Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2808

Appeal MA12-57

City of Ottawa

October 31, 2012

Summary: The appellant alleged that the City of Ottawa did not conduct a reasonable search for responsive records in relation to a statement made by an identified City of Ottawa employee in an email. The adjudicator finds that the city's response to the appellant's request, as well as its search for responsive records, is in compliance with its obligations under the *Act*.

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: M-493.

OVERVIEW:

[1] This appeal arises out of changes to the City of Ottawa's (the city) eligibility criteria for the Essential Health and Social Supports (EHSS) and Home Support Services (HSS) programs, both of which fall within the mandate of the city's Community and Social Services Department.

[2] The appellant has been engaged in lobbying the city to address his expressed concern that a number of low income seniors do not qualify for the programs because they have assets over $5000.00.

[3] In the course of his lobbying efforts, the appellant made the following request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*):

> On April 12, 2011 [named city employee] stated the cost of my EHSS and home support proposal was open ended but he did not provide any justification. Please provide me with facts, figures and other supporting document that clearly prove my proposal is open ended and that my analysis is wrong. His figures should include those 131 EHSS and HSS citizens plus those other groups that he is convinced will cause a considerable increase in taxes should they also be provided with the new LICO program of social benefits. Please see [identified email correspondence dated April 12, 2011].

[4] The city issued a decision letter advising that no responsive records exist.

[5] The requester (now the appellant) appealed the city's decision.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[7] I invited and received representations from the city and the appellant.

[8] The only issue in this appeal is the city's response to the appellant's request, as well as the reasonableness of its search for responsive records.

[9] In the order that follows, I find that the city's response to the appellant's request, as well as its search for responsive records, is in compliance with its obligations under the *Act*.

The city's representations

[10] The city's position is two-fold:

- that it conducted a reasonable search for responsive records, and
- it is not otherwise required to create a record in response to the request.

Reasonableness of the search for responsive records

[11] The city provided an affidavit from its Program and Project Management Officer (the PPMO) in support of its position. The affidavit describes in detail the steps taken to respond to the access request. In that regard, the PPMO refers to a decision letter for another of the appellant's requests which, she deposes:

> … incorporates city staff answers to his questions concerning various aspects of the EHSS and HSS programs. These answers in turn incorporate the various city council recommendations and reports that relate to his questions.

[12] The city submits in its representations that this decision letter illustrates how the city was able, in the context of that other request, to create "a type of index that incorporated public documents to answer his questions".

[13] The PPMO further deposes in her affidavit that she determined that as the request was "specific to details supporting a statement made by [the named city employee]" any responsive records "would be held by his office". She states that the named city employee's office oversees the work for Social Services and Housing, which is responsible for the EHSS and HSS programs. Accordingly, she asked the Access to Information and Privacy Office contact for retrieving records, who reports to the named city employee, whether there were any records that were responsive to the request. In the PPMO's view the Access to Information and Privacy Office contact had the knowledge and means to locate and retrieve responsive records in the office of the City Manager. The individual replied that no such records existed. The PPMO further deposes that after the appellant appealed the city's decision, she again contacted the Access to Information and Privacy Office contact. The PPMO states that the Access to Information and Privacy Office contact confirmed that there were no records that were responsive to the request.

No obligation to create a record

[14] The city further submits that it has no obligation to create a record to address the appellant's request. The city submits that:

> … the appellant has effectively requested by means of filing an access to information request that the city generate new records of a particular type to refute *his* ideas/proposals in respect of eligibility criteria for the EHSS and HSS programs. The appellant in his request specifically asked that the city response contain facts, figures, and evidence in respect of his interest in the 105 EHSS and 26 HSS files (total of 131 "cases"). The city takes the position that there is no obligation on the part of staff to create such a record as the purpose of the *Act* is to provide a right of access to information that is under the control of the city at the time the request is made. [Emphasis in original]
>
> …
>
> The city submits that although it is clear that there are general records that relate to eligibility criteria for the HSS and EHSS programs, the

> interactions between the appellant and the [identified ministry employee] demonstrates how the [identified city employee] has simply been explaining processes and the general rationale behind council decisions rather than generating the detailed follow-up information that the appellant requested. The city submits that that by using the word "open-ended" in the April 12, 2011 email, the [identified city employee] was conveying that broadening eligibility criteria necessarily entails a greater number of eligible individuals, which necessarily impacts the cost of funding the programs. The [identified city employee] explains in his email that Council has already considered the eligibility criteria, made a decision and staff will not revisit the issue unless directed to do so by Council. The [identified city employee] conveyed this Council driven decision making process and role of staff without engaging in any assessment/review of the appellants ideas/concerns in respect of the eligibility of the 131 cases …
>
> The city therefore submits that it would not have been possible in this instance for the city to respond to this request by creating a decision letter of the type [referred to by the PPMO above] because the request at issue in this appeal is for detailed information that was not being generated by staff. In addition the city submits that there is no reasonable basis for concluding that records responsive to the request exist because of the detailed nature of the request and the way that staff have interacted with the appellant.

The appellant's representations

[15] In the course of the adjudication of this appeal, the appellant provided documentation in an effort to provide "circumstantial evidence from which other facts will be contrasted with direct evidence to disprove" the city's position that there are no responsive records.

[16] The appellant submitted that the identified city employee's statement included "untruths and misleading information." The appellant then submits:

> The [city] does not have any of the documents that I requested and therefore cannot prove that my proposal was open ended; that my analysis was wrong or that those benefits would cause a considerable increase in city taxes. The city is no longer in a position of strength and therefore not able to challenge the legitimacy of providing benefits to those 131 seniors.

[17] That said, the appellant further submits that:

> Relative evidence including answers to my requests will be recovered from [the city's] Community and Social Services department computers and controlled by [another named city employee], her staff and/or the IT department personnel.

Analysis and finding

[18] 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.

[19] 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]

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

[21] 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.[4]

[22] This office has previously stated that government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed.[5]

[23] In Order M-493, former Senior Adjudicator John Higgins provided some guidance with respect to the extent to which an institution should respond to questions directed to it by a requester, stating:

> In my view, when such a request is received, the [institution] is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section 17 of the *Act*, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to

[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Order MO-2246.
[5] See the postscript to Order M-583. But also see Orders PO-2904 and PO-3100.

> identify the record", then the [institution] may have recourse to the clarification provisions of section 17(2).

[24] I agree with former Senior Adjudicator Higgins' reasoning and adopt it for the purposes of this appeal.

[25] I am satisfied that the city's representations and the affidavit filed in support of its position demonstrate that it made a reasonable effort to address the appellant's request and provided a thorough explanation as to why no responsive records exist. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist. In my view, the appellant has not provided a reasonable basis for concluding that responsive records exist. Accordingly, I am satisfied that the city's response to the appellant's request, as well as its search for responsive records, is in compliance with its obligations under the *Act*.

ORDER:

The city's response to the appellant's request as well as its search for responsive records is in compliance with its obligations under the *Act*.

Original Signed by: October 31, 2012
Steven Faughnan
Adjudicator