



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

ORDER MO-2559

Appeal MA07-369-2

City of Hamilton



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BACKGROUND:

This appeal flows from Order MO-2383, which was issued on January 19, 2009 to address the issues raised by two related requests submitted to the City of Hamilton (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) by the same requester. Both requests led to appeals with this office (MA07-127 and MA07-369). At issue in the appeals were records related to storm water management, drainage, site-grading, siltation and erosion-control for the Glanbrook Municipal Offices and buildings and lands proximate to it.¹

In Order MO-2383, I made the following findings regarding the scope of the two requests:

I find that the scope of the first request (Appeal MA07-127) is defined by the documents and properties that it specifically lists, namely storm-water management studies or plans, storm drain, culvert or berm design or as-built drawings, and drainage, site-grading, siltation and erosion-control plans, all related to the Glanbrook Municipal Offices and the adjacent Sport Complex/Playing Fields.

I find that the appellant's second request [Appeal MA07-369] is broader than the initial request, and that its scope contemplates *all* records related to the planning, engineering, construction or development of the Glanbrook Municipal Offices, the adjacent Sport Complex/Playing Fields, *and* the nearby cemetery lands [emphasis in original].

I also adjudicated the appellant's challenge to the completeness and adequacy of the searches conducted by the city in response to the first request. To that end, I made the following findings, starting at page 9:

The city has correctly pointed out that the *Act* does not require an institution to prove with absolute certainty that records or further records do not exist (PO-1954). However, based on the evidence provided by the appellant in these appeals, I am satisfied that there is a reasonable possibility that additional responsive records may exist in the hands of outside consultants.

...

[As] the appellant points out, there is no indication in the city's evidence that outside (engineering) consultants, who might have direct knowledge of pertinent information or records, were contacted regarding the whereabouts of copies of the records specifically listed by the appellant in his first request. I note that the appellant raised this point directly with city staff early on, and before he filed an

¹ Glanbrook was formerly a rural township with a population of 10,000, located just south of Hamilton, Ontario. On January 1, 2002, the Hamilton-Wentworth regional government and that of its constituent municipalities, including Glanbrook, were amalgamated as the new City of Hamilton. Accordingly, the appellant's requests were directed to the city.

appeal of the city's decision on that request to this office. I also note that this point was made throughout the appellant's appeal documentation.

...

In the circumstances of this appeal, I find that the city ought to have acted on the appellant's suggestion to contact the external consultants in an effort to obtain copies of the records he was seeking. In this particular respect, I find that the city's searches were inadequate.

In light of my finding that the city's searches in these appeals cannot be upheld in this respect, I will order the city to conduct additional searches for responsive records by making inquiries with the relevant external consultants regarding the existence of records related to the development and construction of: the Glanbrook Municipal Offices (on Binbrook Road); the Sports Complex property, including its playing fields to the east, west and north of the Glanbrook Municipal Offices; and the cemetery lands proximate to the Glanbrook Municipal Offices. The records are the types of records specifically described by the appellant in his first request, but also including the cemetery lands for the sake of completeness.

The relevant order provision in Order MO-2383 stated:

I order the city to conduct further searches for the records responsive to the appellant's two requests, by making inquiries with the relevant consultants, using my findings in this order as a guide.

Order MO-2383 required the city to issue a new decision to the appellant within 45 days of the date of the order, describing the outcome of the searches and providing a decision respecting access to any records that were located by the ordered searches.

NATURE OF THE APPEAL:

On February 26, 2009, the city issued a new decision letter to the appellant outlining the outcome of the additional searches conducted in response to Order MO-2383. The city's decision letter listed the individuals and/or companies contacted and provided information about their respective identification of responsive records. The city advised that it would not be claiming any exemptions with respect to the records identified as responsive by the individuals or companies contacted. The city also provided the appellant with a fee estimate under section 45(3) of the *Act* for the cost of processing the records.

