



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

ORDER MO-2608

Appeal MA09-29

City of Vaughan



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NATURE OF THE APPEAL:

The appellant submitted a request to the City of Vaughan (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to information regarding the City's response to the Information and Privacy Commissioner/Ontario's (IPC) investigation report MC07-64. The request stated in part:

I would like a copy of the City of Vaughan Policy and any relevant guidelines and/or procedures that address the distribution of information to third parties, before June 2008 and a copy of the revised Policy and any relevant guidelines and/or procedures after June 2008 and after the noted compliance date of October 16, 2008.

Specifically, I am submitting an FOI request to the City for copies of all policies, both original and revised with regards to MC07-64. I am also requesting a copy of the letter submitted to the IPC for proof of compliance with MC07-64.

I would like both the original and revised Policies and Procedures that relate to MC07-64, and the IPC ruling. You were instructed by the IPC to do the following: "review and revise its policies and procedures relating to receiving complaints from individuals to ensure that disclosure of personal information to third parties is in accordance with the Act." You sent a letter to the IPC that confirmed you have complied with the ruling. I would like a copy of the letter sent to the IPC confirming the compliance, along with all documents.

I would like a copy of the review and revision documents presented to Council with regards to the above, and please give me the reference where this was submitted to Council for their approval. I would also like a copy of any correspondence with regard to the above, with members of staff, and/or Council, and/or the IPC and/or any third parties, such as [MuniCard].

The City located two responsive records and granted access to them, in full. The records that were provided to the requester are:

- a letter, dated October 16, 2008, from the City Clerk to the IPC Investigator in response to the Privacy Investigation Report MC07-64 [the Report];
- an email, dated October 23, 2008, from the City Clerk to the Mayor and Members of Council providing an update on the IPC privacy investigation and the City's response.

The City Clerk, on behalf of the City, advised the appellant that the City follows the privacy practices of the IPC noted on the IPC web site and it did not establish any new policies and procedures as a result of the IPC privacy investigation. Specifically, the City Clerk's decision stated, in part:

On October 16, 2008, I advised the investigator that her recommendations have been carried out, in that we have ceased the named practice, and that we disclose information to the third parties only where doing so is necessary and is otherwise in keeping with the requirements set out in MFIPPA. Though it is often stated otherwise, the City was under no statutory obligation to comply with the report's recommendations. It is important that I correct your understanding of the legislation so that the decision letter is read in the proper context.

There have been no 'review documents' presented to Council regarding our review of the process. The matter is dealt with at an operational level following practices established by the IPC, and does not require the adoption of a formal policy by Council. It was my conclusion that the City has adequately dealt with the narrow circumstances described in the MuniCard report. I will be reporting to Council in the New Year on the City's access and privacy program, and more information may be available to you at that time.

The appellant appealed the City's decision.

During mediation, the appellant stated that the City did not address her complete request. She noted that the City did not respond to the portion of her request that states, "I would also like a copy of any correspondence with regard to the above, with members of staff, and/or Council, and/or the IPC and/or any third parties, such as [MuniCard]."

The City agreed to conduct an additional search, and subsequently issued a supplementary decision stating that no additional records were found. In its supplementary decision, the City indicated that it limited its search to records created between July 16, 2008 and November 17, 2008. The decision, sent from the City clerk, stated in part:

Further to the [City's] December 16, 2008 decision letter and communications with the [IPC], as part of the mediation process, the [City] wishes to confirm that an additional search for records was undertaken. The [City] has searched for additional records that would have been created in response to [the Report]. The [City] searched for additional records that would have been created between July 16, 2008 and November 17, 2008 [the date of the appellant's request]. More specifically, a search was conducted for records in relation to paragraph four of your November 17, 2008 access request. You requested a copy of the review and revision documents presented to Council for their approval. As stated in my December 16, 2008 access decision, there has been no 'review documents' presented to Council regarding our review of the process. You also requested correspondence related to the above, with members of staff, and/or council, and/or the IPC, and/or any other third parties, such as MuniCard. Some responsive records were disclosed to you on December 16, 2008. In addition, the electronic and hardcopy records of City staff that were involved with the MuniCard program were searched. No correspondence records or records documenting the City's practices regarding MuniCard were found. Furthermore, records related to communications between City staff, the IPC and other third parties, do not exist.

