

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2718

Appeal MA09-358

City of Vaughan

April 23, 2012

Summary: The appellant requested records relating to a named charitable foundation. The city located some records and disclosed them to the appellant, claimed that other records do not exist or are not in its custody or control and claimed the application of section 15(a) for one record. The order addresses only the issue of whether the city's search for responsive records was reasonable, and finds that it was.

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

OVERVIEW:

[1] The appellant submitted the following three-part request to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

Part 1 of the request

A copy of the Michael DiBiase charitable Foundation Agreement, Registration, Legal Documentation of any sort...including a detailed account summary, which may be called a Detailed Business Transactions Subtotal Object Account and Business Unit, this should itemize any and all revenues received or expenses withdrawn for this Foundation, identifying how these monies were disbursed (details of expenses should be noted in

the detailed summary) any balance including any left over, if or where it was transferred, including a Detailed Summary Report of Revenue or Account [emphasis added] containing this information. The name of such account if different should be noted thereon. A copy of who are or were the list of members that controlled this money. This can be a list of directors and officers or it can be noted in Minutes of Meetings. Please print out each year individually not combined and is to include totals to the end of May, 2009.

Part 2 of the request

A copy of the Mayor's Charitable Foundation Agreement, Registration, legal documentation of any sort set up during [or after] the Mayoral leadership of Lorna Jackson, including [the remainder of the request is the same as above]

Part 3 of the request

A copy of the current mayor's charitable Foundation Agreement, Registration Legal Documentation of any sort set up during the new Mayoral leadership of Linda Jackson, including [the remainder of the request is the same as above]

[2] The city granted access, in part, to records responsive to part 1 of the request, and charged a fee of \$30.60. The city also advised that there are no records responsive to parts 2 and 3 of the request. The following sets out the particulars of the city's decision regarding part 1 of the request:

- The city denied access to the request for a copy of the Michael DiBiase Charitable Foundation agreement, registration, legal documentation of any sort and minutes of meetings pursuant to section 4(1) of the *Act* on the basis that the records are not in the custody or under the control of the city, because the city does not administer the Foundation's records.
- The city granted access to two records responsive to the portion of the appellant's request entitled "Detailed Business Transactions Subtotal Object Account and Business Unit," but noted that the financial records were created to support the city's business functions, and do not exist in the format suggested by the access request.
- The city provided an explanation as to why the records do not exist in the form requested.

- The city also denied access to the request for a list of directors and officers of the Foundation pursuant to section 15(a) of the *Act* on the basis that these records are publicly available.

[3] The appellant appealed the decision to deny access to records pursuant to sections 4(1) and 15(a) of the Act and on the basis of his belief that more records exist.

[4] During mediation, the appellant indicated that he is not pursuing the appeal on the basis that records responsive to parts 2 and 3 of the request must exist. As a result, parts 2 and 3 of the request are not at issue in this appeal.

[5] At the Intake stage of the appeals process, the appellant sent the Analyst an e-mail clarifying part 1 of his request. At the mediation stage, the appellant consented to sharing the e-mail with the city for the purpose of conducting a further search for records responsive to the request as clarified. The city conducted a further search and located three additional records.

Supplementary Decision

[6] The city issued a Supplementary Decision granting partial access to the additional records for a fee of \$76.40. Access was denied to the names and addresses of individuals contained in Record M1 (6 pages) pursuant to section 14(1) (personal privacy) of the *Act*. The appellant indicated that he is not interested in obtaining access to the names and addresses of individuals. As a result, section 14 and Record M1 are not at issue in this appeal.

[7] The Supplementary decision also addressed three specific items, and the appellant responded to each of them. They are summarized as follows:

1. The city advised that it had conducted a further search for a copy of the Michael DiBiase Charitable Foundation agreement, registration, legal documentation of any sort and minutes of meetings. The city did not locate any records, and advised that it maintains its position that the records are not in the custody or under the city's control pursuant to section 4(1) of the *Act*.

[8] The appellant confirmed that he is appealing this decision, and the question whether the records are within the city's custody and/or control remains at issue in this appeal.

2. The city had explained in its initial decision and in the Index of Records why specified information is not included in records entitled "*Detailed Business Transactions Subtotal Object Account and Business Unit*". In its Supplementary Decision, the city advised the appellant that it is unclear

what records the appellant is referring to in his request for a "Detailed Summary Report of Revenue or Account" or for "detailed billing". The city advised the appellant that he may already have received this information as part of the substantial financial records provided to him in his subsequent access request.

