted the search due to the nature of the request or its inability to search, I added "Scope of the Appellant's Request" as a pre-condition to the issue of whether the City has conducted a reasonable search for responsive records. The City provided representations in response. Because of the nature of the representations received from the City, it was not necessary for me to contact the appellant for his representations.

DISCUSSION:

SCOPE OF THE 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].

The City begins its representations with a discussion of the background between the appellant and the individual (the affected person) who is the subject of the request. The City notes that both the appellant and the affected person are employed by the City as by-law enforcement officers. In the confidential representations, which I cannot reproduce in this order due to confidentiality concerns, the City goes on to describe, in some detail, the nature of the appellant's request. The City concludes the background of the appeal by stating that it is possible that the exclusionary provision in section 52(3) of the *Act* would apply to exclude any responsive records from the *Act*.

The City argues that it cannot identify the specific records that are being sought as neither the subject matters nor any specific dates for the email correspondence sought have been provided.

The City submits that the appellant has not fulfilled his obligation under section 17(1)(b) of the *Act* and states:

> The City submits that it does not know the records being sought, only that the appellant is seeking any 10 to 15 (even the exact number has not been specified) records that fit the category of being "work related". Most emails created at work by City staff on City computers are "work related". The appellant, however, has

> not specified the "work" subject matter of the emails he is seeking. As a result, the City does not know if 15 emails about a work meeting would suffice or if the appellant is seeking emails relating to specific property complaints/investigations which, as previously indicated, constitute the main work of by-law enforcement officers.
>
> Further the City does not know on what basis or within what parameters it should be conducting its searches. Should the City require its Information & Technology staff to recover the first 10 to 15 "work related" emails created and received by [the affected person] for the month of October for 2003 and 2004? Or should "searches" be conducted for the first 3 to 5 emails for each of the months of October, November, December for 2003 and 2004 or would some other combination be more applicable?
>
> Further, if these emails contain information subject to exemptions under the *Act*, (there is even the possibility that they are excluded), can the City issue a decision denying access in full or in part and charge fee for severing or is the City obliged to continue conducting searches until it recovers emails for which there are no exemptions and to which access can be granted in full? If the City must do the latter, this may entail additional search time and/or costs with possible time extensions in order to do the work. It should be noted that there is only one restore server, the availability of which is very limited and the time it would take to do the searches would be dependent on whether or not the server is being used for other reasons/purposes.

The City concludes that the result of the appellant's request is that it is being asked to find a "broad category" of emails and not specific records and as such the appellant has failed to meet his obligations under section 17(1). On the other hand, the City submits that the additional information it continues to seek from the appellant fulfills its obligations under section 17(2).

Although the City did not conduct a search, it was asked to comment on the questions listed below in the Notice of Inquiry. The City acknowledges that it did not conduct a search but provided the following answers to the questions in its representations. The City's response for the purposes of discussion are put in bold.

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

   The City did not originally contact the requester for additional clarification of the request.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

The City did not narrow the scope of the request.

3. As the City has not yet conducted a search , please provide details of any searches that would have to be carried out to respond to the appellant's narrowed request including: by whom would they be conducted, what places would be searched, who would be contacted in the course of the search, and what types of files are to be searched .

As indicated above, the City does not know what searches it should conduct given that it does not know what specific records and date of records are being requested. If the appellant were to clarify his request, searches could be done based on the reformulated request by relevant Information and Technology staff (most likely email administrators).

Information and Technology staff, however, are not allowed to read any user's email messages as per the City's email policy and do not have the system ability to do so. Therefore, as previously advised, the searches would have to be done by way of recovering the emails from the year end back up tapes. Before this can be done, the consent of [the affected person] or another person with the proper authority (this would have to be determined) would be required.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Recovery from a set of 4 to 5 year old tapes may not be 100% successful due to possible media errors. It is possible that all emails for the last 3 months of 2003 and 2004 may not be completely recoverable.

