

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2751

Appeal MA11-492

City of Greater Sudbury

June 14, 2012

Summary: The appellant requested two documents referred to by the city's Supervisor of Development Engineering in a letter sent in 2006. The city responded by indicating that no responsive records exist, and the appellant appealed that decision. In its representations the city provided information describing the nature of the searches it had conducted for any records, and explaining why no responsive records exist. The city's search is found to be reasonable, and its decision is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

Orders and Investigation Reports Considered: Order MO-2627.

BACKGROUND:

The appeal arises from the release of a document ordered disclosed in an earlier appeal. In Order MO-2627 dated June 7, 2011, I ordered the City of Greater Sudbury (the city) to disclose to the appellant the record at issue in that appeal, which was identified as the "Stormwater Management Study Report." The city disclosed the report to the appellant.

The appellant then contacted the city and asked why the report, which is dated June 5, 2005, had a city date stamp on it indicating that it was "received April 3, 2008." In

response, the city sent an email to the appellant, stating that the city had the report for review in July, 2005, but that it may have been circulated internally later, resulting in the April 3, 2008 date stamp being affixed.

The appellant then submitted a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

Records indicating "Stormwater Management Report" was indeed received in July 2005 as indicated in [the referenced email].

In response to the request, the city issued a decision in which it stated:

The record responsive to your request and our decision regarding access to the record is as follows:

Record 1 Letter dated March 10, 2006 addressed to [a named engineering firm] from [a named city Supervisor of Development Engineering] (4 pages). Full access is granted.

Please note, Condition 16 on page 2 is the paragraph which is responsive to the request.

Attached to the decision letter was the March 2006 letter from the city's Supervisor of Development Engineering (the Supervisor) to the engineering firm. That letter referred to a number of specific conditions. Under Condition 16 the letter states, in part:

Submission of the [named company] Stormwater Management Study (Phases 1 and 2) dated November 4, 2004 and July 5, 2005 respectively, are sufficient to clear this condition ...

After reading this record, the requester submitted a follow-up request for:

Stormwater management studies, [an identified subdivision] for Phase 1, dated Nov 4/04 and Phase 2 dated July 5/05 as described in Condition 16, ... in attached letter dated March 10, 2006 by [the Supervisor of Development Engineering], City of Sudbury.

In response to this follow-up request, the city issued a decision in which it advised that the requested records do not exist. The appellant appealed the city's decision. The sole issue in this appeal is whether the city's search for responsive records was reasonable.

Mediation did not resolve the appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of

Inquiry identifying the facts and issues in this appeal to the city, initially, and received representations, including an affidavit, in response. I then sent the Notice of Inquiry, along with a copy of the representations of the city and a copy of the affidavit, to the appellant. The appellant did not provide representations in response, but stated that he was relying on the material provided by him earlier in this appeal.

DISCUSSION:

As indicated above, the records requested by the appellant are referred to in Condition 16 of a March 10, 2006 letter, which refers to them as "the [named company] Stormwater Management Study (Phases 1 and 2) dated November 4, 2004 and July 5, 2005 respectively...."

In its decision, the city indicated that the requested records do not exist. The appellant takes issue with that decision.

In appeals involving a claim that responsive records exist, as is the case in this appeal, the issue to be decided is whether the city has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the city will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals.¹ In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

... the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with Acting-Adjudicator Jiwan's statement.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution

¹ See. For example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Representations

In response to the Notice of Inquiry sent to the city, the city provides representations and an affidavit from the Supervisor.

The city begins by reviewing the background to this request, and the circumstances leading to the request and its decision that no records exist. Regarding the references in Condition 16 by the Supervisor to the records dated November 4, 2004 and July 5, 2005, the city states:

The Final Report, including the 3 drawings prepared in the course of the preliminary review, is the July 5, 2005 document.

The other document that the [Supervisor] referred to in his March 10, 2006 letter was a draft of the Final Report, not a second and different document reporting on the Preliminary Review. This document is believed to have been destroyed.

