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

ORDER MO-2630

Appeal MA10-79

City of Toronto

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HISTORY OF THE APPEAL

An individual submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the city) for "all records relating to the building being constructed at" a specified address. In later correspondence sent initially to the Building Division,[1] the requester also asked the city to provide certain additional records, namely:

i any internal city policy memoranda that considered alternative rules that might have been implemented (such as an average of the heights of the various runs of eaves on the building), and that provided a recommendation for the adoption of the "lowest run of eaves" rule that the city uses;
ii the internal legal opinion [that] confirmed the legality under the by-laws of the use of the "lowest run of eaves" as the point from which roof height is measured;
iii city council memoranda, resolutions, votes, policies and minutes relating to this issue;
iv the document on which formal approval was given to the adoption of the policy of "lowest run of eaves" as the basis for roof height measurement, along with an identification of who provided the approval;
v any internal city instructions to by-law compliance officers that set out the limits to be imposed on abusive building design that use short runs of low eaves as a technique to maximize the permitted height of a planned building.

In the decision letter issued on January 22, 2010 in response to the request, the city confirmed with the requester its understanding of the scope of the request as follows:

> You have requested access to a copy of: a) building permit records with respect to [a specified address] and b) the following information with respect to the interpretation of the "lowest run of eaves" rule:
>
> [points i. to v. as outlined above]

The city granted partial access to the Building Division records identified as responsive to the first part of the request, but withheld some portions under the mandatory personal privacy exemption in section 14(1) and others as being non-responsive to the request. The city charged a fee of $32 for processing this part of the request. As the appellant had already viewed copies of the building plans, the city provided him with contact information in the event that he wished to receive copies of them.

Respecting the records described in the second part of the request (items i. to v.), the city advised that a search had been conducted by staff in the Building Division, the City Clerk's office and Legal Services, but that no records responsive to the request had been located. Apparently in an effort to address the appellant's concerns with the construction at the address specified in the request, the city suggested that the requester could contact the zoning information office, obtain

[1] For ease of reference in this order, the particular district office of the city's Building Division is referred to simply as the "Building Division."

more detailed zoning information through purchase of the zoning by-law relevant to the property in question, or apply for a "Preliminary Project Review."

The requester (now referred to as the appellant) appealed the city's decision to this office based on his belief that additional records responsive to his request ought to exist. The appellant also conveyed concerns about what had transpired when he tried to obtain records directly from the Building Division, as well as the way in which the city processed his access request under the *Act*.

This office opened an appeal file and appointed a mediator to explore resolution of the issues. After the appellant's concerns had been shared with city staff, the city issued a supplementary decision on March 16, 2010 because further searches of its email holdings originating within the Building Division had identified additional responsive records. For a fee of $69.80, the city granted partial access to the additional records, with the remaining information severed pursuant to section 14(1). The city also advised the appellant that although a number of the e-mail records provided by the Building Division post-dated his request, he was being given access to them "as a courtesy."

After the appellant received and reviewed the additional records, he expressed the view that additional records relating to the specified construction project should exist. He advised the mediator that he was seeking access to three other records, described as:

> (1) the survey of the coverage and of the roof line (the survey of the building to ensure the footprint of the building matches the plan);
>
> (2) a copy of the examination to verify the roof has minimum coverage (the survey to confirm the rise of the roof is equal to or more than 1-in-10); and
>
> (3) the coverage calculations (the calculations to show the coverage is equal to or less than 30% of the property).

In support of his position that additional records ought to exist, the appellant provided a copy of a letter from the city's Chief Building Official and Executive Director, which stated, in part:

> Toronto Building documents and records all zoning requirements, proposals, remarks/exceptions and outstanding issues related to the zoning bylaws on standardized worksheets which are attached to each file, and it is these worksheets in association with plans submitted and subsequently issued that document compliance.

Based on this correspondence, the appellant advised this office that he was seeking access to the "worksheets" in electronic form. The appellant also contended that the worksheets should include the "formulas and macros that may calculate the data that is displayed."

Following a further search for records and consultation with staff in the Building Division, the city sent the appellant a second supplementary decision letter dated April 22, 2010, which stated the following in reference to items (1) to (3) (above):

> In respect to item [(1)], the city has requested the information related to the footprint from the applicant but it has not been received.
>
> In respect to item [(2)], a survey does not exist for this information nor was the information prepared by an Ontario Land Surveyor. Please find enclosed a copy of the drawing received by the city from the architectural firm.
>
> Regarding item [(3)] of your request, staff have advised [that] the mathematical calculations that are done by the zoning examiners to determine coverage are not retained. This is standard practice for the division and for all zoning examiners. The coverage (in a percentage of overall lot area) is documented and noted on the residential worksheet which is completed by each zoning examiner. This form has already been disclosed to you.

