

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2770

Appeal MA11-16

Toronto Community Housing Corporation

July 30, 2012

Summary: The appellant requested numerous records from the TCHC relating to job descriptions, evaluations, complaints and other administrative records. The TCHC provided access to some records, denied access to others and determined that certain records did not exist. The appellant appealed the decision. Following mediation, the issues were identified as whether section 10(1) third party information) applied to certain portions of a record, whether other requested records were in the TCHC's custody or control, and reasonableness of search. Section 10(1) does not apply to the portions of a contract remaining at issue. Complaints made to the TCHC and forwarded to a named management company are within the TCHC's control. The searches for three items identified by the appellant were reasonable. The TCHC's search for complaints made to it and forwarded on to a named management company was not reasonable, and the TCHC is ordered to conduct a further search through its own record-holdings and by obtaining from the management company any complaints received by the TCHC and forwarded to the named management company.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1), 10(1), 17.

OVERVIEW:

[1] The appellant is a tenant in a property owned by the Toronto Community Housing Corporation (TCHC). She submitted a request to TCHC under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to numerous

records and categories of records. These records included job descriptions, job evaluations, complaints, petitions and investigation materials relating to certain individuals, as well as regulations regarding inter-office mail procedures and staffing issues.

[2] The appellant subsequently added a number of additional items to her request.

[3] In response to the request, the TCHC issued four (the original and three supplementary) access decisions addressing the request and the additional items. The TCHC granted access to certain records, denied access to other records on the basis of specified exemptions, and indicated that certain requested records did not exist.

[4] The appellant appealed the TCHC's decision on access, and expressed her concerns that additional records responsive to her request ought to exist.

[5] During mediation, the TCHC issued four additional supplementary decisions addressing a number of the issues raised in this appeal. In one of those decisions, the TCHC indicated that certain records (relating to complaints made about a named individual) are not in its custody or control.

[6] Mediation did not resolve all of the issues in this appeal, and issues regarding the custody and control of certain records, the application of section 10(1) (third party information) to two pages of records and the reasonableness of the searches for certain records were not resolved.

[7] This appeal was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*. During the inquiry into the appeal, I sought and received representations from the TCHC, a named management company (affected party) and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I find that the mandatory exemption at section 10(1) does not apply to the portions of pages 18 and 19 remaining at issue. I also find that complaints made to the TCHC and forwarded by it to the affected party are within the TCHC's control. I find further that the TCHC did not conduct a reasonable search for complaints made against a named individual. However, I find that the searches for other records were reasonable and dismiss that part of the appeal.

RECORDS:

[9] The records remaining at issue are certain withheld portions of pages 18 and 19 of an agreement between the TCHC and the affected party. Pages 18 and 19 consist of two schedules to the agreement, both of which are charts indicating a breakdown of amounts payable over certain periods of time. The appellant has clearly indicated that

she does not wish to pursue access to any numbers or dollar amounts. Accordingly, the only portions of these two pages remaining at issue comprise the title and a one-sentence explanation of the subject matter of the chart, the column headers which contain a breakdown of the specific time periods for which amounts are due and the information contained in the first column of the chart which specifies the addresses of the properties covered by the agreement.

ISSUES:

- A. Does the mandatory exemption at section 10(1) apply to the portions of pages 18 and 19 remaining at issue?
- B. Are the requested complaints about a named individual's work in the custody or under the control of the TCHC?
- C. Did the TCHC conduct a reasonable search for records?

DISCUSSION:

A: Does the mandatory exemption at section 10(1) apply to the portions of pages 18 and 19 remaining at issue?

[10] As I indicated above, the TCHC denied access to pages 18 and 19 of an agreement between it and the affected party on the basis of the exemption in section 10(1) of the *Act*. Pages 18 and 19 consist of two schedules to the agreement, both of which are charts indicating a breakdown of amounts payable over certain periods of time. Both of these schedules are referred to in the agreement itself.

[11] During mediation, the appellant indicated that she was not pursuing access to any numbers or dollar amounts contained in the record, and that this information could be severed from pages 18 and 19. Accordingly, the only information on pages 18 and 19 remaining at issue is a) a general description of the information contained in the chart, b) the identification of the addresses covered by the agreement, and c) a breakdown of the specific time periods for which amounts are due. The actual amounts are not at issue in this appeal.