As the appellant had not responded to this correspondence or paid the stated fee, the city wrote to him again on March 25, 2009, indicating that if the fee was not paid by April 11th, the city would close its file.

The appellant paid the fee and concurrently sent an e-mail to city staff regarding follow-up with certain individuals and firms. The city responded the following day, advising the appellant of its

view that it had complied with Order MO-2383 and no further action was required. The appellant replied to the city, conveying his dissatisfaction with the search efforts. It was this communication, which was copied to this office, which led this office to open Appeal MA07-369-2. The appeal was moved directly to adjudication and assigned to me to conduct an inquiry into the issues.

I commenced my inquiry by sending a Notice of Inquiry to the city, seeking representations. As a result of the absence of relevant city staff from the office, I placed the appeal on hold temporarily. Following the reactivation of the appeal, I received the city's representations. I subsequently sought and received representations from the appellant in response, as well.

DISCUSSION:

PRELIMINARY MATTER - CUSTODY OR CONTROL

The issue of the city's custody or control over responsive records in the possession of external consultants has been raised by the appellant, either implicitly or directly, at several points over the course of these appeals. Strictly speaking, however, the issue of custody or control is not before me in this appeal. For clarity's sake, I will address why it is not at issue in this appeal as a preliminary matter.

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. Accordingly, it is sometimes necessary to determine the issue of custody or control as a preliminary matter because records *not* in the custody or under the control of an institution do not fall within the purview of this office. In other words, the issue of custody or control goes straight to the authority of the Commissioner to assume jurisdiction over the matter in the first instance.

In view of the appellant's comments respecting the possible existence of responsive records in the possession of the external consultants, I stated the following in Order MO-2383:

Although the appellant refers to the city as having "control" over copies of records that may be in the hands of external consultants, I note that the issue of "custody or control" under section 4(1) of the *Act* is not before me and need not be determined in the circumstances of the present appeal.

However, I note that in communicating with the city regarding the searches conducted following Order MO-2383, the appellant wrote:

... On this point [regarding contacting the regulatory body for engineers], I need not remind you of the issue raised in the appeal, namely that the City has custody and control of the documents held by the consultants that you have been ordered to obtain responsive records from.

This correspondence was copied to this office and led, as previously indicated, to the opening of Appeal MA07-369-2. However, I decided to address the issue as a preliminary matter in the

Notice of Inquiry because both parties appeared to be referring to the concept. The city had indicated that it could not determine who “owned” any records that may have documented agreements or contracts between the former Township of Glanbrook and third parties, but was contacting the parties nonetheless to seek responsive records.²

In the appellant’s copy of the Notice of Inquiry, I reiterated for emphasis that the issue of custody or control over responsive records in the possession of external consultants was not before me; nor had any determination on the issue been necessary (or made) in the appeals leading to Order MO-2383. I also advised the appellant that the issue would only require determination if the city identified further responsive records in the possession of external consultants and simultaneously claimed that these records were not in its custody or under its control.

I note that in the appellant’s representations, he contends that there are responsive records that are in the possession of the city and argues:

These include, but are not limited to, the records which have been confirmed to exist in paragraph 4 of the affidavit of [the city’s analyst]. On this point the partnership of [the planning firm] was retained as the consulting firm providing the services of the municipal planner through [a previously identified individual]. The records created for the city by the partnership have been paid for by the former township and are the property of the City of Hamilton and are therefore “under the control” of the city. The fact that the partnership has been renamed does not affect this ownership issue or the joint and several obligations of all the partners of the partnership to the city. This is a basic tenant of partnership and agency law.

In paragraph four of its affidavit, the city describes that the town planner had left “archived files” with his former partner, and the appellant’s submissions set out above are based on the content of that paragraph. However, the city’s receipt of these same files, and the subsequent identification of additional responsive records from within their contents, is described in the following two paragraphs, which the appellant does not address in his submissions. Indeed, in paragraphs five and six of this affidavit, the city advises that it disclosed all the additional responsive records identified in the course of reviewing the records of the former town planner. Accordingly, as I understand the city’s evidence, no other responsive records are in the possession of this particular external consultant, contrary to what the appellant submits.