After receiving the city's second supplementary decision, the appellant wrote to this office to advise the mediator that he still believes certain information has not been provided and/or is missing. The appellant described the information as follows (as summarized):

1. Any evidence of formal acknowledgement by an examiner of the compliance of the plans with the requirements of the by-laws, and any evidence of authorization by an official of Toronto Building for the issuance of the building permit for [the specified address];

2. Any evidence that Toronto Building verified planned lot coverage; and

3. Evidence of verification of the compliance of the as-built building.

In the same letter to this office, the appellant expressed his continued dissatisfaction with the manner in which his requests were handled by the city's Building Division and its Corporate Access and Privacy (CAP) office. With the appellant's consent, the letter was forwarded to the city by this office.

At that time, the appellant also confirmed that he does not take issue with the fees charged by the city for processing the request, or with the withholding of information under section 14(1) or as non-responsive. However, the appellant maintained that there ought to be additional records responsive to his request which had not yet been located. Accordingly, the adequacy of the city's search remained at issue in this appeal.

As the mediation process reached its conclusion, the appellant also requested that the mediator add several issues to the report she was preparing to summarize the outcome of mediation: specifically, his concerns with the processing of his request through the Building Division's "routine disclosure" (i.e., its regularized system of access); and CAP's handling of his request

under the *Act*. Subsequently, following the transfer of the appeal to the adjudication stage, the mediator's report was provided to me as the adjudicator assigned to conduct an inquiry under the *Act*.

Following my review of the appeal file, I began my inquiry by sending a Notice of Inquiry outlining the facts and issues to the appellant initially, seeking representations. In the circumstances, I concluded that I wished to hear from the appellant first regarding the basis for his belief that additional records responsive to his request should exist. In addition to wanting to clarify the basis of the appellant's position on the search issue, I also decided that it was important to communicate to him the limits of an inquiry under the *Act* with respect to the issues identified in the mediator's report, prior to seeking representations from the city. The appellant responded to my Notice of Inquiry by providing detailed representations.

Next, I sent a modified Notice of Inquiry to the city, along with a copy of the appellant's written submissions and several of the attachments,[2] in order to seek the city's representations.

I received representations from the city, which were accompanied by five affidavits from Building Division staff respecting the search issue. I subsequently shared these materials with the appellant, in their entirety, to permit him the opportunity to provide reply submissions regarding the "reasonableness" of the search for responsive records. In the letter I sent to the appellant at that time, I added the following statement: "I would ask that you consider the scope of my authority in this inquiry in providing your reply submissions."

After the appellant submitted reply representations, I sought sur-reply representations from the city on two specific matters raised in the appellant's reply correspondence, namely the lack of an affidavit from the "relevant zoning examiner" and questions the appellant had about the site plan provided by the city.[3] For this purpose, I did not provide the city with a complete copy of the appellant's reply representations as I concluded that it was not necessary to do so for the purpose of sur-reply. I received sur-reply representations from the city that addressed the two points requested.

ISSUES

1. What are the limits on this inquiry under the *Municipal Freedom of Information and Protection of Privacy Act*?
2. What is the scope of the appellant's request?
3. Was the city's search of responsive records "reasonable"?

[2] Tabs 2 and 5 contained copies of various email strings and correspondence to and from the appellant, from city staff in the CAP office and Building Division.

[3] The appellant requested a "better" (more legible and/or enlarged) copy of the site plan attached to the affidavit prepared by the inspections manager because the copy provided to him was "so reduced in photocopy that much of the printing is unreadable." In addition, I asked the city to clarify if that particular site plan had been disclosed for the first time through the representations because the appellant's reply representations suggested that this is the case. As I advised the city, "newly identified, responsive records should be disclosed to the appellant directly along with a decision letter granting access, and not for the first time by this office as appears to have unintentionally occurred in this case." The city responded by issuing a decision letter and providing an enlarged [11"x17"] copy of the site plan to the appellant concurrent with providing its sur-reply representations to this office.

DISCUSSION

WHAT ARE THE LIMITS OF THIS INQUIRY UNDER THE *ACT*?

In his communications with this office, the appellant has expressed many concerns with the adequacy of the services provided to him by the Building Division and by the city's Corporate Access and Privacy office in processing his requests for information related to the construction project on the property neighbouring his own. In view of concerns I had with respect to the appellant's expectations regarding the possible remedies that might result from my adjudication of the appeal, I had staff from this office contact him to discuss appeals under the *Act*, including the limitations on my jurisdiction. I sent correspondence to the appellant to confirm the nature of this advice.

In the initial Notice of Inquiry sent to the appellant, I noted that the appellant had "asked the IPC to conduct inquiries in Toronto Building and in CAP to identify the process and training reforms that are necessary to allow Toronto Building officials to reliably perform their obligations under the *Act*." I also acknowledged his concern with the adequacy or sufficiency of the documentation kept by Toronto Building staff.

