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

ORDER MO-2460-I

Appeal MA08-278

City of Vaughan

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NATURE OF THE APPEAL:

The City of Vaughan (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for three lists containing specific information relating to the amount of compensation paid to former employees or non-active employees during a specified period of time.

In response to the request, the City issued a decision letter to the requester which states that the "request is for a number of lists that do not exist".

The requester (now appellant) appealed the City's decision to this office. Mediation did not resolve this appeal and it was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I decided to commence my inquiry by sending a Notice of Inquiry to the City which set out the facts and issues in the appeal and sought representations.

The City provided representations in response, which were provided to the appellant. A Notice of Inquiry was then sent to the appellant who in response provided representations. The appellant's representations were provided to the City, who made reply representations. Following the exchange of representations, the appellant referred me to information available on the City's website, which will be considered in my discussion of the issues in dispute.

Other Issue:

In her representations, the appellant raised a general concern about the City's treatment of requests she has filed under the *Act*. The appellant submits that the City has adopted a practice of initially denying her access requests, only to grant partial access after she appeals the City's decision to this office. The appellant states that this office has an obligation to look into this practice and enforce the public's right to access government-held information. The appellant identifies this concern as the most important issue arising from this appeal.

I note that in this appeal, the City did not initially claim an exemption to withhold access to an entire record and then subsequently grant partial access. Rather, in this case, the City claims that no responsive records exist. Accordingly, the only issues in this appeal are the scope of the request/ responsiveness of records and whether the City conducted a reasonable search for responsive records.

In response to the appellant's comment, however, I would observe that this office encourages institutions to apply the exemptions in a specific and limited manner to ensure that as much information as possible is provided to requesters. Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The interests of transparency and efficiency are best served when institutions turn their mind to precisely what portions of a record may or may not be exempt at the request stage.

DISCUSSION:

SCOPE OF REQUEST/ RESPONSIVENESS OF RECORDS

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;
>
> . . .
>
> (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 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The appellant's request states:

> I wish to have a list of positions and the amount of compensation paid to each employee that left the employment of the City of Vaughan during 2006 and 2007. Compensation broken into salary range paid during time of employment and compensation including all benefits, as a pay out when their employment was severed. I am requesting that employees that were paid more than a $100,000 be listed separately.
>
> As well, please provide a list of employees' positions where the employees are currently on stress leave or leave with pay or leave without pay and including employees in the process of negotiating severance from the City or being paid either by the City or through insurance plans who were previously in active employment with the City. Please provide a cumulative figure for all positions with compensation below $100,000 and individual salary ranges for compensation above.

> The [access request] is for ALL money paid to ALL employees that are no longer in active employment and where they left the City for whatever reason or are on stress leave or any other type of unpaid leave. For the purposes of meeting expectations of privacy for employees paid below $100,000, if you list the positions and provide a comprehensive figure for these positions, this is satisfactory.
>
> Please provide this information for the years 2005, 2006 and 2007.

The City's decision letter to the appellant states "[y]our request is for a number of lists that do not exist". The City's decision letter goes on to advise that though it does not maintain or create the requested lists, related records may exist. In particular, the City advises the appellant that its Human Resources Department maintains an employee personnel record for each employee, which may include severance payment and compensation information. The City also advises that occupational health records may exist for employees who experienced health issues. The decision letter concludes by inviting the appellant to contact the Coordinator to "clarify and to reformulate" her request in order to seek access to the related records.

The appellant submits that she subsequently discussed her request with the Municipal Freedom of Information and Protection of Privacy Coordinator (Coordinator) who suggested that she withdraw her request and file another request. The appellant did not agree to this approach as she felt it would "obviously have resulted in more delays and a request still unfulfilled". The appellant advises that she filed an appeal with this office but made a further attempt to clarify her request during mediation when she sent the mediator an e-mail listing the names of individuals she believed had left the City during the time frame identified in her request. The appellant provided a copy of her e-mail to me.

The City's position is that the information the appellant provided to the Coordinator and Mediator still lacks the requisite detail to identify responsive records.

Decision and Analysis

Having regard to the representations of the parties, I am satisfied that the appellant worked with the City to clarify her request. In particular, I note that the appellant states in her representations that "[t]he format is not a requirement, only the information. The City is free to provide [it] in whatever format they wish". The appellant also submits that she does not seek access to individuals' names. Finally, the appellant identified individuals she believed had left the City's employment.

However, the appellant's efforts to clarify her request did not result in a new request which sought access to the related records identified in the City's decision letter. The appellant continues to seek access to the information identified in her original request. All that was modified was that she no longer seeks access to the names of individuals and no longer requires the information to be broken down in a specific manner.

In my view, the appellant provided sufficient detail to identify records responsive to the request. The City understood the appellant's request and gave her an opportunity to file an amended request for existing records that may be contained in its record holdings.