² Similarly, in its affidavit describing the searches conducted pursuant to Order MO-2383, the city stated in the closing paragraph that:

It is my belief that city staff has made every effort to search for and retrieve all records in the possession of outside parties. However, given that the city has no copies of any contracts or agreements entered into between the former township of Glanbrook and third parties, we cannot ascertain who “owns” the records.

For the reasons outlined above, the issue of custody or control is not before me in this appeal. It cannot be raised as a theoretical construct as regards “phantom,” or unidentified, records. There must actually be records identified as responsive *and* a claim that such records are not in the institution’s custody or under its control for the issue to be raised. In the present appeal, based on the outcome of the city’s inquiries with external consultants, it is taking the position that there are no additional responsive records. Indeed, that is why the issue of the adequacy of the city’s search is squarely before me; the appellant remains unsatisfied with the city’s searches and believes that additional responsive records *ought* to exist.

There being no records for which the issue of custody or control can be raised, I will now consider the issue of whether the city’s search for responsive records pursuant to the provisions of Order MO-2383 was reasonable.

DID THE CITY CONDUCT A REASONABLE SEARCH FOR RESPONSIVE RECORDS THAT MAY HAVE BEEN HELD BY EXTERNAL CONSULTANTS?

The appellant challenges the adequacy of the city’s searches in response to order provision 1 in Order MO-2383 based on his concern that the city did not satisfy “its search obligations under legislation.” In this appeal, therefore, the onus is on the city to satisfy me that it conducted “reasonable” searches in response to Order MO-2383.

In my view, for the purpose of reviewing the adequacy of the city’s searches, it is important to review the wording of the relevant order provision. Order provision 1 stated:

I order the City to conduct further searches for the records responsive to the appellant’s two requests, by making inquiries with the relevant consultants, using my findings in this order as a guide.

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 as required by section 17.³ Under the *Act*, I must be satisfied by the city’s evidence that reasonable steps have been taken to locate and identify records responsive to the requests according to my findings in Order MO-2383 (Order PO-1954-I). If I am not satisfied that the search carried out was reasonable in the circumstances, I may order further searches.

Representations

In email correspondence sent to the city just prior to the filing of this appeal, the appellant’s inquiries focused on certain individuals and firms that were of particular interest to him. He stated:

... kindly advise of the status of your inquiries and efforts to contact [a named individual, a professional engineer] of [named engineering firm]. I also ask that you apprise me of your next steps in your efforts to contact [the named individual]

³ Orders P-85, P-221 and PO-1954-I.

in the event you have no additional news for me. I assume you will be sending a follow up letter to [the named individual] and copying it to the regulatory body which oversees engineers. As I am sure you are aware, this body will ensure [the named professional engineer] responds to your correspondence and phone calls.

As for other consultants, I note that you still have not contacted the engineer who prepared the Site Plan which was referred to by the Adjudicator and which was provided to me. I also note that while you have contacted the Architect for the Glanbrook Municipal Offices building, you have not contacted the Contractor who is more likely to have documents responsive to the FOI requests. Both the Architect [named individual] and the Contractor [named construction firm] are recognized and honoured on a plaque affixed for public display at the entrance of the Glanbrook Municipal Offices main doors...

I asked the city to prepare affidavit evidence to convey a written summary of the steps taken in response to the searches ordered in Order MO-2383, with particular attention to, and emphasis on, the individuals/firms identified by the appellant in the email to the city excerpted above: namely, the consulting engineer, the site plan engineer, and the general contractor.