At that time, I advised the appellant of my view that I do not have the legislative authority to order the remedies requested to address the concerns he has with process and with training of city staff. I set out the relevant provisions of the *Act*, as well as information about what past orders have determined to be possible remedies available to an adjudicator in an inquiry. The following passage is excerpted from the Notice of Inquiry sent to the appellant:

> Sections 43(1) and (3) of the *Act* state:
>
> > (1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.
> >
> > (3) Subject to this Act, the Commissioner's order may contain any conditions the Commissioner considers appropriate.
>
> In Order M-618, former Commissioner Tom Wright explained that **sections 43(1) and 43(3) do not afford the Commissioner unlimited remedial power**, but they do embody the Legislature's intentions that the Commissioner should have the flexibility to fashion remedies in order to resolve issues in a fair and effective manner in accordance with the fundamental purposes of the *Act*. As this statement – and the established principles of statutory interpretation – imply, reference to the fundamental purposes of the *Act* must be made. These fundamental purposes are outlined in section 1, which states:

> 1. The purposes of this *Act* are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. R.S.O. 1990, c. M.56, s. 1.

The *Act* confers the independent oversight function referred to in section 1(a)(iii) on the Information and Privacy Commissioner.

Examples of orders of a permissible nature by the Commissioner (or her delegate) relate to the issue of access to requested responsive records and include orders to: disclose non-exempt records; conduct further searches for responsive records where a search has been found not to be reasonable (see section 17); issue an adequate decision to a requester (see, for example, section 22); and waive fees (see section 45(4)).

Orders that have been found not to be permissible include: making an award of costs (see, for example, Order P-604); and ordering disclosure of records subject to restrictions on use (Order PO-2018).

As suggested, it is my preliminary view in the present appeal that while I may properly consider the adequacy of the city's search for records responsive to your request (and any access issues arising), **the other remedies you have requested respecting additional staff training and regulating record-keeping standards by city staff do not fall within the range of permissible orders. Rather, in my preliminary view, further measures respecting staff performance are matters that should be taken up with the City Clerk or Mayor's office** [emphasis added].

As stated, I concluded that it was important to identify for the appellant that I was concerned about his expectations respecting the relief or remedy this office could offer to address his stated

concerns with the city's responses, either by the Building Division or the CAP office, which included issues with the approvals given to the specified construction project.

However, in the appellant's second set of representations, he referred once again to matters which, in my view, fall outside the scope of my authority. In the introduction to these representations, the appellant stated:

> We are now at a point where conclusions can be reached. There are no material facts in dispute. The only outstanding issues relate to the revealed inadequacies of the policies and procedures of the City relating to the verification of the By-law compliance of residential building projects, the informal and inadequate procedures of the City relating to record search under the *Act*, and two documents relating to the specific project in question which appear to be unavailable.
>
> This letter will outline an appropriate Order from [the] IPC to the City which mandates reforms to the processes of Toronto Building. Such reforms are required if the City is to offer the public reasonable access to its records and so comply with … [the *Act*].
>
> …
>
> The IPC could restrict its Order to issues that are specific to this appeal, and refuse to deal with the wider systemic issues disclosed by … this appeal.
>
> …
>
> It is a core function of the IPC to deal with barriers to access and to ensure the purposes of the *Act* are respected… The IPC has both the responsibility and the jurisdiction to issue an order to deal with each of these barriers. I therefore submit that an order containing substantially the same points as those outlined above should be issued by the IPC to the City of Toronto.

Upon receipt of the city's decision letter of October 15, 2010, the appellant contacted this office by email to confirm receipt of the enlarged copy of the plan and also to remark upon "three salient features" of the plan. The appellant identified concerns with, for example, differences between it and an earlier approved version of the plan. The appellant acknowledged a conversation with staff from this office in which the jurisdictional constraints on appeals under the *Act* was reiterated, but concluded by stating, "Given that the accurate calculation of lot coverage goes to the heart of this appeal, I would appreciate it if you would confirm the nature of your advice to me." At my direction, therefore, staff from this office advised the appellant in writing that this office "does not have the jurisdiction to determine whether the content of a record is accurate. In your case, the IPC does not have the jurisdiction to determine whether a building plan is accurate vis à vis an approved building plan." The appellant responded to this email in kind, stating: "The extent of the jurisdiction exercised by the IPC is clear."

Accordingly, for the purposes of this order, I confirm that my jurisdiction is limited to a review of the adequacy of the city's search for records responsive to the appellant's request under the *Act*. This entails a review of whether the city's search was "reasonable," as that term has been interpreted by past orders. However, it does not include any review of decisions made or actions taken (or not) by the city in verifying compliance with building or zoning by-laws, nor does it contemplate process review or staff training as identified by the appellant. As stated, I previously advised the appellant that those concerns must be addressed in a different forum. As I have no jurisdiction to fashion the remedies sought to address the appellant's process and training concerns, I will not be reviewing or commenting upon them further in this order.[4]

WHAT IS THE SCOPE OF THE APPELLANT'S REQUEST?