The issue I must determine is whether the related records the City identified in its decision letter are responsive to the appellant's request. The appellant's position is that her request is worded sufficiently broad to include these related records. In this regard, the appellant is incorrect. The appellant did not make a broad request for severance and compensation information. Rather, the appellant requested specific information relating to former and non-active employees. In my view, the City's entire record holdings, including its personnel and occupational health files, do not "reasonably relate" to the appellant's request.

However, I find that the City's narrow interpretation of the appellant's request does not best serve the purpose and spirit of the *Act*. In my view, the City's position that the appellant's request only relates to information already formulated in a "list" is too narrow. Having regard to the representations of the appellant, I am satisfied that the scope of the appellant's request includes information that may not be formulated in a "list". Accordingly, I find that the responsive records are comprised of any records which identify the number, position and amount of compensation paid to former or non-active employees for 2005, 2006 and 2007, whether the information is contained in a "list" or in some other document.

I will now determine whether the City conducted a reasonable search for these records.

SEARCH FOR RESPONSIVE RECORDS

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 and 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.

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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

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 [Order MO-2246].

A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

Representations of the parties

The Notice of Inquiry sent to the City asked it to provide a written summary of all of the steps taken in response to the request. In particular, the City was asked to respond to the following questions:

- Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

- 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.

The City provided an affidavit prepared by its Director of Human Resources who advises that she met with the Coordinator to discuss the request. The Director of Human Resources indicates that "the requested records do not exist". However, her affidavit did not provide a written summary of the steps taken in response to the request. Instead, this information was provided in the City's representations.

The City's representations state that its Human Resources Department is involved whenever an employee leaves the City and is responsible for creating specific compensation or severance packages for former employees. The City also states that the Human Resources Department also provides its services to employees who are on stress leave or leave with or without pay. The City submits that its Human Resources Department has not created "lists" for the:

- positions and the amount of compensation paid to each employee that left the City in 2006 and 2007, in the form requested by the appellant or in any other form

- employees' positions where the employees are currently on stress leave, or leave with pay or leave without pay, in the form requested by the appellant or in any other form

- for all employees that are no longer in active employment, whether it be for stress leave or any other type of paid or unpaid leave for the years 2005, 2006 and 2007, in the form requested by the appellant or in any other form

The City's representations also state:

> The Human Resources Department does not create lists of employees in the process of negotiating severance from the City or lists of employees being paid either by the City or through insurance plans who were previously in active employment with the City.

The City's position is that it conducted a reasonable search for the responsive records. In support of its position, it refers to Order 50 which states:

> In cases where a request is for information that currently exists, either in whole or in part, in a recorded format different from the format asked for by the requester, in my view, section 24 [section 17 of the *Act*] imposes a responsibility on the institution to identify and advise the requester of the existence of these related records. It is then up to the requester to decide whether or not to obtain these related records.

The City submits that its decision letter provided the appellant with information about the existence of related records. The City also submits that Order 50 states:

> The *Act* requires the institution to provide the requester with access to all relevant records, however, in most cases, the *Act* does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format.

The appellant's position is that information responsive to her request exists. The appellant argues that the information she requested must exist as the City has an obligation to identify and collect this type of information. In support of this position, the appellant states:

> The human resources department is responsible for all staff of the [C]ity and given [that] statutory payments are made to each person leaving the employment of the [C]ity, there are financial and other government records that will obviously exist. In addition, at budget time each year, each department must reconcile staff.

The appellant also states that:

> …there are only six Commissioners (Community Services, Legal, Engineering, Planning, Economic Development, Finances) in the City of Vaughan. A proper search could have entailed an email be written to the Commissioners and requesting the positions of people who have left the employment of Vaughan. The salaries and compensation could have been gathered after that. I did not require names, only amounts and numbers of staff.

The appellant also submits that:

- The City is required to produce a public report which identifies staff who earn more than $100,000.00 per year. As a result, the City should review this information for 2005, 2006 and 2007 and identify individuals who have left the City.

- The City is required to create and maintain records of employments pursuant to the *Employment Insurance Act* for all individuals who are no longer employed at the City. Accordingly, information, such as the position and compensation of individuals who received a record of employment during the time frame identified by the request must exist.

- Budgetary requirements demand that the requested information is created and maintained by the City.

- The City's insurance company requires the City to maintain a list identifying the individuals on stress leave given that this type of leave is an insurable item. The appellant argues that this list must be filed annually and includes information about the individual's salary and/or compensation.

The City's reply representations state that its compliance with the *Public Sector Salary Disclosure Act* (PSSDA) does not require it to maintain the lists requested by the appellant. The City goes on to state:

> It appears to be the appellant's position that, because some employment information is required by law, there must be lists of the information requested by the appellant. There is no statutory obligation to maintain lists containing the array of information requested by the appellant. As previously stated, and as communicated to the appellant in the … access decision letter, information related to employment and severance is contained in [the] employees' Employee Personnel Record. Records related to health issues are part of employee's Occupational Health Records.