[12] Section 10(1) of the *Act* reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[13] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²

[14] For section 10(1) to apply, the TCHC and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) and/or (c) of section 10(1) will occur.

[15] In its representations the TCHC indicates that, provided the numbers and dollar amounts are severed from these pages, it is no longer relying on the exemption in section 10(1) to deny access to the remaining portions of 18 and 19 pages of the records.

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[16] The affected party provides representations regarding its concern about the disclosure of the fees and dollar amounts; however, it also states that the main information contained in these charts is the numbers and dollar amounts. The affected party states that it does not understand why the appellant would want the other information contained on these two pages, and does not provide representations regarding the application of section 10(1) to the portions of these two pages that do not contain the numbers or dollar amounts.

[17] The appellant indicates that she continues to pursue access to these two pages, but not to the numbers or dollar amounts. In these circumstances, and in the absence of representations from either the TCHC or the affected party in support of a finding that section 10(1) applies to the other information on these two pages, I find that the portions of these two pages that do not contain numbers or dollar amounts do not qualify for exemption under section 10(1). Accordingly, I will order that these portions of pages 18 and 19 be disclosed to the appellant.

B: Are the requested complaints about a named individual's work in the custody or under the control of the TCHC?

[18] The TCHC takes the position that the requested complaints about the named individual's work since January 2008 are not in its custody or control.

[19] Section 4(1) reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[20] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[21] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.³

[22] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.⁴ A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

³ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

⁴ Order PO-2836.

[23] The courts and this office have applied a broad and liberal approach to the custody or control question.⁵

[24] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.⁶ The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?⁷
- What use did the creator intend to make of the record?⁸
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?⁹
- Is the activity in question a “core”, “central” or “basic” function of the institution?¹⁰
- Does the content of the record relate to the institution’s mandate and functions?¹¹
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?¹²
- If the institution does have possession of the record, is it more than “bare possession”?¹³

⁵ *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.

⁶ Orders 120, MO-1251, PO-2306 and PO-2683.

⁷ Order P-120.

⁸ Orders P-120 and P-239.

⁹ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above at note 3.

¹⁰ Order P-912.

¹¹ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders P-120 and P-239.

¹² Orders P-120 and P-239.

¹³ Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?¹⁴
- Does the institution have a right to possession of the record?¹⁵
- Does the institution have the authority to regulate the record's content, use and disposal?¹⁶
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?¹⁷
- To what extent has the institution relied upon the record?¹⁸
- How closely is the record integrated with other records held by the institution?¹⁹
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?²⁰

[25] In addition to the above factors, the the Supreme Court of Canada²¹ has recently articulated a two-part test for institutional control of a record:

1. whether the record relates to a departmental matter, and
2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

[26] According to the Court, control can only be established if both parts of the test are met.

Background/Initial decision

[27] The appellant's request included a request for complaints about a named individual's work since January 2008. The TCHC indicates that this individual is not an employee of TCHC, noting that TCHC has contracted with the affected party to manage

¹⁴ Orders P-120 and P-239.

¹⁵ Orders P-120 and P-239.

¹⁶ Orders P-120 and P-239.

¹⁷ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1.

¹⁸ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above at note 1; Orders P-120 and P-239.

¹⁹ Orders P-120 and P-239.

²⁰ Order MO-1251.

²¹ *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25

the building in question and that the named individual is an employee of this affected party. For this reason, the TCHC takes the position that the requested records are not in the custody or control of the TCHC.

[28] After receiving this decision, the appellant contended that the TCHC did not conduct a reasonable search for the requested records. With respect to the TCHC's position that the TCHC does not have custody or control of the records, the appellant took the position that these complaints should be under TCHC's control and should be in TCHC's records, as tenants complain to TCHC and not to the affected party. The appellant further stated that TCHC is obligated to protect its tenants.

[29] During mediation, TCHC agreed to conduct a search to see if it may have any records relating to complaints about this individual, and indicated that its search did not yield any records. In a later supplemental decision the TCHC also stated:

Further to our letters... request for complaints about [the named individual's] work since January 2008, we noted that [he] is an employee of [the affected party] and the request was forwarded to [the affected party]. [The TCHC] retained [the affected party] to provide management services for select groups of buildings that fall within [the TCHC's] portfolio, including the building of your residence at the time of the submission of your Freedom of Information request. Complaints of tenants would normally be sent to and resolved by [the affected party].