The City's explanation for not conducting a search thus far is twofold. Firstly, the City argues that the appellant has failed to provide sufficient detail to enable an experienced employee of the City, upon reasonable effort, to identify the record. Secondly, the City argues that it may not be feasible to conduct the search given its system limitations and/or the limitations of its email policy and its Information and Technology staff. In my view, however, neither of these arguments provides a reasonable basis as to why the City has refused to conduct a search for responsive records.

In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the [provincial] *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

In Order 134, former Commissioner Sidney B. Linden also commented on the proper interpretation of section 24(2) (the equivalent of section 17(2) of the *Act*), stating, among other things:

> ...the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the Act compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

In Order PO-1897-I, commenting on the above orders, Adjudicator Sherry Liang noted that in the appeal under consideration in Order 134, the request was somewhat vague, and that the institution had genuine difficulty in interpreting the scope of the request. She pointed out, however, that "even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request". In the present appeal, I find that the appellant's request is not ambiguous and I do not accept the City's position that the appellant has failed in his obligation to clarify and narrow his request under section 17(1) of the *Act*. The appellant's request at the end of the mediation process was, as follows:

> 10 to 15 work related e-mails from the months of October, November and December for 2003, and 10 to 15 work related e-mails for the months of October, November and December 2004.

I find that the City's arguments that it is still unable to complete the search based on this new narrowed request are unreasonable. The City's representations and behaviour indicates that it wishes the appellant to provide specific instructions on how to conduct a search of their own records instead of further clarification. Under section 17(1) of the *Act*, a requester is required to provide sufficient detail to enable an experienced employee, upon reasonable effort, to identify the record. It is not the intention of section 17(1) to require the requester to provide sufficient detail to locate the exact record which is the subject of the request.

The City makes it very clear in its representations, including the confidential representations, that it appreciates and understands the meaning of "work related" emails. The City's arguments that these "work related" emails may be excluded from the *Act* under section 52(3) are irrelevant to identifying the scope of the request. Further, it is apparent that the City has actually made little if no efforts to clarify with the appellant whether emails relating to certain property complaints/investigations would be responsive. Instead, the City has predetermined that any responsive records would either be exempt or excluded from the *Act* and thus has decided not to conduct a search for records. From my review of the circumstances of this appeal, I find that the City has failed in its obligation to "offer assistance in reformulating the request so as to comply" with section 17(2).

The City's arguments regarding the "exact number" of emails to be searched are even more unreasonable. The City is not entitled to use this as a reason not to conduct a search for responsive records. Further, it is unclear to me why the City did not conduct a search of the responsive records first to determine if there are even any records responsive to the request instead of disputing the number of records to be searched.

Finally, the City's arguments that it may be difficult to access the records is irrelevant to the issue of the scope of the request. The City has the ability to issue an interim decision including a fee estimate that would alleviate some of the difficulties that it claims to have prevented it from conducting the search. The City appears confused as to how to properly respond to the appellant's request yet it has not argued that the appellant's request was frivolous or vexatious or that the request involves a large number of records such that it would unreasonably interfere with the operations of the City. The City has provided no reasonable basis for not conducting the search and providing the appellant with a decision based on that search.

Accordingly, I find that the City has improperly interpreted the scope of the request and has failed in its obligation to clarify the appellant's request with him as required under section 17(2). I will order the City to conduct a search for a representative sampling of 10 to 15 emails from 2003 and 2004 and issue the appellant a decision letter respecting access to any records located.

ORDER:

1. I order the City to conduct a search for records responsive to the appellant's request, as set out in the order, and to issue a new decision to the appellant in accordance with the following requirements:

   a. The new decision letter is to be prepared in accordance with the legislative requirements set out in sections 19, 21 and 22 of the *Act*;

   b. The date of this order is to be treated as the date of the request and without recourse to a time extension under section 20 of the *Act*.

2. I order the City to provide me with a copy of the new decision letter sent to the appellant on the same date it is sent to the appellant.

Original Signed by: March 10, 2009
Stephanie Haly
Adjudicator