In my view, it would be helpful for my review of the search issue to confirm the scope of the appellant's 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;
>
> . . .
>
> (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).

In the Notice of Inquiry sent to the appellant initially, I requested clarification from him respecting certain aspects of the access request. As there had been rather extensive communications between this office, the CAP office, the Building Division and the appellant, I concluded that it was important to confirm which records he continued to seek from the city and the scope of the request more generally, since there appeared to have been some dispute respecting it, at least initially.

[4] See Orders PO-2802-I, PO-2883 and MO-2554.

Representations

The appellant states that when he met with CAP staff, they asked him to clarify his request and that he replied that the "request remained exactly as submitted … December 14th, 2009 – a request for "… all records relating to the building being constructed at [the specified address]." The appellant expresses some concern that CAP staff may have unilaterally narrowed the scope of his request by limiting its terms to the "building file" (i.e. building permit records) for the specified address, as opposed to "all records relating to the building being constructed [there]." The appellant states that the notation on the request page of "Site Plan, Struc Archt" was placed there by staff in the Building Division, not by him, and he submits that the city "initially appears to have restricted the search criteria" to the extent that email records were not included. The appellant notes that he submitted a second access request five months after the first one "because of the on-going nature of the building project."

The city acknowledges the wording of the December 2009 request but notes that before CAP could begin processing the request, the appellant contacted Building Division staff about access to further specified information. The city described the various exchanges related to the records the appellant wanted, which became more specific as matters progressed, but because these exchanges have previously been outlined in the introduction to this order, I will not reproduce them here. However, as stated, it was these various communications through different channels that suggested the need to clarify the scope's request.

The city submits that it clearly understood the appellant's "specifically worded access request, with later modifications." Further, the city submits that it adopted a liberal and expansive interpretation of the request in deciding what records were "reasonably related" to the subject matter of the request.[5]

The city acknowledges that the appellant filed a new "follow-up" request some five months after the first, which referred to "all records relating to the new building at [the specified address] other than those already delivered under the FOI request filed on December 14, 2009." Among these records, the city notes, was the survey of the roof relating to slope percentages which was responsive to the clarification provided by the appellant in later communications respecting the first request filed about the neighbouring property.

The city argues that the appellant's position that certain records must exist "regardless of evidence to the contrary" amounts to:

> … *post-facto* reinterpretations of his original request to justify his belief. While it is improper for an institution to unilaterally narrow the scope of a request, it is also improper to allow an appellant to broaden the scope of their request through the use of the appeal and mediation processes provided under the *Act*. …

[5] The city also provided a number of order references in support of its description of this office's interpretation of the term "reasonably related" in determining the scope of requests under the *Act*: Orders 38, P-880, MO-2132, MO-2433, PO-2339 and PO-2704.

> It should also be noted that this was a request for documents relating to an active construction project. The city continued to receive documentation in the normal course of the responsibilities and activities in relation to the permits, including the application for and the obtaining of a revision to the various permits.

Finally, the city maintains that the notation of "Site Plan, Struc Archt" on the request form had no effect on the interpretation of the scope of the request. According to the city,

> The notation came about as a result of the difficulties encountered by Toronto Building staff in communicating the routine and formal processes [for access]. Building staff were simply trying to inform the appellant that some of the documents, for example, the "site plan" and "structural drawings" could be processed in accordance with Toronto Building's routine disclosure plan and this notation was there to assist Building staff as to what was being requested.

Findings

Based on the evidence provided to me in this appeal, I am satisfied that the city properly construed the appellant's request. I find that any uncertainty resulted from the appellant's good faith pursuit of two avenues of inquiry due to the initial confusion surrounding access to records available under the *Act* (for which CAP is responsible) and the routine access and disclosure regime established for disclosure outside the *Act* for certain types of records held by the Building Division.

Moreover, I am satisfied that the relevant city staff understood the appellant's interest to be in obtaining access to "all records related to the building being constructed at [the specified address]." This would include email records. Further, in saying this, I accept the city's explanation that the notations made on the form by Building Division staff do not represent a unilateral narrowing of the scope of the appellant's request to those particular documents. I find that it was clear that the appellant's interest lay in "foundational" documents, or ones that would provide the evidentiary basis for the granting of permits for the construction project at the specified address as of the date of the request, December 14, 2009.

I note that the appellant appears not to have appealed the city's decision respecting the second request (filed in April 2010) to this office, which means that review of an appeal of decisions respecting it are not actually before me. In any event, it appears that the scope of this second request mirrors that of the first request, with the only qualification being that it contemplates an extended time period due to the "ongoing nature of the building project."

Having confirmed the appellant's request to be a request for access to all records related to the building being constructed at the specified address, I will now proceed with my review and findings respecting the city's search for records responsive to the request.

DID THE CITY CONDUCT A "REASONABLE" SEARCH FOR RESPONSIVE RECORDS

The appellant takes the position that additional records related to the approval process for the construction project on a neighbouring property ought to exist.

Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[6] If I am satisfied by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the city to carry out further searches.

The *Act* does not require the city to prove with absolute certainty that further records do not exist, but the city must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records (Order P-624). Similarly, 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.

As suggested in the introductory section of this order, I sought clarification from the appellant about what records, or categories of records, he alleged should exist, but had not yet been identified through the searches conducted to date by the city.[7] I asked the appellant to specifically clarify if he continued to assert that the following records should exist:

1. "a copy of the examination to verify roof has minimum coverage (the survey to confirm the rise of the roof is equal to or more than 1-in-10);"

2. "coverage calculations" with or without formulae or macros used to produce such calculations; and/or

3. additional "worksheets," other than the one disclosed to you [in two duplicate copies] … and particularly, ones that would more closely coincide with the date of the building plans for the property in question.

Additionally, in seeking the city's submissions on the search issue, I asked the city to comment specifically on relevant record maintenance policies and practices, such as retention schedules for any records related to compliance with by-laws (including calculations) and the appellant's position with respect to records he believes ought to exist. I also asked the city to advise if it had

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

[7] In writing to this office following the April 22, 2010 second supplementary decision, the appellant referred to: 1. Any evidence of formal acknowledgement by an Examiner of the compliance of the Plans with the requirements of the By-Laws, and any evidence of authorization by an official of Toronto Building for the issuance of the Building Permit for [the specified address]; 2. Any evidence that Toronto Building verified planned lot coverage (as related to the subject property's "footprint"); 3. Evidence of verification of the compliance of the as-built building;

received a copy of "the survey of the coverage and of the roof line (the survey of the building to ensure the footprint of the building matches the plan)" which it claimed (in its April 22, 2010 letter to the appellant) had been requested from the permit applicant, but not received.

Representations

In his initial representations, the appellant submits that in a review of this issue a distinction should be made between retention of routine records of a day-to-day administrative nature and those that include data and tests that are integral to a process for reaching a decision under a particular act, such as the issuance of a building permit or the verification of by-law compliance. With respect to the latter type of record, the appellant suggests that a contradiction exists between the evidence of the director/deputy CPO submitted in this appeal by CAP and the letter he received separately from the Chief Building Official respecting records retention.

The appellant remarks on concerns he has about the two "residential worksheets" disclosed to him. The first one disclosed to him is dated March 23, 2009, which he points out is three months before the approval of the relevant building plans, while the second one postdates the approval of the plans on June 15, 2009, but contains no calculations. The appellant suggests that a residential worksheet related to the approved building plans was never prepared or was destroyed.

The appellant submits that the Building Code obliges "Code Agencies" such as the city's Building Division to maintain records "that are required to support a conclusion of compliance of key building measurements with the applicable by-laws."[8] In this context, and with regard to the type of records "integral to a process for reaching a decision under a particular act, such as the issuance of a building permit or the verification of by-law compliance" the appellant provided a lengthy list of records he believes ought to exist.[9] However, the appellant then indicates that for the purposes of this appeal, he is only pursuing access to the records he had described on page two of the same correspondence that he asserts ought to exist, namely:

1. evidence of compliance of the building with the coverage provisions of the by-laws based on data from the approved building plans and the appropriate calculations from these data;

[8] The appellant sets out an excerpt from the Building Code, namely Clause 3.7.4.7.(1) The registered code agency shall maintain records of all plans review and inspection activity, of all certificates and orders and any other activities taken in carrying out functions under an appointment in accordance with the quality management plan described in Clause 3.4.3.2.(1)(d).

[9] The list included: a residential worksheet "completed and authorized at the time the building plans were authorized on June 15, 2009, along with an identification of the measurements drawn from the building plans and the resulting calculations to establish the coverage ratio of the building"; records demonstrating verification of the compliance of the as-built building to the approved building plans through a formal survey; a survey to confirm the requisite percentage of roof area with a minimum rise of 1-in-10 to establish that the as-built building qualifies for the maximum height of 8.8 metres; records supporting the conclusion that the building complies with the By-law setting two stories as a maximum (i.e. "document setting out the legal basis for the determination that the 3rd floor … should not be deemed as an illegal third "storey"…); other records, "particularly e-mails relating to administrative matters," either in the "production or back-up files"; a "Notice of Applicable Law Compliance;" additional records related to ancillary buildings, including the Committee of Adjustments application regarding those buildings; and copies of the building plan revision submitted in January 2010.

2. a survey to confirm and document the "as-built" compliance of the building with the coverage restriction of the by-law; and a survey to confirm the as-built slopes of various sections of the roof such that the roof is not determined to be a "flat roof" under the by-law – without which confirmation the roof may exceed the maximum height in the by-law by 0.8 metres; and
3. documentary support for Toronto Building's legal contention that the third floor does not fit the by-law's definition of "storey."