The [City] acknowledges, and has communicated to [named IPC] Mediator, that telephone communications took place between City employees and MuniCard. Written records, either electronic or hardcopy, do not, however, exist.

Upon receipt of the supplementary decision the appellant indicated that she still believes that additional records should exist, specifically, a copy of the correspondence that forwarded her initial complaint to MuniCard and a copy of the contract between MuniCard and the City.

In response, the City agreed to conduct a third search. As a result, the City issued a third decision and disclosed two e-mails and a copy of the contract between MuniCard and the City, which the appellant could receive if she paid a fee of \$47.40 for 90 minutes of search time at \$30.00 per hour and 12 photocopies at \$0.20 per page. The appellant appealed the calculation of the fee.

Upon receiving the third decision, the mediator advised the City that the decision did not include a copy of the correspondence that forwarded the appellant's initial complaint to MuniCard. The City agreed to include that record as part of the request and issued a fourth decision disclosing a copy of the e-mail in full.

The City, however, maintains its position that the scope of the request is limited to records created between July 16, 2008, the date of the Report, and November 17, 2008, the date of the appellant's request. Therefore, it takes the position that no additional responsive records exist

The appellant maintains her position that the request is for copies of "any correspondence with regard to the above, with members of staff, and/or Council, and/or the IPC and/or any third parties, such as [MuniCard]." She believes that the City has interpreted her request too narrowly and that the City has not conducted a reasonable research. In addition to calculation of the fee, she added reasonable search and scope of request as issues on appeal.

As no other issues were resolved during mediation, the file was transferred to the adjudication stage of the appeal process. The adjudicator previously assigned to this file began her inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal, to the City. The City responded with representations.

In its representations, the City advised that it had issued a revised fee estimate to the appellant in which it decided to waive the fees associated with her request. The City also advised that it was enclosing the records with the letter that set out the revised fee estimate. Accordingly, the issue of whether the City's revised fee estimate should be upheld is no longer at issue in this appeal.

The previous adjudicator sent the amended Notice of Inquiry, together with a copy of the City's representations, in their entirety, to the appellant. The appellant submitted representations in response.

The file was subsequently transferred to me to complete the adjudication process. After reviewing the appellant's representations, I sought representations in reply from the City, and attached the non-confidential portions of the representations submitted by the appellant to the Notice of Inquiry. The City provided brief submissions by way of reply.

The issues on appeal are reasonable search and scope of the request.

DISCUSSION:

SCOPE OF THE REQUEST

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

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

The City submits that it has reasonably interpreted the appellant's request to include documents produced or modified between July 16, 2008, which is the date of the Report, and the date of her request. Referring to the appellant's request, as cited above, the City points out that she repeatedly asked for "revision documents" or "revised records" that are based on the findings of the Report. In an affidavit sworn by the City's Records Management Supervisor (the Supervisor), who was responsible for conducting the search for responsive records, the Supervisor indicates that he determined that the request was sufficiently clear to enable him to search for responsive records. He states that he did not contact the appellant for clarification.

The City also notes that in attempting to mediate this appeal, it agreed to expand the scope of the appellant's request to include documents that were not asked for in her initial request, such as the agreement between the City and the company that ran the MuniCard program and copies of e-mails sent by the appellant in October 2007 that contained her original complaints about the MuniCard program.

The City submits that any other records that were not mentioned by the appellant in her request and which fell outside the time frame indicated in her request fall outside the scope of the request.

In response, the appellant states:

Lastly, with regards to the refusal to disclose documents before some date and after some other date, and then the city deciding to disclose the documents and the city once again reverting back to their original position, I believe that my FOI is clear. I asked for documents BEFORE AND AFTER. I also clarified this with the city. I clarified this with the IPC, during mediation. The onus is on the city to seek clarification if they find the request unclear, and indeed did clarify, and they did (at first) send documents according to the clarified request, however then decided to reverse their position and not send any further documents.