In addressing the appellant's query respecting whether the "site plan engineer" had been contacted, the city clarified that the site plan was not prepared by an engineering consultant but rather by an architect, the same architect identified on the plans previously provided to the appellant. The city noted that:

The site plan provided to the appellant does not contain any reference to an engineering firm [as asserted by the appellant], but has the words... [Named] Architect Services Ltd. stamped on the record. Further, dialogue with [specific individual at the named architectural firm] established that the site plan was prepared by his firm.

The city indicated that "in the interests of time and resolving this appeal" it would make further inquiries with the general contractor and the named engineering firm.

The city's representations included an affidavit as requested, recounting the efforts made to contact outside consultants pursuant to Order MO-2383. In response to the order, the city analyst contacted the Public Works Department, the Planning and Economic Development Department and the Community Services Department to request that they contact "known outside parties for records responsive to the request." According to the city, the Community Services Department responded that it had not been involved in the Glanbrook Project, so it had no records pertaining to this matter and was not in a position to contact outside parties.

The city advised that an individual from the planning department subsequently identified archived files related to the Glanbrook Cemetery Project, which had been left behind by the former town planner. According to the city, the records consisted of 55 pages of correspondence from consultants to the Township of Glanbrook or the city, a servicing report, site plan control memoranda, and drawings that included site, grading and drainage plans, landscaping detail

drawings and preliminary grave lot and numbering plans. These records were provided to the appellant.⁴ The same individual from the planning department contacted the landscape architects and the named engineering consultant. The former replied:

I have reviewed our corporate records for the files noted in your ... letter. I can advise you as follows, the paper records for this job were shredded/destroyed in or about 2005 which was following the 7 year period. (This is a 1996 job for us.).

We checked our electronic drawing files and will forward PDF drawing copies for your use and records. Please note, our firm was only involved with the Township of Glanbrook Cemetery project. We had no involvement in the other noted files. These will be sent under separate cover.

The PDF files referred to by the landscape architect were subsequently received and sent to the appellant.

The city advises that the engineering consultant did not respond to the correspondence sent to him regarding the terms of the searches required by Order MO-2383, nor did he respond to a follow up telephone call. Attached to the affidavit was a copy of a letter sent to the consulting engineer in follow-up, requesting a response. The city later informed this office that the consulting engineer had subsequently advised in a phone call that he had no responsive records, but he declined to put this position in writing.⁵

The city indicated that the architectural firm responded that no responsive records pertaining to the request had been located. A letter to this effect from the architectural firm's representative was attached as an exhibit to the affidavit. Next, the city's affidavit describes how it conveyed the details of the appellant's request to the named construction company in a written request for a search. The city had not yet received a response to the letter (a copy of which was attached to the affidavit). The city subsequently advised this office that the construction company had confirmed that they had no responsive records and later sent a copy of an email received from the construction company's representative.⁶

In a subsequent email exchange between staff from this office and the appellant, the appellant indicated he was interested in receiving reviewing retention policies or practices of some of the third party consultants prior to preparing his representations. At my direction, staff advised the appellant that no additional documentation or information was expected or would be provided. In a letter sent to the appellant to confirm that advice, I also reiterated that I have no jurisdiction

⁴ These are the same 55 pages referred to in the discussion of custody or control, above.

⁵ City staff expressed reluctance to follow up further with this individual regarding his initial indication that he would send correspondence confirming that he had no responsive records, "given his tirade and use of profanity during our aforesaid telephone conversation." It was this consultant regarding whom the appellant maintained the city should be contacting the Society of Professional Engineers in order to seek assistance in obtaining a response from him.

⁶ The email stated: "[We] regret to inform you that we no longer have any data and/or paperwork on file regarding the project. Our business is transitioning to the next generation and we completed a major "housecleaning" this spring, where all files 10 years of age and older were disposed of."

over private consulting or engineering firms and, specifically, over the retention (or any of the) policies or practices of the external consultants with whom inquiries were made.