[30] The appellant took the position that records must exist and that they are under the control of TCHC. She also indicated that the TCHC should have approached the affected party about the request and should have obtained the information requested as part of its obligations.

Representations

[31] In its representations the TCHC maintains that, because the request is about complaints made about an employee of the affected party, these complaints are not in the custody or control of the TCHC. The TCHC then provides considerable information in support of its position, referencing a number of the factors listed above which assist in determining whether or not a record is in the custody or control of an institution. The major points raised by the TCHC in support of its position that it does not have custody or control of the complaints can be summarized as follows:

- Complaints about the affected party's employees are created by tenants of the TCHC, not by the TCHC itself, and they would normally be sent to and resolved by the affected party.

- Any records of complaints about the affected party's employees that are compiled by the affected party would be created by one of its officers or employees. TCHC's role is only to forward complaints to the affected party in order for it to resolve any issues. Records of complaints are not normally retained by the TCHC.
- Tenants who file complaints against the affected party's employees intend for TCHC to ensure that their concerns are indirectly or directly addressed.
- The activity in question is the behavior/actions of the affected party's staff at the appellant's building. TCHC's mission is to provide affordable housing, connect tenants to services and opportunities, and work together to build healthy communities. The activity in question is a part of the mission; however, since the affected party's staff are "first and foremost" its employees, the affected party addresses issues with its employees. The TCHC is responsible for forwarding the complaints to the affected party, where it is then the affected party's responsibility to resolve the issues.
- Tenants who file complaints against staff of the affected party may voluntarily do so to TCHC.
- TCHC officers/employees generally do not retain any complaints against the employees of the affected party.
- The TCHC does not have the right to possession of any complaints against employees of the affected party. The TCHC concedes that it may have a right to knowledge of complaints against these employees, but it does not have a right to possession of any such complaints. While the TCHC has a right to object to an affected party employee employed to perform the Management services under the Agreement, it does not have a right to possession of written complaints against these employees.
- The TCHC would only rely on its knowledge of such a record if it chose to exercise its contractual right to object under the agreement. This right to object would be regarding an affected party employee carrying out the management services under the agreement.
- The affected party is not an "institution" for the purposes of the *Act*; it is a private company hired by the TCHC to manage some of TCHC's properties and it has possession of and owns any complaints submitted to it by the TCHC, on behalf of tenants.

- The TCHC provides the complaint forms and makes them accessible for the tenants. Any subsequent record created once the complaint form has passed to the affected party is at the affected party's expense.
- Any additional records of complaints about employees of the affected party would be created by an officer or employee of the affected party. The TCHC forwards complaints to the affected party in order for the affected party to resolve any outstanding issues involved.
- Complaints would be filed by tenants and investigated by the affected party. Therefore, it is these two parties that create the records.
- Generally, the TCHC's only contract with each of the tenants is the lease. Where there are complaints against TCHC employees, TCHC has the right to possess or otherwise control such complaints. However, nothing in the standard lease provides TCHC with a right to possess or otherwise control complaints against the affected party's employees. TCHC is responsible for forwarding complaints against employees of the affected party to it so that the affected party can resolve such issues.
- The customary practice of tenants in creating complaints is to turn them over to TCHC staff in their building. From there, TCHC turns the complaints that are about employees of the affected party over to the affected party, which then handles the complaints against its own employees.

[32] The TCHC also refers to its agreement with the affected party, and states that there is nothing in the agreement that explicitly requires the affected party to forward complaints about its employees to TCHC. It also states that there is no understanding or agreement that such complaints are not to be disclosed to TCHC, and that there is nothing in the agreement with respect to confidentiality of complaints about employees of the affected party. The TCHC also refers in some detail to certain clauses in the agreement in support of its position that the complaints are not in its custody or control. Specifically, it refers to the following clauses of the agreement:

- clause 3.1 which states that an employee of the affected party is not an employee, servant or agent of the TCHC;
- clause 2.1.5, which states that the affected party is responsible for the conduct of its employees in the carriage and performance of its duties under the agreement, and which requires the affected party to "cause its employees ... to ... act professionally and ethically in their performance of the [services under the agreement], including in their dealings with TCHC's employees and tenants"; and

- clause 2.1.4, which allows the TCHC to object to personnel employed by the affected party (though the TCHC states that its “general practice” is to allow the affected party to “handle such complaints against its own staff on its own, with TCHC interfering only in extreme cases”).

