



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

# **ORDER MO-2547**

**Appeal MA09-168**

**City of Sault Ste. Marie**



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## **NATURE OF THE APPEAL:**

The City of Sault Ste. Marie (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to any documents or records, including complaints, collected or forwarded by the City's Fire Department as a result of an incident which occurred at a particular address (the Subject Property) on a specified date.

The City identified records responsive to the request and granted partial access to them. The City withheld information that it defined as "third party information".

The requester (now the appellant), appealed the City's decision. As set out in the Appeal Form the appellant sought access to the information in the responsive records identified by the City, but also asserted that additional records exist that are responsive to her request.

At mediation, the appellant decided not to pursue access to the withheld portions of the responsive records identified by the City. As a result, that information is no longer at issue in the appeal.

Also in the course of mediation, the City disclosed two additional pages of responsive records which were, according to the City, "inadvertently withheld". In addition, the City provided the appellant with a copy of its letter to the mediator describing its search efforts.

In response, the appellant told the mediator that it was her position that additional records should exist including, but not limited to:

- (1) Additional journal entry records (as the appellant believes that the original entries have been altered by the City);
- (2) Records pertaining to a complaint, or complaints, from the City's Fire Department to the City's Building Department; and
- (3) Court documents obtained by or on behalf of the City's Fire Department and filed with the Building Department.

After conducting a further search, the City advised that no additional responsive records exist.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator is assigned to conduct an inquiry under the *Act*. I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the City. The City provided representations in response to the Notice of Inquiry. I then sent a Notice of Inquiry to the appellant accompanied by a complete copy of the City's representations. The appellant provided representations in response to the Notice. I determined that the appellant's representations raised issues to which the City should be given an opportunity to reply. Accordingly, I sent a letter to the City along with the non-confidential representations of the appellant inviting its reply representations. The City provided representations in reply.

In preparing the Order in this appeal I noted that there appeared to be a typographical error at paragraph 16 of the affidavit of the Assistant City Solicitor. There she refers to a retrofit letter dated January 26, 2008, which according to the calendar was a Saturday, a non-business day. The appellant bases her assertion that the City did not conduct a reasonable search for responsive records, in part, on her inability to obtain a copy of a retrofit letter dated January 26, 2008. In answer to an inquiry from this office with respect to the date of the letter, the Assistant City Solicitor confirmed in writing that the date of the retrofit letter should have been January 22, 2008 rather than January 26, 2008, and that the incorrect date was the result of a typographical error.

## **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].

## **Representations**

### *The City's Representations*

In support of its position that it conducted a reasonable search for responsive records the City provided an affidavit from its Assistant City Solicitor, who is assigned to addressing access to information requests. She deposes that to commence the search for responsive records, she wrote to the Acting Fire Chief requesting that he provide the information sought in the appellant's request. She received a number of records from the Assistant Fire Chief in response. She states that she provided the copies of these records to the appellant, along with the City's initial

decision letter. She states that she applied the exemption at section 14(1) (invasion of privacy) to sever some information from the records she disclosed to the appellant.

Subsequent to her receiving notification that the City's decision had been appealed to this office she wrote to the Acting Fire Chief requesting copies of unsevered versions of the records that she had initially disclosed to the appellant. A short time thereafter, in the midst of a conversation with the Fire Services Clerk (the Clerk) responsible for providing Freedom of Information materials to the Legal Department, she was advised that during the search for the unsevered versions of the records initially disclosed to the appellant the Clerk discovered that two additional responsive records had not been provided to the Assistant City Solicitor. The Clerk then provided those additional records along with a copy of the unsevered records to the Assistant City Solicitor. The Assistant City Solicitor deposes that it is her belief and understanding that those two records were inadvertently withheld.

Accordingly, the Assistant City Solicitor then sent copies of the unsevered records and the two additional responsive records to this office and engaged in further discussions with the Mediator.

Further to those discussions and in an effort to ensure that all responsive records had been provided to the appellant, the Assistant City Solicitor then attended personally at the City's Fire Service offices and met with the acting Fire Chief, a fire inspector and the Clerk. In the course of those discussions:

Fire staff explained that the journal entries [as reflected in the responsive records] are made via a software program. Where additional entries are made those entries are electronically date stamped by the software. As no date stamp appears on any of the journal entries [that appear in the responsive records] no additions have been made to the entries that were provided to [the appellant].