The remainder of the appellant's initial representations are concerned with requesting that various inquiries be made by this office with the mayor's office and other city offices regarding functions and processes related to access to information and regularized systems of access and, as such, are beyond the scope of this appeal.

In responding to the outline of the issue provided in the Notice of Inquiry, the city submits that it has searched for all records responsive to the original request and the appellant's "every amendment and clarification." According to the city, the searches conducted were for all records related to the construction project on the neighbouring property, not just the "building file." Furthermore, the city submits that while electronic copies of emails may not be stored within the collection of documents maintained by the Building Division, the searches conducted did, indeed, include responsive emails in the city's custody or control.

The city submits that "a finding of an unreasonable search may not be imposed without the requestor providing a reasonable basis for concluding that such records exist." The city argues that it has made a reasonable effort to identify and locate records responsive to the request and has therefore satisfied the requisite onus in a reasonable search appeal.

The city's initial representations refer to the challenges posed by the appellant's apparent misunderstanding of the differences between routine access to building plans through the Building Division compared to the records that might be available under the *Act* through an access request filed with the CAP office. On this theme, the city submits:

> Building staff, however, have consistently tried to resolve all of the appellant's outstanding concerns but have been unsuccessful due in part to the appellant's belief that they have deliberately withheld records. For example, the appellant provided the IPC with a copy of the April 15, 2010 letter from the city's Chief Building Official in support of his position that further electronic documents existed because her letter stated that information about "calculations" is contained in "standardized worksheets which are attached to each file."
>
> The appellant in fact had already received a copy of "standardized worksheet" attached to the file containing the calculations of the responsible Building staff. It would appear that the appellant believed that the reference to a "worksheet" in the April 15, 2010 letter to be an electronic document similar to a Microsoft Excel "worksheet" rather than … a paper document designed to record work (such as calculations, observations, etc.) related to a task. In other words, there were no

> electronic documents containing the "macros" or "formulae" relating to calculation of data. …

With regard to retention schedules for building permits and building inspection records, the city indicates that (pending Council approval), the schedule will be 15 years after the later of either January 1, 2004 or the file being closed upon completion of final inspection. The city confirms that in the interim, no records of this type (including calculations) will be, or have been, destroyed.

The city refers to the searches having been conducted by "knowledgeable staff with a total of 77 years of experience in working in the Building Division and who are familiar with all types of building records." The city attached five affidavits to its representations in support of its position that the searches conducted were adequate. The individuals who provided the affidavits are employed in the following roles for the relevant Building Division: Director/Deputy Chief Building Officer, Customer Services Manager, Document Management Clerk, and two Inspections Managers. I have reviewed all five affidavits and have summarized the evidence provided in them in the following list:

- the search for responsive records in the Building Division was conducted by the document management clerk who provided the records which were available under the routine disclosure policy directly to the appellant on December 17, 2009. The document management clerk then forwarded those records that had to be considered for disclosure under the *Act* to the CAP office along with the access request form;
- on or about December 23, 2009, the customer services manager was given a letter originally sent by the appellant to one of the inspections managers in which the appellant requested additional specific information (previously outlined on page 1 of this order as items i.-v.);
- this letter from the appellant was forwarded to the CAP office on January 4, 2010 and also formed the basis of further searches both by the document management clerk and the customer services manager, which did not identify any additional responsive records at that time;
- on February 2, 2010, CAP requested that additional searches for email communications related to the construction project at the specified address be conducted. Emails identified by the search (of the property address and the appellant's name) carried out by the director/deputy CPO – who indicates that he "retain[s] all [his] emails, both sent and received" – were given to the customer services manager to provide to the CAP office. Over the next several days, searches of the email accounts of the customer services manager, the two inspections managers, and the plan examination manager were also conducted and the resulting records were compiled by the customer services manager and sent to the CAP office on February 19, 2010[10];
- in March 2010, CAP requested an additional search for the items (1)-(3) outlined on page two of this order, which led to the March 31, 2010 emailed response to CAP by the director/deputy CPO in the customer services manager's absence from the office. CAP

[10] The affidavit provided by the customer services manager gives a date of February 19, 2010 for this action while the affidavit of the second inspections manager refers to February 25, 2010. I have concluded that this difference is not material to my determination.

then prepared another supplementary decision letter, with the responses to those items outlined previously on page three of this order;

- the director/deputy CPO, the customer services manager and two inspections managers were asked in April 2010 to conduct additional searches for responsive (sent or received) emails, and the newly identified email records were provided to the customer services manager. The customer services manager also printed "screen shots" of each electronic page from the related files in the electronic database system (IBMS) which he provided to the CAP office along with the emails;
- on or about April 9, 2010, the document management clerk responded to a request for additional information related to the revision application for the specified property;
- the director/deputy CPO states that on April 12, 2010, he received a stamped roof plan prepared by an architect (apparently from the document management clerk), which "detailed the rise and run of all roof areas" for the property in question. The plan was reviewed by the zoning examiner who advised the director/deputy CPO that "the roof slopes were in compliance" with the zoning By-law. The director/deputy CPO and document management clerk met with the appellant on that day to review the revision application file with him. The director/deputy CPO subsequently provided a copy of the plan dated March 12, 2009 to the CAP office;
- on or about August 10, 2010, the second inspections manager was asked by CAP to search for "any documents relating to coverage and roof line," which resulted in the identification of one page showing coverage calculations from the preliminary zoning review file. This individual forwarded a copy of the record by email to the CAP office.