[33] The TCHC then summarizes its position as follows:

... [the] TCHC takes the position that it has no control or custody over any complaints filed by tenants against [affected party] employees. TCHC’s role in the situation of complaints against [these] employees is limited to (a) making complaints forms available to tenants and (b) turning over complaints about [the affected party’s] employees to [the affected party]. It is [the affected party] that resolves issues involving its employees.

It should also be noted that even if such records existed, the appellant would not be entitled to those records as they would be considered “personal information” of [the named individual] under section 14 of [the *Act*]. Therefore, the entire issue is moot.

[34] The affected party’s representations focus on its concern that records containing the personal information of its employees ought not to be disclosed. It does not directly address the issue of whether the TCHC has custody or control of complaints which the TCHC provided to the affected party.

[35] The appellant has also submitted representations on this issue. In her representations she takes issue with the TCHC’s position, and also provides copies of complaints she has made about the named individual which she provided to the TCHC. She also refers to the “Complaints Process” publically available on the TCHC’s website. However, in light of my findings below, it is not necessary for me to address the appellant’s representations in detail in this order.

Analysis and findings

[36] As I noted above, the courts and this office have applied a broad and liberal approach to the custody or control question.²² As well, a record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.²³

[37] As a preliminary matter, I note that both the TCHC and the appellant provide their representations in relation to complaints made about the named individual that

²² *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited at note 3 above, *Canada Post Corp. v. Canada (Minister of Public Works)*, cited above at note 3 above, and Order MO-1251,.

²³ Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at note 1 above.

were provided to the TCHC and subsequently forwarded by the TCHC to the affected party. Consequently, my decision on the custody and control issue relates only to records which were provided to the TCHC and subsequently forwarded by it to the affected party. Furthermore, the TCHC refers to additional records that may be created by the affected party in investigating the complaint. Any such record is not covered by the scope of this appeal, and it is only the complaints about the named employee which are at issue.

[38] With respect to the issue of whether the TCHC has custody of the records, subject to my decision below regarding the reasonableness of the TCHC's searches for responsive records, I accept that the TCHC forwarded complaints that it received to the affected party and that these complaints are in the affected party's possession. Accordingly, for the purposes of this discussion, I accept that any such records in the possession of the affected party are not in the TCHC's custody.

[39] However, based on the representations of the parties, and on the wording of portions of the agreement between the TCHC and the affected party, I find that the TCHC does have control of those records. I make these findings for the following reasons:

- The TCHC confirms that the "activity in question" (being the behavior/actions of the affected party's staff at the appellant's building) is a part of the "mission" of the TCHC.
- Although the TCHC states that it "generally" does not retain complaints against the employees of the affected party, and states that it does not have the right to possession of them, it concedes that it "may have a right to knowledge of complaint" and could use that knowledge to exercise its right to object to an affected party employee under the agreement. It is reasonable to expect that in order to exercise its right to object to an employee where a complaint(s) has been made, the TCHC must have the authority to require that copies of any complaints made to it and subsequently forwarded to the affected party be provided to it.
- The TCHC has confirmed that it provides complaint forms to its tenants. It also confirms that it receives the complaints from the tenants, and forwards the complaints about employees of the affected party to the affected party, stating that the "customary practice" of tenants is to submit their complaints to TCHC staff in their building. This supports a finding that receiving complaints forms part of the TCHC's mandate and function.
- The TCHC acknowledges that tenants look to the TCHC to ensure that their concerns are indirectly or directly addressed, which further supports a conclusion that the TCHC has the authority, if not obligation, to retain the complaints that

are made to it and/or to require that any complaints received by it and forwarded to the affected party be provided to it.

[40] In addition, although the TCHC has referred to certain clauses in the agreement, it did not refer to clause 2.1.12, which provides that the affected party will give the TCHC "full and free access" to records that are "pertinent to the operations under the terms of the agreement." In my view this supports the position that the TCHC has a right to request and receive copies of complaints which it forwarded to the affected party, and that any such complaints would be under control of the TCHC.