[9] During mediation, the appellant indicated that he understands the explanations as to why the information he is seeking in the *Detailed Business Transactions Subtotal Object Account and Business Unit* does not exist. He also advised that he is satisfied with the information contained in the financial records he has received and he does not wish to pursue the appeal with respect to this part of the request.

3. The city also addressed the clarification in the appellant's e-mail that he believes that records relating to a further charitable foundation called the Mayor DiBiase Foundation exists as follows:

The city has not limited the scope of the request based on the terminology used to describe the Michael DiBiase Charitable Foundation in the access request. The city has sought records about the Foundation and has included in the search records with variations on the Foundation's name.

[10] The appellant indicated that he does not accept that there are no records relating to a Mayor DiBiase Foundation and he is appealing this decision. He clarified that he is seeking access to the same type of records for the "Mayor DiBiase Foundation" as he has requested in part 1 of the request for the "Michael DiBiase Charitable Foundation." This includes the Foundation Agreement, Registration, Legal Documentation of any sort, Letters Patent of Incorporation and the list of directors/officers.

[11] As a result of the above, the issue of whether a reasonable search was conducted to locate records relating to the Mayor DiBiase Foundation remains an issue in the appeal.

[12] Further mediation could not be effected and the file was transferred to the adjudication stage of the appeal process. During the inquiry into the appeal, I sought and received representations from the city and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

Preliminary matters

[13] I note that although the city raised the issue of whether responsive records are in its custody and/or control, neither the city nor the appellant addressed this issue in

their representations. Rather, their representations focus on whether the city conducted a reasonable search for the records. In the absence of submissions or other evidence, I will not consider the custody/control issue in this order. I will review the city's search for the records below.

[14] In addition, the city states in its representations, that it does not have a list of directors of the foundation in its custody or control. The city states further that prior to issuing an access decision, its Records and Information Analyst determined that lists of directors or officers of charitable foundations are available on a Canada Revenue Agency (CRA) website. The city confirms that the appellant was provided with a link to the foundation information on the CRA website and was advised of a typographical error on the website in order to facilitate his search for the information.

[15] The appellant did not make submissions on this issue.

[16] The approach taken by the city raises a unique issue. On the one hand, the city states that a list of directors of the foundation does not exist within its record holdings, and the language used by the city suggests that it intended to raise this as a custody/control issue (as noted above). On the other hand, the city has made an effort to determine whether the requested record exists outside of its record holdings and has provided the appellant with the results of the queries made, and on this basis, claims that section 15(a) applies.

[17] In my view, the city has effectively stated that "no record exists" that is responsive to the appellant's request for a list of the directors of the foundation. The appellant has raised search as an issue in this appeal, and the parties have both addressed it in their submissions. The list of directors falls into the category of records that the appellant believes should exist and, therefore, is captured in the searches conducted by the city.

[18] I find that it is premature to deal with section 15(a) until it has been determined that the record exists (or should exist) within the city's record holdings. Accordingly, I will not address section 15(a) in this order.

[19] Despite this determination, I note that the city's submissions, which have not been contradicted or challenged by the appellant, claim that a list of directors and officers of the foundation is publicly available, and state that the city has provided the appellant with the information he requires in order to access the public information. In my view, the appellant has been provided with sufficient information to access the information from an alternate source. Nevertheless, I have considered whether the city's search for the list of directors, along with the other records requested, was reasonable in the discussion set out below.

[20] As a result, the sole issue to be determined in this appeal is whether the city conducted a reasonable search for records relating to the Mayor DiBiase Foundation.

[21] In this order I find that the city's search for responsive records was reasonable in the circumstances. Accordingly, I uphold the city's decision.

DISCUSSION:

Did the city conduct a reasonable search for responsive records relating to the Mayor DiBiase Foundation?

[22] 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 17.¹ 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.

[23] 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.² To be responsive, a record must be "reasonably related" to the request.³

[24] 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.⁴

[25] 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.⁵

[26] 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.⁶

[27] 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.⁷

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469, PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

⁷ Order MO-2213.

The city's representations

[28] The city acknowledges that it did administer the foundation in the past, but no longer does so. According to the city, the foundation is administered independently. The city focussed its representations on the search that was undertaken for legal documentation related to the Michael DiBiase Charitable Foundation (the foundation). The city states that staff in the Legal Services Department conducted two searches. According to the city, at the time the first search was conducted, a member of the city's legal staff advised that foundation records previously in the city's custody were transferred to the foundation. The Records Management Supervisor contacted a named individual to confirm this information. The named individual indicated that she no longer worked for the foundation, but she confirmed that the records had been sent to the Director of the foundation.