In addition, she deposes that as a result of her being aware that when either "a fire or building inspector notices a violation they may advise the other party" she took steps to contact the Chief Building Official for the City. She deposes that to further ensure that all responsive records had been identified, she asked the Building Division for a complete copy of their file pertaining to the Subject Property, which she reviewed in its entirety. She states that there was no complaint by the Fire Department to the Building Division. However, the Building file did contain a retrofit letter. She deposes:

The Building file does contain a retrofit letter dated January 26, 2008. Attached hereto as [an exhibit] to this my affidavit is a copy of the Retrofit Letter to [the appellant and her husband] dated January 22, 2008. The retrofit letter contained in the Building Division file is dated January 11, 2008. The Fire Department have an identical letter dated January 22, 2008. Again I attended at the Fire Department seeking explanation of two identical letters with different dates.

The Assistant City Solicitor states that she showed both copies of the retrofit letters to the Assistant Fire Chief, the inspector and the Clerk. She deposes that:

They explained to me that the January 11th letter, although signed was in fact a draft letter that was never mailed out. The January 22, 2008 letter is the only letter that was mailed out.

She concludes her affidavit by deposing:

It is my belief that a full and thorough search for the requested documents was conducted. In no way was the scope of the search limited.

Personally and with the aid of Fire and Building staff, I conducted a complete search of both sets of documents. It is my belief and the fact is that no further documents are in existence relating to these files.

*The appellant's representations*

The appellant's representations came in three parts. They are wide ranging and recount in great detail her difficulties with certain tenants and her dealings with the City regarding the Subject Property. She also takes issue with the Fire Department claiming that two responsive records were inadvertently withheld. She submits that this was not done inadvertently. She also submits that when referencing the retrofit letters in the Building Division file and at the Fire Department in her affidavit, the Assistant City Solicitor:

... reversed the location as to where these identical letters were filed. The Fire Department file was dated January 11, 2008. The Building Department File was dated January 22, 2008.

...

Either this letter exists. This letter does not exist. Or this letter will manifest in the future under that particular date.

The appellant also refers to a number of her beliefs and suspicions to support her conclusion that the City failed to conduct a reasonable search for responsive records.

In particular, the appellant submits that she and her husband attended the City Building Department to search for "a letter dated January 26, 2008" that was referred to in the affidavit of the Assistant City Solicitor, but the letter was not there, nor, she says, was it there when she attended at the Building Department to obtain a building permit to address certain "items that the fire department had ordered" and she asked to see "our file and the complaint which was filed."

She states:

I witnessed the gentleman who issued the permit remove several documents from the file including a half sized sheet of bright pink paper. He explained to me that he had been instructed to inform me that if I wanted to see these files I would have to go to court. I got the file and there was nothing recent in it except our permit which we obtained on January 8, 2008. ...

On March 4, 2009, we attended the Fire Department and asked to see our file. We met with [an identified individual] who took us into a conference room. He brought in our file which contained nothing more than what already had. ...

I then asked [an identified individual] about the complaints at the Building Department and he knew nothing about these complaints. ...

She states that she then received a call from an individual at the Ontario Fire Marshal's Office who told her that "they had nothing on record" and that "what I had was not an order. An order would have a date to complete the repairs by. It would also have your right to appeal the order." In response, the appellant advised that "it did contain a date to have the repairs done by, but does not contain our right to appeal." The appellant states that the individual "doesn't know what I have." She submits that she subsequently called an Engineer with the Fire Marshall's office who also advised that "what I have is not an order."

She states that:

I explained to him that the building permit was for repairs per fire code retrofit order. I also told him that the unit was ordered closed. He said that if the unit was closed, that the Ontario Fire Marshal would have to have authorized the closure and that a written notice would have to be posted and the entire unit shut down. The Fire Marshal's Office has no record of this.

In further support of her position that other responsive records exist, the appellant also refers to an incident that occurred when she showed the Subject Property to a prospective purchaser. She submits that shortly after viewing the property this prospective purchaser telephoned her and questioned her "motive for selling" and inquired about "the charges filed against the property." She states that this convinced her that the prospective purchaser knew something about the property that she did not. She had her attorney conduct a search at the Land Registry Office, but nothing was found. Nonetheless, she submits that:

I am more than ever convinced that the records which disappeared from the Building Department files between January 4, 2008 and February 22, 2009, were these documents. I have seen these documents (including a half-sized sheet of bright pink paper) but was told that I would have to go to court to access them. Delays by the Legal Department could have been buying time to dispose of these records.