[41] Lastly, I note that the TCHC complaint policy, which is referred to by the appellant and is located on the TCHC website, refers to the process by which complaints are to be made, and includes the identification of individuals at the TCHC to whom the complaints could be made. It also identifies various types of complaints and how they are processed, which includes a reference to complaints which will be specifically processed by TCHC staff members. This, in my view, supports the position that the TCHC has an obligation to process complaints in certain ways, and that it retains control of any complaints received by it.

[42] Accordingly, I find that any complaints received by the TCHC and forwarded to the affected party concerning the actions of the named individual are in the TCHC's control. Accordingly, I will require the TCHC to obtain these complaints from the affected party and to issue an access decision regarding them, as discussed below under the heading "reasonable search."

C. Did the TCHC conduct a reasonable search for records?

[43] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the TCHC 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 TCHC will be upheld. If I am not satisfied, further searches may be ordered.

[44] A number of previous orders have identified the requirements in reasonable search appeals.²⁴ In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

... the *Act* does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] 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

²⁴ see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[45] I agree with acting-Adjudicator Jiwan's statements.

[46] 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 order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[47] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

[48] The appellant takes the position that the searches conducted for the following four records or categories of records were not reasonable, and that additional records ought to exist:

- the job description of the Unit K Manager,
- the TCHC Interoffice Postal Service Regulation
- TCHC Policy & other Regulations regarding making meeting records, and
- complaints about a named individual's work since January 2008,

[49] I will address each of these items separately below.

a) *Job Description for the Unit K Manager*

[50] In response to the appellant's request for the job description of a specifically named Unit K Manager, the TCHC provided the appellant with a job posting for an "Operating Unit Manager" and stated that the job posting includes the responsibilities of an Operating Unit Manager at the TCHC. It also stated that this was the most recent job description for all Operating Unit Managers of TCHC, including the Unit K Manager.

[51] The appellant took the position that the job posting provided to her was for the Unit D Manager, and that a separate job description for the Unit K Manager ought to exist. She also stated that the Unit K Manager and Unit D Manager do not have the same responsibilities, as the Unit K Manager is responsible for supervising subcontractors. Lastly, she stated that it was not clear whether the information in the job posting is the same as the information in the job description.

[52] In a later supplemental decision, the TCHC stated:

... we have provided you with the most recent description for all Operating Unit Managers [OUMs] of [the TCHC]. The records consisted of a job posting with a posting date of February 17, 2010. The record was provided by our human resources division and the record was disclosed without any alterations or severances. The responsibilities and qualifications in the job posting provided are the same for any OUM, irrespective of which unit/district of [the TCHC's] portfolio she has been assigned to manage. Further enquiries were made with our human resources division, and enclosed is a copy of a generic job description prepared in 2008 when [the TCHC] restructured to 13 operating units, which essentially contains the same responsibilities and qualifications as contained in the record provided in our earlier decision letter. The job posting dated February 17, 2010 as provided in our earlier decision letter, is the most recent and up to date job description of Operating Unit Managers.

[53] The appellant maintained that a separate job description for the Unit K Manager must exist, and also stated that she is not interested in "the most recent" job description, but rather, the job description that was used in 2008 through 2010.

[54] In its representations on this issue the TCHC maintains that there are no records of job postings for an OUM for Unit K. It also states:

TCHC went through an organization change in 2008/2009, through which the OUM position was created (i.e. OUM positions did not exist before this change). Therefore, as there has been no opening for an OUM position in Unit K since this change, it is not surprising that there are no job descriptions specific to this unit available. This is why a generic description was provided to the appellant.

[55] The TCHC then identifies the nature of the searches conducted for this record. It states that it assigned a named paralegal to coordinate the search efforts, and that this paralegal:

... is experienced with the appellant's request and claims, having handled all of the appellant's previous and subsequent requests [under the *Act*]. She is also knowledgeable about TCHC's responsibilities under [the *Act*] and is responsible for a number of files and duties [relating to the *Act*]. As such, she is cognizant of the duty to conduct a reasonable search for records.

In response to the appellant's request, [the paralegal] contacted all TCHC staff who have interacted with the appellant, and she requested copies of all relevant records. ...

[56] The TCHC also provides an affidavit sworn by the paralegal in which she identifies the individual in the Human Resources Division who she contacted, and who has access to the job descriptions stored in the Human Resources Division's electronic files. She confirms that there was no job description specific for the Operating Unit K Manager.

[57] Lastly, the TCHC states that the appellant has been provided with documents that are closest to what the appellant requested, and there are no other documents responsive to the appellant's request.