Analysis and Findings

In determining this issue, I have considered both the request as worded and the file notes from mediation that refer to the various discussions that took place with respect to identifying the scope of the request.

It is apparent that the appellant's request contains several parts. In the first paragraph of her request she asks for items relating to three distinct time periods: before June 2008, after June 2008 and after October 16, 2008. With respect to pre-June records, the appellant is seeking "any relevant guidelines and/or procedures that address the distribution of information to third parties." The post-June and post-October records she is seeking all pertain to revisions made to policies and procedures as a result of the Report. In my view, this paragraph sets the parameters for the request, as clarified in the next three paragraphs.

Paragraphs two and three are essentially seeking the same information; paragraph three simply expands on the information she has identified in paragraph two. The significant portions of these two paragraphs state, "I would like *both the original and revised* Policies and Procedures that relate to [the Report], and the IPC ruling" [my emphasis]. Despite the City's position, the appellant did not "repeatedly [ask] for 'revision documents' or 'revised records' that are based on the findings of the Report" only. Her request clearly stated that she was seeking the "original" documents, which, reading her request as a whole, pertains to pre-June documents.

In the first sentence of paragraph four, the appellant states that she is seeking only "the review and revision documents presented to Council." She also specifies that these documents relate "to the above." I agree with the City that, taken in context, "to the above" can only relate to the post-June records that were created following the Report.

The second sentence of this paragraph appears to be the most contentious between the parties. In this sentence, the appellant is seeking "any correspondence *with regard to the above*, with members of staff, and/or Council, and/or the IPC and/or any third parties, such as [MuniCard]" [my emphasis]. In my view, this sentence is not clear. I am unable to determine, from reading

this portion of the appellant's request, whether she is seeking correspondence relating to the revisions made to policies and procedures, or whether she wants correspondence relating to any policies and procedures the City had or has relating to the issue of the distribution of information to third parties, or whether this also includes correspondence relating to the Report.

As a result of my analysis of the appellant's request, I find that the first three paragraphs clearly requested documents that were in existence prior to the date of the Report, that is, prior to June 2008. In addition, I find that the first sentence of paragraph four seeks only documents that exist post-June 2008. I find that the meaning of the second sentence in paragraph four is not clear. As noted above, section 17(2) of the *Act* provides that "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 ..."

By unilaterally limiting the scope of the request to only post-June documents, I find that the City failed to respond to the appellant's request as worded. Moreover, I find that the City failed to inform the appellant of a deficiency in her description of the time period for the correspondence she was seeking, and failed to assist her in reformulating that portion of her request. Throughout mediation, the appellant made it very clear that she is seeking records that predate the Report. Given the information provided during mediation, and the parameters of the request as set out above, I find that the scope of her request was broader than that identified by the City, although I am not persuaded that every document the appellant believes should exist forms a part of her request. The following sets out my findings regarding the scope of the appellant's request:

- Where a specific reference made in the request is unclear, the parameters for defining the scope of the appellant's request relate to guidelines, policies and/or procedures that address the distribution of information to third parties that existed prior to and post Report;
- The scope of the request includes "original" policies (pre-June 2008) and revised policies (post-June 2008);
- The scope of the request includes a specific reference to the letter that was sent to the IPC confirming compliance with the report, including any documents that were enclosed with that letter;
- The scope of the request includes the review and revision documents (post-June 2008), created in response to the Report, that were presented to Council;
- The scope of the request includes copies of any correspondence between one or more of the parties identified in the request, including staff, Council, the IPC and any third parties, such as MuniCard, regarding the issue of guidelines, policies and/or procedures that address the distribution of information to third parties. The scope of the request includes correspondence relating to the pre or post June 2008 guidelines, policies and procedures she identified at the beginning of her request;

- In addition, it is clear that the Report is a central focus of her request. Based on the wording of the appellant's request as a whole and its constituent parts, and after considering her expectations as set out during mediation, I am not persuaded that the appellant's request can reasonably relate to all issues that arose in respect of the privacy complaint, or in respect of agreements between the City and third parties. Unless the correspondence relates specifically to the Report, as stated in her request, it would not be reasonably related to the request as worded and clarified by the appellant during mediation. I find that the timeframe for this portion of her request includes correspondence that occurred before the Report was issued as well as after it was issued, as long as it pertains to the subject matter of the Report.