The city reiterates that this was an active construction project for which the city continued to receive documentation in the course of carrying out its responsibilities, including documentation related to revisions to the permits. As an example, the city notes that it provided the "survey of the roof line" to the appellant when that record became available.

In his reply representations, the appellant characterizes the city's response as inadequate and he expresses concern that no affidavit of search was prepared by the relevant zoning examiner. Further, the appellant takes the position that mathematical calculations done by zoning examiners ought to be retained and not destroyed. The appellant submits that

> A dismissal of the appeal as requested by the city essentially leaves the city free to destroy records generated in compliance verification and therefore free from any obligation to provide its citizens with access to records explaining the rationale for building permit issuance.

The appellant's representations then address the "early destruction of records" generated for the purpose of ensuring compliance and offer several suggested approaches to dealing with the "routine destruction" of such records. However, notwithstanding the appellant's arguments to the contrary, I have concluded that addressing these "matters arising," particularly the order provisions suggested by the appellant to deal with his concerns, are outside my jurisdiction.

The appellant submits that the city's search for responsive records was rendered "unreasonable" because the decision letters issued all refer to the "existence of limitations on the document

search process," none of which were communicated explicitly to him. The appellant also argues that the survey disclosed to him through the May 20, 2010 decision letter is date stamped January 25, 2010 and the fact that it was not disclosed to him in the supplementary decision of March 16, 2010 means that the search conducted for that supplementary decision was inadequate and "unreasonable."

With respect to the May 20, 2010 decision letter, the appellant states:

> The search failed to turn up any documents in the files of CAP, indicating that CAP was excluded from the scope of the search. This was a clear and significant limitation of search, particularly in view of my complaints about the service provided by CAP.

The appellant refers to the indication given in the May 20, 2010 decision letter that searches had not located any records pertaining to the "ancillary buildings" and so access could not be granted to such records that do not exist. The appellant states:

> However, the foundations for these buildings were laid in the fall of 2009, and were the subject of repeated discussions between me and officials of Toronto Building in December, 2009 and January, 2010, because they would cause lot coverage to exceed the maximum in the by-laws.[11]

Further, the appellant asserts that the drawings and other records related to the Committee of Adjustment's review of the variances requested for the neighbouring property that were disclosed to him with the May 20, 2010 letter do not represent the full "large set of documents…."[12]

The appellant also disputes the city's assertion that it has disclosed the relevant residential worksheet. The appellant notes that the city produced two residential worksheets, dated March 23, 2009 and January 2010; however, according to the appellant, neither of these worksheets constitutes a residential worksheet for the "building being built at [the specified address]" because the first one was produced prior to the approval of the building plans in June 2009 and the second one was only prepared in relation to revisions to the roof design demanded by the by-law restrictions on roof height. As I understand it, the appellant is arguing, therefore, that neither of these worksheets is a complete version as required for the "building being built at [the specified address]." The appellant also conveys other concerns and suggested remedies relating to the format and content of records he submits ought to exist or be created.

However, the appellant then submits that:

> … the record clearly shows that the searches conducted for the first and second decision letters were highly limited in scope, with the scale of the subsequent document disclosure being a measure of these limitations.

[11] Here, the appellant directs my attention to a certain part of his tabbed representations that are minutes he took of meetings with Building Division staff regarding process issues and building approvals.
[12] The May 20, 2010 decision letter relates to the appellant's second request, which is not the subject of this appeal.

> The rationale set out in the … city's submission … relating to the reasonability of their search is logical, but quite irrelevant to the issues in play in this appeal. The fourth paragraph submits that I have adopted a position that certain documents must exist and, in the absence of disclosure, the city's search must be defective. It is true that I have expressed surprise that some documents do not exist – in particular the residential worksheet that should have formed part of the authorization of the building plans on June 15, 2009, and the related calculations. The absence of such a document reflects extremely badly on the competence and diligence of Toronto Building officials. But in the absence of disclosure of the document, I am prepared to accept that the document does not exist – i.e. that the city's search for this document has been reasonable. A similar argument goes for the survey of the as-built roof. [13]

The appellant distinguishes the as-built roof survey from the "survey of the roof line" referred to in the city's representations which, according to the appellant, is actually a roof plan.