[58] In her representations the appellant maintains that the searches conducted were not reasonable. She questions the specificity of the information in the affidavit, and suggests that additional searches should have been conducted for hardcopies of the job description in various locations.

[59] After reviewing the representations of the parties, I am satisfied that the searches conducted by the TCHC for a job description for a Unit K manager were reasonable. The TCHC identifies the searches conducted, and the results of those searches, and also indicates why no description specific to Unit K exists. In addition the TCHC provided the appellant with records which they believed are closest to what the appellant requested. Although the appellant questions the searches, she has not provided me with sufficient evidence to satisfy me that the searches conducted by the TCHC were not reasonable, and I am satisfied that the TCHC's searches for records responsive to this request were reasonable.

b) Inter-office Postal Service Regulation

[60] In response to the appellant's request for inter-office postal regulation, the TCHC issued a number of decisions, which resulted in the appellant being provided with a copy of the full text of the TCHC Inter-Office Mail Procedures, and a copy of Canada Post mail procedures.

[61] The appellant indicated that she was not satisfied with TCHC's decision regarding this request item, and contended that the document released to her:

- is a partial print out from the internal website;
- does not contain information regarding who should sign the envelope,
- does not indicate whether it should be signed manually or printed,
- does not contain information as to who should put envelopes with letters into the mail box, and

- is incomplete (without a signature and date of approval on it).

[62] In its representations on this issue the TCHC maintains that it conducted a reasonable search for this record, and confirms that the named paralegal referred to above coordinated the search efforts. The TCHC also refers to the affidavit sworn by the paralegal in which she states:

I started my search by emailing the [named] Office Services Manager regarding TCHC's inter-office and Canada Post mails policy/procedure. [The named Office Manager] supervises staff who are responsible in receiving/processing incoming/outgoing mail.

[The named Office Manager] directed me to download the Inter-office and Canada Post mail Procedures on TCHC's internal website. I downloaded the procedures, which [were] provided to the appellant.

In a follow-up inquiry, [the named Office Manager] advised that the procedures on [the internal website] are the original document, that there is no signed version of the procedures with his signature on it, and the procedures [were] prepared for staff's general information only.

[63] In her representations the appellant maintains that the information provided to her does not contain the requested information. She also states that she wishes to be provided with access to the TCHC's internal website so that she can choose what information is relevant to her request.

[64] After reviewing the representations of the parties, and in the absence of more specific information from the appellant, I am satisfied that the searches conducted by the TCHC for the interoffice postal service regulation are reasonable. The TCHC identifies the searches conducted, and the records located as a result of those searches. The TCHC has also provided the appellant with information addressing some of her questions (for example, why there is no signed procedure). In the circumstances, I am satisfied that the TCHC's searches for records responsive to this request were reasonable. I also find that there is no obligation on the TCHC to provide the appellant with general access to its internal website in order to respond to an access request.

c) TCHC Policy & other Regulations regarding making meeting records

[65] In response to the appellant's request for TCHC policy and other regulations (city guidelines, social housing regulations, etc) regarding making meeting records, the TCHC stated that there are no documents responsive to this request.

[66] The appellant took the position that a regulation about writing meeting records should exist that would include requirements regarding the meeting date, place, time,

purpose, question discussed, decision and signature of participants. As a result, the issue of whether the TCHC's search for a responsive record was reasonable was raised.

[67] In its representations on this issue the TCHC maintains that it conducted a reasonable search for this record, and that no responsive records exist. It again confirms that the named paralegal (referred to above) coordinated the search efforts, and states:

[The named paralegal] confirmed with both the operations department at TCHC and TCHC's legal unit that no such policies exist. The steps are outlined in detail in [the paralegal's] affidavit.

[68] In the named paralegal's affidavit, she states:

I searched for policies and other regulations, City guidelines, etc. regarding meeting records in TCHC, using the Policy Management page of TCHC's internal website as this is where internal policies/procedures are stored. After conducting my search, I found no such records.

Throughout my [11 year] employment with TCHC, I am not aware of any TCHC policy regarding meeting records.

[69] The appellant begins by stating that, in her view, the paralegal only conducted a search for responsive records on the TCHC's internal website. She states that the search ought to have included a search of all external, publically available websites for responsive records, as this is where these records would be located. The appellant also alleges that requests ought to have been made to the TCHC's Legal Department and the Program Service Department.