Accordingly, I find that the City interpreted the scope of the appellant's request too narrowly. Although I will send this matter back to the City to conduct a search for records responsive to the request as I have defined it above, I will now review the steps taken by the City in its search for records in accordance with the scope of the request as the City defined it.

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

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

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

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

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

The City indicates the primary search was conducted by the Supervisor and that he contacted knowledgeable staff from the City Clerk, Financial Services, and Legal Services Departments, who undertook searches in their respective areas. The City provided affidavits of search from the four staff members that conducted searches.

In his affidavit, the Supervisor indicates that he spoke with the City Clerk and conducted a search through the City Clerk's department for its "Corporate Policy records" for policies, procedures and guidelines created prior to June 2008, and between June 1, 2008 and October 16, 2008, that addressed the distribution of information to third parties. The Supervisor states that he did not locate any records as a result of this search.

He states further that he searched the Clerk's Corporate Policy records for both "original" and "revised" policies and guidelines relating to the Report. He confirms that no records were located.

He states that he searched the Clerk's Administrative Records for a copy of the letter that was sent to the IPC in response to the Report. He confirms that this letter was located and provided to the appellant.

In addition, the Supervisor states that he searched the Clerk's Council Records for a copy of any review or revision documents presented to Council regarding the above, and did not locate any records. He indicates further that he searched at this location for correspondence referred to in the fourth paragraph of the appellant's request. He indicated that he located only one e-mail, which he provided to the appellant.

The Supervisor describes the searches that were undertaken during mediation. In particular, he states that additional searches were conducted for correspondence with MuniCard that was created between July 16, 2008 and November 17, 2008. In conducting this search, he contacted the City Manager (formerly, Deputy City Manager and Commissioner of Finance and Corporate Services), the Director of Financial Services, and the Manager of Tax and Assessment. All three individuals indicated that a search through their offices and e-mail records did not produce any records. The Supervisor notes that the Manager of Tax and Assessment indicated to him that telephone communications had taken place between the City and MuniCard, and this was articulated to the appellant in the City's decision letters.

As well, the Supervisor indicates that he searched for a May or June 2008 Council policy report, revised policies and procedures and correspondence with City staff members created between July 16 and November 17, 2008.

Referring to the two e-mails relating to the appellant's complaint to MuniCard, and a copy of the contract between MuniCard and the City that the appellant requested during mediation, the Supervisor takes the position that the appellant expanded the scope of her request. Nevertheless, he indicates that in an attempt to resolve the appeal, he undertook to search for these additional records and any others that might exist. In conducting this particular search, the Supervisor indicates that he contacted the Secretary/Office Coordinator to determine whether the Legal Services Department had any correspondence with City staff, Council, the IPC and/or other third

parties, including MuniCard “that would have been created between July 16 and November 17, 2008.” He indicates further that an “Administrative file entitled ‘MuniCard’” was located. Following his search through this file, he located the contract and the two e-mails referred to above, and these records were disclosed to the appellant. The Supervisor states that he searched the Clerk’s Council Records again for revised policies and procedures and for a May or June 2008 Council policy report related to MuniCard. He did not locate any responsive records.

In her submissions, the appellant makes the following five points:

- She believes that a certain e-mail has been severed, through “cutting and pasting” because, in her opinion, “every email sent by the [City] has a footer, and confidentiality message,” and that this particular e-mail does not contain that information;
- She takes the position that because the City refers to “conversations,” it must provide, at a minimum, the logs of the phone calls, because she believes that all calls are logged. She also believes that most phone calls are recorded. In this case, I assume that she believes that records should exist that contain these recordings;
- Referring to one of the records disclosed to her, which indicates that the issue had been placed on the senior management meeting agenda, the appellant requests a copy of the agenda and minutes from these meetings and any further correspondence;
- Referring to “numerous e-mails of correspondence” between staff, Council, the City Clerk and a named individual that she provided to this office, the appellant submits this as evidence that additional records exist. I note that the e-mails she forwarded to this office are all dated prior to the date selected by the City for the search parameters;
- The appellant states that her access request was clear, in that she is seeking records before and after the identified dates.