In sur-reply, the city responded to the appellant's concern about the absence of an affidavit of search from the relevant zoning examiner who had, according to the appellant, done "much of the work in verifying By-law compliance of the subject building plans and whose initials appear on the authorized building plans…" According to the city, the zoning examiner was not a staff member who would have had complete copies of the records on the project and so had not been identified as an employee who should conduct a search of his records. The city continues, noting:

> Nevertheless, when the city received the IPC's Notice of Inquiry, [the zoning examiner] was asked on August 8, 2010 to conduct a search to confirm whether he had any responsive records either under the property address or the appellant's name. [The zoning examiner] did not locate any documents responsive to the request …

Analysis and Findings

As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, 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.[14]

In the particular circumstances of this appeal, I consider it important to place emphasis on the qualification "might exist." Furthermore, in my view, it must also be highlighted that the *Act*

[13] However, the appellant takes issue with the accuracy of the calculations leading to the approval of the "new plan" which, he asserts, improperly omits the chimney area from the coverage calculations. The appellant recommends that I order the city to generate a "replacement residential worksheet with measurements drawn from the building plans… and completed in the form laid out in earlier paragraphs" addressing alleged deficiencies in format. The appellant would also have me order the city to produce a "compliance record(s) that confirm (or otherwise) that the structure and slopes of the roof … conforms to those specified in the [approved] building plans…."

[14] Orders P-624, PO-2388 and MO-2076.

does not require an institution to prove with absolute certainty that further records do not exist (Order PO-1954).

A number of past orders have established the principle 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.[15] The expectation created by the wording of section 17 of the *Act* is that the individual or individuals conducting the search must be familiar with the subject matter to which the records relate and have a detailed knowledge of the institution's information management systems. In passing, I note that there is no particular, or corresponding, requirement that the employee(s) conducting the search be knowledgeable in the *Act* or even in access to information matters more generally (see Order PO-2592).

On my review of the evidence before me, I accept that relevant city staff were asked to conduct searches and that they were armed with knowledge of the nature of the records said to exist, at least partly because the appellant's interests were well-conveyed through his request and subsequent detailed communications. Indeed, I am satisfied by the evidence before me from the CAP office, which was accompanied by the search affidavits sworn by five Building Division staff members, that the relevant staff conducted several separate searches for responsive records and, moreover, that these search requests were renewed in response to the questions raised by the appellant throughout the process, as well as the second access request submitted to CAP in April 2010.

Moreover, with respect to the appellant's apparent concern about CAP being excluded from the requirement to conduct a search, I am satisfied that such a search was not required. The CAP office acts as the city's "clearinghouse" for processing access requests under the *Act*. It does not create records, nor is it a primary record holder, of those types sought by the appellant pursuant to his request, and as the scope of that request was confirmed previously in this order.

I note that although the appellant accepts that new records would be added to the Building Division file for the property in question as the construction proceeded, he argues that the ongoing disclosures of newly identified records should be construed as supporting his position that, in retrospect, the city's searches were inadequate. I reject this submission. The ongoing identification of responsive records as the construction project proceeded would reasonably be accompanied by an unavoidable passage of time between that identification within the Building Division and coordination with the CAP office for a decision on disclosure under the *Act*. In my view, this relationship does not impugn the reasonableness of the searches conducted in the circumstances of this appeal. Rather, in my view, this suggests that continuing efforts to provide all available, *existing*, responsive records to the appellant were made.

Notably, the city is not obliged to create a record in response to a request under the *Act*, where one does not currently exist.[16] This well-established principle extends, in my view, to replacing or generating documents the appellant believes ought to exist to substantiate the approvals process of the Building Division. Further, the fact that the appellant may not accept the

[15] Orders M-909, MO-2433, PO-2469, PO-2592, PO-2831-F.
[16] Orders 99 and MO-1422.

explanations provided to him about the approvals relating to construction on the neighbouring property does not, in my view, provide persuasive evidence of a reasonable basis to the appellant's belief that additional responsive records ought to exist.

In summary, based on the evidence before me, I am satisfied that the city made adequate and reasonable efforts to identify and locate any existing responsive records within its record-holdings. I accept that relevant city staff were knowledgeable about the subject matter of the request and conducted searches aware of the possible types of records that would be responsive to the appellant's request, at least in part because the appellant provided detailed explanations of, and clarifications regarding, his interests in this regard. Furthermore, I accept the evidence of the city that the records the appellant seeks related to the construction project on the property neighbouring his own, simply may not exist. It should also be emphasized once again that in my review of the adequacy of the city's search under the *Act*, my jurisdiction does not extend to a review of record-keeping practices or record maintenance procedures.[17]

Accordingly, based on the information provided by the city and the circumstances of this appeal, I find that the city's search for records responsive to the request was reasonable for the purposes of section 17 of the *Act*. Accordingly, I dismiss this appeal.

ORDER:

I uphold the city's search for records responsive to the appellant's request.

_Original signed by:_____ June 20, 2011
Daphne Loukidelis
Adjudicator

[17] Orders PO-1943 and MO-2554.