[70] After reviewing the representations of the parties, and in the absence of more specific information from the appellant, I am satisfied that the searches conducted for the TCHC Policy & other Regulations regarding making meeting records were reasonable. The TCHC has indicated that it does not have policies of this nature, and confirmed with both the operations department at TCHC and TCHC's legal unit that no such policies exist. In addition, the paralegal who swore the affidavit, and who has been an employee at the TCHC for a considerable time, has indicated that she is not aware of any such policy. Although the appellant believes such records ought to exist, and suggests they exist on external websites, in the circumstances and in the absence of any additional evidence from the appellant, I am satisfied that the TCHC's searches for records responsive to this request were reasonable.

d) *Complaints about a named individual's work since January, 2008*

[71] In response to the appellant's request for complaints about a named individual's work since 2008, the TCHC indicated that the records are not in its custody or control, and the named individual is an employee of the affected party, and not of the TCHC. The appellant took issue with that position, and I address the issue of whether records in the possession of the affected party are in the custody or control of the TCHC, above.

[72] However, the appellant also took the position that the TCHC had not conducted a reasonable search for responsive records in its own possession. During mediation, the TCHC agreed to conduct a search of its own records to see if it may have retained any records relating to complaints about the individual. The TCHC later advised that its search of its EasyTrac database did not yield any records, and stated as follows in a supplementary decision:

Complaints of tenants would normally be sent to and resolved by [the affected party]. As part of the mediation process, a further search was conducted of [the TCHC's] internal EasyTrac database to search for any complaints that have been received by [the TCHC's] call centre regarding any complaints of [the named individual] since January 2008. No records were located during that search.

[73] In its representations on this issue the TCHC maintains that it conducted a reasonable search for these records, and confirms that the named paralegal referred to above co-ordinated the search efforts. The TCHC also states:

[The] TCHC canvassed the appropriate staff, and searches for such complaints were conducted in the appropriate locations by knowledgeable and experienced employees [Order PO-2559]. No records were located that are responsive to the appellant's request.

[74] The TCHC then refers to the affidavit sworn by the paralegal in which she states:

I started my search by emailing the Manager of Human Resources/Payroll of [the affected party] ... regarding complaints about [the named individual's] work since 2008.

[The affected party's Manager of Human Resources/Payroll] advised me that she was not in a position to release the information I was requesting due to privacy issue.

I inquired from [the named individual] if he/she is aware of any complaints against him/her and his/her staff and how they keep track of these complaints. [The named individual] advised that any complaints

against [the staff of the affected party] who are assigned to any TCHC buildings should be logged in TCHC's tenant database, EasyTrac.

I requested TCHC's Program Services to search EasyTrac for any tenant complaints against [the named individual] for all TCHC buildings that he/she manages dating back to 2008.

Program Services found no records pertaining to complaints regarding [the named individual].

[75] The appellant takes the position that the search conducted for the complaints was not reasonable. She states that it "is not clear how the searched documents were named and the area of search stated." She also provides copies of the complaints that she has made about the named individual, which she had emailed or faxed to individuals at the TCHC, and states:

I personally addressed to TCHC a few complaints about [the named individual]. They are attached to my representations. According to the TCHC Complaints policy Complaint should be addressed to the supervisor. In 2008 [named individual] supervised the work of contractors in her Unit K. I addressed to her my complaint. She did not answer and did not investigate.

In 2009 and 2010 I forwarded my complaints to the [named] CEO. She is not with the TCHC anymore, but emails to her are kept in the TCHC mail archive. In January 08, 2010 during the meeting Investigation of my complaint was delegated to [two named individuals]. They did not investigate.

[The named paralegal] did not contact me to clarify where complaints could be. She did not ask [the named individual's supervisor]. She did not check emails addressed to [the named individual's supervisor] and [the named CEO]. ...

[76] The appellant also provides representations in support of her position that the complaints made about the named individual ought to be investigated by the TCHC and not by the affected party.

Preliminary matters

[77] A number of issues have been raised by the parties which do not fall within the scope of this appeal as it relates to the request for records of complaints about the named individual, which involves only the issues of search and custody and control. In that regard, I will not address the appellant's concerns about whether the TCHC or the

affected party is required to investigate these complaints. In addition, my findings on these two matters do not involve any findings regarding whether or not the records contain the personal information of the named individual, and this order does not deal with access to the records, only whether the searches were reasonable and whether the records are or are not in the TCHC's custody and/or control.