As noted above, after the exchange of representations stage the appellant referred me to a report of Council posted on the City's public website. The report includes information about the amount of monies it paid to non-employees for professional services relating to compliance audits. The appellant states:

> The information requested in my appeal, is indeed available. The [C]ity has stated the settlement amounts are not available for employees, as I have requested in my appeal, as the [C]ity does not maintain this information in the form necessary to disclose to me. The [C]ity maintains it does not collect and store settlement amounts for employees, including legal fees, and professional service fees, and therefore they are unable to provide the information. Yet, the report

> attached, proves that the City DOES collect and store the same settlement information for non-employees
>
> …
>
> The [C]ity staff was able to easily produce this report and there were NO costs attached to the actual production of the report. Note the Economic Impact statement in the report itself says "there is no economic impact." … If the costs are zero to produce this report for council, then the same report produced under my appeal should be photocopying charges only. [Emphasis in Original]

Decision and Analysis

The appellant's position is that if the City has not created or maintained records which respond to her request, it should create a record which would respond to her request. In support of her position, the appellant provides evidence that the City collects and maintains information relating to employment, severance, health and settlement issues. She also makes an argument that the costs for the City to create a record to respond to her request are not prohibitive.

The issue in this appeal is not whether the City collects and maintains related records. The issue is whether the City conducted a reasonable search for responsive records. In any event, the City does not dispute that related records exist. The City also does not dispute that, in some instances, it has a statutory obligation to maintain these related records.

The *Act* does not require the City to create an entirely new record if the requested record does not exist. Rather, the *Act* requires the City to conduct a search through its existing records. In Order MO-1989, Adjudicator Frank DeVries stated:

> It is clear from previous orders that an institution is not, in most instances, required to create a record in response to a request… [O]rders M-436, MO-1381 and MO-1396 confirm that "… as has been established and recognized in many previous orders, section 17 does not, as a rule, oblige an institution to create a record where one does not currently exist." (Order MO-1422) Generally speaking, an institution's "… only obligation is to locate records which already exist and which contain the requested information" (Order M-436).

I agree with the reasoning in Orders M-50, M-436, MO-1381, MO-1396, MO-1422 and MO-1989 and find that the City is not required to conduct a search for any information which may be contained in related records and create the lists requested by the appellant. The appellant submits that the City should undertake a two-step approach to locate responsive records. First, the appellant states that the City should contact its six department heads and request general information to identify former employees and non-active employees. Then, the appellant suggests that the City should review its entire record holdings, including the information it makes available to the public, to create records which respond to her request. I disagree and thus will not order the City to conduct a further search in the manner suggested by the appellant.

However, the City does have an obligation under section 17 to identify and advise the appellant of the existence of related records. As stated in Order 50, "[i]t is then up to the requester to decide whether or not to obtain these related records." I am satisfied that the City identified and advised the appellant of the existence of related records by communicating to the appellant that information related to employment, severance and health issues is contained in its personnel and occupational health records. However, the appellant decided against filing a new request for related records or reformulating her request to seek access to these records.

The fact that related records may exist does not respond to the issue of whether or not the City conducted a reasonable search for responsive records.

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 [Orders P-624 and PO-2559]. The only evidence before me of the steps the City took to identify and locate existing responsive records is its evidence that it consulted its Director of Human Resources and inquired whether the Human Resources Department created or maintained the lists requested by the appellant. In my view, the City's consultation with the Director of Human Resources was an important and logical first step in identifying and locating responsive records. However, there is no evidence before me that the City made inquiries to other departments, which may or may not create and maintain responsive records. It appears that the City concluded that if its Human Resources Department does not create and maintain responsive records, it is unlikely that any of its other departments would have responsive records. This type of reasoning does not discharge the City of its responsibility to conduct a search for responsive records. The information requested by the appellant relate to staffing and compensation issues. These issues potentially affect all of the City's six departments and as a result there is a possibility that responsive records exist. For instance, documents such as memorandums, letters or e-mails may contain the information requested by the appellant. Though I do not share the appellant's view that a reasonable search dictates that the City conduct a two-step approach to retrieve and create an entirely new record, I am of the view that the City must conduct an actual search for responsive records that may exist.

I have carefully reviewed the City's evidence and am not satisfied that the City has provided sufficient evidence demonstrating that it made a reasonable effort to identify and locate responsive records which identify the number, position and amount of compensation paid to former or non-active employees for 2005, 2006 and 2007. In fact, there is no evidence before me suggesting that the City conducted a physical search of any of its record holdings to determine whether these records exist.

Accordingly, I find that the City did not conduct a reasonable search for responsive records and will order the City to conduct a further search for these records.

ORDER:

1. I order the City to conduct a search for records responsive to the appellant's request for information which identifies the number, position and amount of compensation paid to former or non-active employees for 2005, 2006 and 2007.

2. I order the City to provide me with an affidavit from the individual(s) who conducted the search, confirming the nature and extent of the search conducted for responsive records within 30 days 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 and responsibilities;

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

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

    (d) the results of the search.

3. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit 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.

4. If, as a result of the further search, the City identifies any additional records responsive to the request, I order the City to provide a decision letter to the appellant 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.

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

Original Signed By: September 30, 2009
Jennifer James
Adjudicator