In the representations subsequently submitted to this office, the appellant framed the issue by asking “has the city’s search for records been adequate and complete?” The appellant’s conclusion is that the city has “not satisfied its search obligations under legislation.”

The appellant advised that he wished to adopt the “facts, grounds of appeal and relief (including the attachments) set out in the Notices of Appeal in respect of Appeals MA07-127 and MA07-369.” In challenging the adequacy of the city’s search efforts, the appellant expresses frustration that in spite of the appeals and Order MO-2383, he has not received “a single document (other than a virtually illegible Site and Grading Plan)” regarding the municipal offices or the sports complex/playing fields. As I understand the appellant’s submissions, he does not accept that there are no additional responsive records relating to these buildings and lands, and his unwillingness to accept this stems in part from there being so many records relating to the cemetery lands identified.

For example, the appellant argues that because the engineering consultant prepared the drainage and stormwater management plans for the cemetery lands, it is likely that he also prepared the same plans for the municipal offices and the sports complex lands. The appellant urges me to infer from the lack of written or affidavit evidence that this individual ought to have additional records relating to these other properties that have not yet been obtained by the city. The appellant refers to a statement in the city’s affidavit that “responsive records are in the possession” of the land use planner’s firm to support his allegation that the city made inadequate efforts to contact external consultants and locate records in their possession.

The appellant submits that the Finance Department should also have been contacted because it is required by “financial disclosure and municipal accounting requirements” to maintain records respecting payments made to external consultants on a project by project basis. The appellant concludes: “A simple search of payments in relation to the construction of Glanbrook Municipal Offices would have disclosed relevant consultants.”

The appellant does not identify what other “relevant consultants” may have prepared records in addition to those already identified although he does allege that “no effort was made to contact the actual engineer who stamped and signed the single Site and Grading Plan provided.” As has been previously noted, however, the city’s evidence is that the Site and Grading Plan was prepared by the architectural firm already identified and contacted as a consequence of Order MO-2383.

Analysis and Findings

This appeal was opened to address the appellant’s concerns with the outcome of the additional searches required by Order MO-2383. It follows, therefore, that the scope of my inquiry in this appeal is predicated on the nature of the searches ordered by me in Order MO-2383. Although the appellant wishes to rely on his presentation of the facts and submissions from the predecessor appeals that led to Order MO-2383, as well as new ones provided in the context of this inquiry, I

note that I previously considered these older materials in reaching the conclusions outlined in Order MO-2383. Specifically, I have already determined that the city's efforts to identify records responsive to the appellant's requests within the city's internal records holdings were reasonable. This appeal is not intended to provide an opportunity to re-argue issues previously before me, and disposed of, in Order MO-2383. To be clear then, Order MO-2383 represents a complete disposition of the search issue, with the exception of the city's efforts respecting responsive records possibly held by external consultants.

As previously noted, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.⁷ The appellant suggests that inquiries with the city's finance department "would have disclosed relevant consultants," However, the appellant does not specify what other relevant consultants or professionals beyond those already identified in Order MO-2383 ought to have been identified by such contact. In my view, the appellant's vague assertions about "relevant consultants" do not persuade me that other types may yet be identified. In the circumstances, I am satisfied that the "relevant external consultants" were previously identified by the findings in Order MO-2383.

That being the case, however, it must be acknowledged that the appellant continues to be concerned about the records provided to him, particularly the apparent dearth of records relating to the municipal offices and the sporting complex and fields. It appears that the appellant does not accept that there may be reasonable explanations for why there are no additional responsive records relating to the municipal offices and the sports complex still in existence. However, I note that among the other findings I made in Order MO-2383 is the following statement on page 9:

Furthermore, I accept the evidence of the City that responsive records related to the development and construction of the municipal offices and sporting complex of the former Township of Glanbrook may indeed have been misplaced or destroyed during the amalgamation period. In my view, it is also possible that a similar fate may have befallen the City's copy of a full-sized version of the site and grading plan previously disclosed to the appellant in electronic form. It should be emphasized at this point that in a review of the adequacy of the City's search, my jurisdiction does not extend to a review of record-keeping practices.