In reply, the City confirms that none of the e-mails provided to the appellant were “cut and pasted,” and states that it does not have a policy requiring a confidentiality message to appear on outgoing e-mails. With respect to telephone logs and recordings of telephone calls, the City states that its logs are maintained for only one year, and would therefore have been erased for the time period included in the appellant’s request. The City states further that other than for its information service “Access Vaughan,” the City does not record telephone calls. Finally, the City takes the position that agendas and minutes of senior management meetings are outside the scope of the appellant’s request.

Analysis and Findings

After considering all of the submissions made by the parties, keeping in mind my findings above under “Scope of the Request,” I find, with one exception, that the City’s search for responsive records was reasonable. With respect to the five points raised by the appellant in her representations, I make the following findings:

- The City has provided the appellant with a complete copy of the e-mail referred to by her, although it does not contain certain information that she expected to see;
- No recordings have been made by the City of telephone conversations, as it is not in the practice of recording telephone conversations. Accordingly, no records exist of conversations held between City staff and other individuals within the framework of the appellant's request;
- Telephone logs are not reasonably related to the appellant's request. It is clear that the appellant is looking for substantive records rather than communication tracking records;
- Agendas and meeting minutes are outside the scope of the appellant's request. These types of records are distinct categories and easily identified and referred to in an access request. Moreover, although the appellant's request seeks the policies, guidelines and/or procedures in existence before the report and any changes to them that might have been put before Council for approval after the Report, there is no reference in her request for the deliberations of Council on this issue;
- The City's search for responsive records was conducted by knowledgeable and experienced employees, in locations in which responsive records would likely be housed. Accordingly, I am satisfied that this aspect of the City's search for responsive records was reasonable;
- The City searched in the appropriate time frame for "original" policies (pre-June 2008) and "revised" policies (post-June 2008 to the date of the request);
- The City's search for the letter that was sent to the IPC was reasonable; the letter was located and provided to the appellant;
- The City's search for "review and revision documents" (post-June 2008) was reasonable;
- As discussed above, the appellant's request relating to correspondence was not clear, and the City's interpretation of this portion of the request was too narrow. The search that was conducted was also too narrow. I note that in its decision and throughout its representations, the City stated that it searched for records created between July 16, 2008 (the date of the Report) and November 17, 2008 (the date of the request). Based on my findings above under "Scope of the Request," the City's search of the locations noted in its representations should have included a time frame prior to July 16, 2008. Accordingly, I find that this component of the City's search was not reasonable.

I will, therefore, require the City to conduct a further search for correspondence between one or more of the parties identified in the appellant's request, including staff, Council, the IPC and any third party, such as MuniCard, regarding the issue of guidelines, policies and/or procedures that address the distribution of information to third parties and/or the Report, that were created prior to July 16, 2008. In order to determine a reasonable time frame contemplated by the appellant, the City should contact the appellant for clarification.

ORDER:

1. I order the City to conduct a further search for records responsive to the portion of the appellant's request that states: "I would also like a copy of any correspondence with regard to the above, with members of staff, and/or Council, and/or the IPC and/or any third parties, such as [MuniCard]."
2. In conducting this search, the City is to review the locations identified in its representations for correspondence between one or more of the parties identified in the appellant's request, including staff, Council, the IPC and any third party, such as MuniCard, regarding the issue of guidelines, policies and/or procedures that address the distribution of information to third parties and/or the Report, that were created prior to July 16, 2008.
3. Prior to conducting its search, the City is to contact the appellant to determine a reasonable time frame, which will form the parameters of search.
4. I order the City to provide the appellant with an access decision regarding the results of this search pursuant to section 19 of the *Act*, using the date of this order as the request date, without reference to a time extension under section 20(2).

Original signed by: _____
Laurel Cropley
Adjudicator

_____ March 28, 2011