She is confident that an “information” was laid by the Fire Department and that “charges were filed”. She states that the lack of preparedness of an inspector who attended at her property supports her belief that “he was there to serve us with papers.” She submits:

When he discovered that a mistake had been made, he instead ordered a “retrofit” in an attempt to justify the charges. I also believe that the January 11, 2008 letter was used due to the severity of charges. I believe that the January 11, 2008 order was withheld to permit the tenants time to vacate, and then reissued on January 22, 2008.

She submits that:

On December 22, 2009 I picked up my Freedom of Information Package for the Building Dept from the Legal Department. Attached to [her representations as an exhibit] are three pages which I did not already have and were not in the file when I attended at the building Department on March 7, 2008. On the Building Division Complaint Form there is a note that the building permit [number] was issued the day before the complaint. The complaint was filed on January 4, 2008 and the permit in question was issued on January 8, 2008. The other two documents contain a date stamp of February 23, 2009 which is ten days after my letter to them requesting written notice as to what the complaints were. It would appear to me that these documents were processed on February 23, 2009. They also make it obvious to me that the complaint was filed by [a named individual]. [The named individual] told me personally that she has never been in the building.

She further states:

I know that there are court records. I have attempted to locate these, but I need the disposal date in order to see the file. The city has been shuffling records and I cannot keep up. This FOI has taken a very long time for something that should have been simple.

I would also like [the Assistant City Solicitor] to verify that there were never any court records held by the Fire Department, the Building Department, or the Legal Department. And I mean never... not that they are not there now. Her answers are always vague.

Finally, the appellant submits that the manner in which the journal notes are made causes unnecessary confusion. She explains:

I find these journal notes extremely difficult to understand. Not only do the fire Department records contain no file number whatsoever, these journal notes go in reverse from start to finish. [Named individual] started these journal notes with number 5. The Fire Department must have known that there would only be 4 more reports after this. This could account for there being no date stamps.

In response to the statement in a letter from the Assistant City Solicitor that no additions were made to the entries provided, she submits that this does not confirm that these were the original entries. Furthermore, she takes issue with the way in which her name was spelled and the content of certain conversations reflected in the journal notes. She also submits that the journal notes of one individual are signed by another. To her this “would indicate that these notes are now under the control” of the second individual and she therefore has no records from the first.

In closing she states:

I feel strongly that court documentation exists. I was told by the Building Department that I would have to go to court to see the files. I witnessed these papers but was denied access to them. At the time this all started I believe that the Fire Department officials were still in the City Hall Building. I believe that [a named individual] had documentation to give to me. He certainly was not prepared to inspect the building. As well, I have not seen that bright pink paper which was in the Building Files.

#### *The City's reply representations*

The Assistant City Solicitor states that after she received the letter inviting reply submissions she conducted yet another search for responsive records. She states that she met with the Assistant Fire Chief and the Chief Building Official who both confirmed that there are no other responsive records and further, neither of them has any court records relating to either the appellant or the Subject Property.

The Assistant City Solicitor confirmed that the City Legal Department does not have a file relating to either the appellant or the Subject Property and that the only Legal Department file that exists “is the Freedom of Information file.” The Assistant City Solicitor also checked with the Provincial Offences Court for both the appellant’s name and the Subject Property and that “[t]he Provincial Offences Court confirms that they have no records relating to either.”

With respect to the appellant’s request to have the Assistant City Solicitor verify that there were never any court records held by the Fire Department, the Building Department or the Legal Department, she writes:

I can advise that the Fire, Building and Legal Departments do not have nor have they previously had any court records relating to [the appellant or her husband] or to the [Subject Property].

#### **Analysis and Finding**

The issue before me is limited to the adequacy of the City’s search for responsive records pertaining to the request for access to any documents or records, including complaints, collected or forwarded by the City’s Fire Department as a result of an incident which occurred at the Subject Property on a specified date.



When 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 [Orders P-85, P-221 and PO-1954-I].

The appellant alleges that the City did not conduct a reasonable search because she is certain that other responsive records exist that are within the City's custody and control. Part of her argument is based on an unfortunate typographical error in the Assistant City Solicitor's affidavit. As set out above, however, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control [Orders P-624 and PO-2559]. In my opinion, the City's searches were extensive and wide-ranging. I find that, based on the multiple searches it conducted, the City has made a reasonable effort to locate responsive records.

In all the circumstances, I find that the City has provided sufficient evidence to establish that it has conducted a reasonable search for responsive records.

**ORDER:**

I uphold the reasonableness of the City's search for responsive records and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ August 19, 2010