As was noted in the inquiry documentation, the *Act* does not require an institution to prove with absolute certainty that further records do not exist. Such a statement contemplates circumstances such as those described above where a lack of *absolute* certainty appears unavoidable. Further, I note that final statement in the excerpt from Order MO-2383, above, regarding the limits of my authority as regards record-keeping practices is relevant in the present appeal. This is particularly so in view of the appellant's assertion that the city must determine if there are electronic copies of any of the records that may have been in the possession of the engineering consultant. The limitation on my authority respecting the city's record-keeping practices applies equally to those of a third party professional such as the engineering consultant. Further, I reject the suggestion implicit in the appellant's submission that contacting the engineer's professional regulatory body

⁷ Orders P-624, PO-2388 and MO-2076.

is required to render the city's efforts in contacting external consultants "reasonable" for the purposes of my review here. I accept the city's evidence that the engineering consultant advised verbally that he had no responsive records. The fact that he declined to put that in writing, or in affidavit form, does not necessarily lead to an adverse inference as to its truthfulness, as suggested by the appellant. However, I find that the city's evidence respecting the nature of this particular individual's response upon further follow up is relevant in assessing the reasonableness of the city's efforts to contact that external consultant. I am satisfied with the efforts made by the city to contact this particular individual regarding responsive records.

Several of the appellant's submissions appear to be based on a misreading or misinterpretation of the city's evidence. For example, I accept the city's evidence that there was no "site plan engineer" as alleged by the appellant and, moreover, that it was the previously identified architectural firm that prepared the site plan. Further, the city has provided evidence to me respecting the contact it made with this firm. Next, and as noted under the discussion of custody or control, the appellant also points to paragraph four of the city's affidavit that "responsive records are in the possession" of the land use planner's firm in alleging that inadequate efforts were made to locate records with external consultants. However, the appellant's argument does not appear to take into account the following two paragraphs of the city's affidavit which address the review of these same records by city staff, the determination that 55 pages were related to the cemetery development, and their subsequent disclosure to him.

Returning to the appellant's position that the city has failed to satisfy its "search obligations under legislation," I would emphasize that the issue is not whether additional records ought to exist, but rather whether the city has conducted a reasonable search for such records, as required by section 17 (Order MO-1930-I). This office has interpreted an institution's "search obligations" under section 17 in such a way that 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.⁸ Further, in my view, the wording of the relevant order provision in Order MO-2383 carries with it the suggestion of what might be considered "reasonable" for the purposes of the external searches required. The order provision required the city to respond "... by making inquiries with the relevant external consultants, using my findings in this order as a guide." Implicit in the wording is an awareness of limitations on the capacity of this office, and institutions that fall under its jurisdiction, with respect to the activities of individuals and entities not subject to the *Act*.

Ultimately, in my view, the fact that the appellant may not accept the explanations provided to him about the lack of responsive records, or their possible fate upon amalgamation of the former Township of Glanbrook with the City of Hamilton, does not by itself render his belief that additional records should exist a reasonable one. I find that the appellant's representations do not provide a reasonable basis for concluding that there may be additional records in the possession of the relevant external consultants.

Based primarily on the affidavit material provided to me, I am satisfied that the city has adequately discharged its responsibilities under section 17 of the *Act* to conduct a "reasonable" search for additional responsive records that may have been held by external consultants.

⁸ Orders M-909, PO-2469, PO-2592 and PO-2831-F.

Accordingly, I find that the city's further searches conducted in response to Order MO-2383 were reasonable in the circumstances, and I dismiss the appeal.

ORDER:

I uphold the city's further searches conducted pursuant to the terms of Order MO-2383.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ October 27, 2010