With respect to actual searches that were conducted for these records, the city states:

... the [Supervisor] personally conducted a detailed search of any location which contains engineering documents related to [the named subdivision] and has also had searches conducted in additional locations where it was not likely the records would be located. ... the [Supervisor] was unable to locate the draft of the Final Report or a document reporting on the Preliminary Review.

In support of the information referred to in its representations, the city provides an affidavit sworn by the Supervisor on behalf of the city. In the affidavit the Supervisor states:

I believe that [the named company] conducted this study in 2 phases. Phase 1 of the study was a background review and preliminary stormwater management plan for which there is no formal report (hereinafter referred to as the "Preliminary Review").

Phase 2 of the study was completed and the entire study is captured in the record titled *Stormwater Management Study Report on Study Phase 2 [named] Subdivision ...*(hereinafter referred to as the "Final Report").

The Final Report is dated June 15, 2005.

I believe that on or around June 15, 2005, [the named company] sent the Final Report to [the engineering firm].

I believe that the City received the Final Report on July 5, 2005 at which time it was date stamped as being received July 5, 2005

On March 10, 2006, I wrote a letter to [the engineering firm] and indicated that the City considered Condition 16 of the draft plan approval satisfied based on the documents provided to the City, the mapping provided as part of the Preliminary Review and the Final Report.

I believe that the documents that I referred to in my March 10, 2006 letter were the Final Report, which was the July 5, 2005 document to which I referred, and a draft of the Final Report, which was the November 4, 2004 document to which I referred.

The Supervisor also refers specifically to the references to "phase one" and "phase two" of the report, and states that these references have resulted in some confusion. He states:

... the Final Report was the stormwater management study for the entire subdivision. [The] "Report on Study Phase 2" is the name given by [the named company] to the Final Report.

... the name applied to the report by its author, [the named company], was creating the confusion with respect to the term "phase". ... phase 1 of the stormwater management study was a background review and a preliminary stormwater management plan.

The Supervisor attaches to his affidavit a number of supporting documents. He also reviews the initial request and the background to the request as set out above. With respect to the questions raised about why the responsive report had a date stamp of April 3, 2008 on it, the Supervisor states that he was contacted when the access request was made. He then states:

... being familiar with the [named subdivision], I searched the filing cabinets in the Development Engineering Section. These filing cabinets contain all engineering documents related to the [named subdivision]. I found the relevant document in the cabinet, the Final Report.

The copy of the Final Report which I located was date stamped April 3, 2008.

He then states that he forwarded the Final Report to the Freedom of Information office.

He also addresses the issue of why this report might have a date stamp of April 3, 2008 on it, and states:

I believe that there are several possible reasons why the copy of the Final Report has an April 3, 2008 date stamp. The City was likely to have a number of copies of the Final Report. The copy of the Final Report released to the appellant may have been circulated internally and it was date stamped on April 3, 2008 when returned to Development Engineering or another copy of the record may have been provided to the City by [the named company] at a later date resulting in the April 3, 2008 date stamp.

The Supervisor then addresses the references to two records (dated November 4, 2004 and July 5, 2005) in Condition 16 as follows:

... I have reviewed the copy of the Final Report provided to the Appellant and know it to be the same record or a copy of the same record as I reviewed to prepare a letter to [the named engineering firm] indicating that the Stormwater Management Study dated November 4, 2004 and July 5, 2005 was sufficient to clear Condition 16 as required by City Council.

The Supervisor then reviews the appellant's concerns regarding the reference to these records (dated November 4, 2004 and July 5, 2005) and states:

It appears to me that the Appellant is still seeking reports for phases 1 and 2 of the subdivision. There was only one Final Report for the entire subdivision and the documents produced in the Preliminary Review are included in the Final Report.

I believe that the draft of the Final Report that I reviewed in preparation of my March 10, 2006 letter was likely destroyed since it was a draft version of the Final Report. Since the City had the Final Report, there was no longer a need to keep the draft version of the Final Report.