[78] In addition, I note that both the TCHC and the appellant provide their representations in relation to complaints made about the named individual that were provided to the TCHC and subsequently forwarded by the TCHC to the affected party. Consequently, my decision on the custody and control issue (above) relates only to records which were provided to the TCHC and subsequently forwarded by it to the affected party, and my decision regarding the search undertaken by TCHC will only consider records within the TCHC's own record-holdings.

[79] Furthermore, the TCHC refers to additional records that may be created by the affected party in investigating complaints. Any such record is not covered by the scope of this appeal, and it is only the complaints about the named employee which are at issue.

Analysis and findings

[80] In the circumstances I am not satisfied that the TCHC's search for the requested complaints made about the named individual were reasonable.

[81] It appears from the TCHC's representations and the affidavit provided that the TCHC's search focused on three areas. The affidavit clearly states that the paralegal began her search by requesting copies of the complaints from the affected party, she then asked the named individual to identify where any complaints might be held, and he directed that the search of the EasyTrac system be undertaken. The paralegal then searched the EasyTrac system and could not locate any records there.

[82] In my view, the search conducted by the TCHC is not reasonable. It is clear that the TCHC did receive some complaints (including ones from the appellant) about the named individual. The TCHC states that these were forwarded to the affected party, and the TCHC did not retain copies of them. However, the TCHC has not indicated that it contacted any of its own individual employees who may be expected to have received complaints, and conducted searches of their record-holdings (either hardcopies or electronic records/emails, etc). In addition, the TCHC complaint policy, which is referred to by the appellant and is located on the TCHC website, refers to the process by which complaints ought to be made, and includes the identification of individuals at the TCHC to whom the complaints could be made. Again, there is no indication that the TCHC conducted searches of the record-holdings of these individuals.

[83] As a result, I will order the TCHC to conduct further searches of its own records for records responsive to this part of the request. As a first step in determining where records might reasonably be located, the TCHC should contact the appellant and clarify with her which individuals at the TCHC received her complaints, and in what form, and conduct a search of the record-holdings of these individuals. In addition, the TCHC should search the record-holdings of any individuals who would be expected to receive complaints about the actions of the named individual, based both on the Tenant Complaint Policy located on the TCHC's website, as well as a reasonable review of any additional people or offices where such complaints may have been sent.

[84] Finally, as I indicated above in my discussion of custody and control, the TCHC retains control over any complaints made to the TCHC which were forwarded to the affected party. Although the paralegal made queries to the affected party, she did not require that the complaints be provided to the TCHC. Nor did she take any steps to notify another individual at the TCHC with authority to require compliance with this request in the event that she did not have the requisite authority. In the circumstances, I find that the TCHC's search for complaints about the named individual made to the TCHC was not reasonable, and will order the TCHC to conduct a further search for them. As I indicated above, as part of this search, I will order the TCHC to contact the affected party and require the complaints about the named individual that it forwarded to it be provided to the TCHC.

ORDER:

1. I order the TCHC to disclose the portions of pages 18 and 19 remaining at issue to the appellant by sending the appellant a copy of the severed portions of these pages to her by **September 5, 2012** but not before **August 29, 2012**. I have attached to the copy of this order sent to the TCHC a highlighted copy of the portions of these pages remaining at issue, highlighting in green those portions that are not at issue, and ought not to be disclosed.
2. Complaints made to the TCHC and forwarded by it to the affected party remain in the control of the TCHC.
3. The search conducted by the TCHC for items (a), (b) and (c) was reasonable and this part of the appeal is dismissed.
4. I order the TCHC to conduct a further search for records responsive to item (d) in accordance with the directions set out above. On completion of its search, I order the TCHC to provide the appellant with a decision outlining the results of the search and/or an access decision if records are located, pursuant to the requirements of the *Act*, using the date of this order as the request date.

5. In order to verify compliance with the terms of this order, I reserve the right to require the TCHC to provide me with a copy of the record provided to the appellant in accordance with order provision 1 and of the decision letter issued to the appellant in accordance with order provision 4.

Original Signed By:

July 30, 2012

Laurel Cropley
Adjudicator