[29] The city indicates that a second search was conducted for records relating to the foundation. During that search staff located two sets of records, comprising drafts and invoices and these records were identified as responsive records in this appeal. The city takes the position that due to the unofficial nature of the drafts and based on confirmation that records relating to the foundation had been transferred to it, it is likely that the documents located in the city's records had simply been overlooked when the transfer occurred.

[30] The city provided an affidavit sworn by the Director of Legal Services (the director). She indicates she has never been asked to perform any work for the foundation, nor has she been in possession of records relating to the foundation. She confirms that the legal department has never been responsible for records pertaining to this foundation. Rather, she states that any files relating to the foundation were opened and kept in the Office of the Commissioner of Legal and Administrative Services/City Solicitor. The director indicates that she requested the Office Co-ordinator for that office to search for records. She states that the Office Co-ordinator advised that she had sent all records to a named individual pursuant to the instructions from a former Commissioner. The Office Co-ordinator also confirmed that no copies of the records were made and no records were kept in that office.

[31] The director indicates further that she, her legal assistant and four lawyers searched the files of the Legal Services Department for records, which included:

- A physical search of the Legal Services filing cabinets
- A search of the Department file list, for both open and closed files
- A search through each individual lawyer's files
- A search of electronic records of a lawyer who had left the city's employ.

[32] The director confirms that no records were located as a result of these searches.

[33] The city also provided an affidavit sworn by the Commissioner of Legal and Administrative Services/City Solicitor (the commissioner). She indicates that her Office Co-ordinator conducted a search of her personal computer and files within that office. As a result of this search a few documents were located (as noted above), consisting of draft memos, invoices and some director information. She notes that these records were provided to the city's Access and Privacy Officer and confirms that no other records were located.

[34] In addition to the two previous affidavits, the city provided an affidavit sworn by the Office Co-ordinator in which she reiterates the searches she conducted that were described by the commissioner. She indicates further that in 2006, she sent all records to the administrator of the Vaughan Health Campus of Care and Vaughan Health Care Foundation on the instruction of the former commissioner, and that no copies were made or kept.

The appellant's representations

[35] The appellant points out in his representations that the non-profit foundation was set-up by city staff in 2003 and "monies were consistently deposited by city staff into a bank account until 2005, at which time the new Foundation was set-up." The appellant estimates that approximately \$326,604 in funds was collected over the three-year period that the foundation was managed by the city. He states:

As per federal and provincial requirements, the city must have kept these financial documents for a minimum of seven years. It is difficult to believe that the city would have turned these documents over without keeping copies on file. The city would have been required to keep a copy of the legal registration documentation, particularly since ultimately it would be the city's responsibility to answer any questions that would arise concerning the registration and/or financial records of the foundation. At the very least the city would have had to maintain these records for the activity between 2003 and 2005.

[36] The appellant goes on to argue that it is "unreasonable to believe" that the legal or finance department would not have kept copies of the documentation relating to the foundation, for audit purposes and in conformity with the records retention requirements of the *Act*.

[37] The appellant notes that although the city claims that it does not have any records relating to the foundation, there exist documents in his possession which show that the city had or received documents relating to the foundation that are dated "well after the city states they transferred documents." The appellant attached several documents relating to the foundation that appear to show the head office at the city's offices. He states:

Based on these documents alone, it is evident that the city continued to receive documents related to the new foundation and that it would also be reasonable to believe that there may be additional correspondence on file with the Legal Department. In addition, the city most recently released a report regarding the activity related to this foundation. It is reasonable to note that this would not have been possible unless documents and reports were requested to look into this matter once a deputation was made by a member of the public.

Analysis and findings

[38] I am satisfied, based on the wording of the appellant's request and the discussions and communications that took place during mediation, that the city searched the appropriate locations for records responsive to the subject portion of the request. I am also satisfied that the staff members conducting the searches in the two departments were experienced and knowledgeable in the subject matter of the request. I am satisfied that the searches within each department were thorough and that staff have made a reasonable effort to locate responsive records in locations in which such records would likely be found.

[39] I have reviewed the documentation submitted by the appellant and although I agree that it would appear that the city was receiving information about the foundation after the date that the records were transferred, the nature of some of this documentation supports a finding that the city no longer had an interest in the foundation. In and of itself, I do not find that this evidence supports a conclusion that the city's search for responsive records was not reasonable. Although the appellant believes that records should exist relating to this foundation, at least up to the date of transfer, I am satisfied that the city has made reasonable efforts to search for and locate any records that would be reasonably related to the appellant's request. Accordingly, I find that the city's search was reasonable, and dismiss the appeal.

ORDER:

1. The city's search for responsive records was reasonable and the appeal is dismissed.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ April 23, 2012