The Supervisor then provides additional information regarding his belief that the Final Report is the only existing report, and proceeds to provide evidence regarding the searches he conducted for any additional responsive records, stating:

... I am the person that performs the searches with respect to Development Engineering records. That is the reason that I was [asked] to perform the search for [the access request], although I know that additional records do not exist.

However, to resolve this situation, to indicate that there was no Preliminary Review document and to ensure that the City no longer has custody of a draft of the Final Report, I searched the locations where any such documents would be filed.

I searched the [named subdivision] files again. I was unable to locate any such records.

I also searched the offices of [a named] Development Engineering Technician, and [a named] Subdivision/Site Plan Control Officer, because they have both been responsible for aspects of the ... subdivision. I was unable to locate a Preliminary Review or draft of the Final Report in those searches. Finally, I contacted [a named] Drainage Engineer ... to ensure that there were no documents circulated to the Drainage Engineer. I believe that [a named individual] conducted a search of the Drainage Engineer's office and no documents were located.

Furthermore, [the named Drainage Engineer] informed me that he did not have any records related to the preliminary review or Final Report.

The appellant did not provide representations in response to the Notice of Inquiry. Earlier in this appeal, the appellant had raised questions regarding the responses he had received from the city, and identified the confusion that resulted from the references to various records, when he was provided with only one responsive report.

Findings

As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether the city has conducted a reasonable search for the records as required by section 17 of the *Act*. In this appeal, if I am satisfied that the city's search for responsive records was reasonable in the circumstances, the decision of the city will be upheld. If I am not satisfied, I may order that further searches be conducted.

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must

rely on the experience and judgment of the individual conducting the search.

I adopt the approach taken in the above orders for the purposes of the present appeal.

In this appeal it is clear why the appellant raised concerns about the existence of additional records responsive to his request. He had received a stormwater report as a result of an earlier request, and this document, though created on June 5, 2005, was date stamped "received April 3, 2008." When the appellant raised questions about this, he was referred to a letter written by the named Supervisor in 2006 which seemed to refer to the existence of two other documents (dated Nov 4/04 and July 5/05). When the appellant requested those two documents, he was advised that they did not exist. The appellant's concern about the existence of additional responsive records is understandable.

However, in response to the Notice of Inquiry sent to the city, the city provided extensive material regarding each of the questions raised in this appeal.

To begin, the city explains that, although its response to the request for the two requested records (November 4, 2004 and July 5, 2005) was that no responsive records exist, the July 5, 2005 record is actually the record (the Final Report) that was provided to the appellant as a result of his earlier request. The city explains why the dates referred to are different, and why the report is dated June 5, 2005 (the date it was completed by the company), referred to as the July 5, 2005 record (the date it was received by the city from the engineering firm), and later date stamped April 3, 2008 (likely due to subsequent internal circulation or other identified explanations). The city also states that the November 4, 2004 record which is referred to is an earlier version of the Final Report, and that a copy of that document was not retained.

In addition to these explanations, the city provides a detailed review of the background to the report, and the reasons why the report was referred to variously as "phase one" and "phase two." The city's representations are supported by a detailed affidavit sworn by the Supervisor who was involved in this matter throughout, and by considerable supporting documentation (most of which was also shared with the appellant).

The city also reviews the searches it conducted for additional responsive records, indicating that the Supervisor who was involved in this matter from the start conducted searches and asked other identified individuals to also conduct searches for responsive records. These searches resulted in no additional records being located, and were supported by affidavit evidence.

In the circumstances, based on the explanations provided by the city regarding why additional records do not exist, and on the evidence of the searches conducted by the city, and because the appellant has not provided any additional information to support a

finding that additional searches ought to be conducted, I am satisfied that the city's search for records responsive to the request was reasonable.

ORDER:

I find that the city's search for responsive records was reasonable, and dismiss this appeal.

Original signed by:
Frank DeVries
Adjudicator

June 14, 2012