

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2778

Appeal MA11-169

Toronto Community Housing Corporation

August 10, 2012

Summary: The appellant submitted a multi-part request for various records relating to the manner in which rent is calculated in TCHC rental housing. The TCHC granted access to certain records, but denied access to some of the records on the basis of sections 14(1) and 38(b) (personal privacy). The appellant appealed the denial of access and also took the position that additional responsive records should exist. In this order, the TCHC's search for responsive records is upheld. In addition, this order determines that issues regarding access to certain records are being addressed in another appeal, and they are not addressed in this appeal.

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: MO-2739.

OVERVIEW:

[1] The Toronto Community Housing Corporation (the TCHC) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or MFIPPA). The request was for records including internal and external regulations, legislation, guidelines, internal documents, policies, correspondence, meeting minutes, rent review schedules, a lease, a group survey and instructions. The requested records generally relate to the manner in which rent is calculated in TCHC rental housing.

[2] The TCHC issued a decision letter on March 16, 2011 in which it responded to a number of the items in the request. It issued a second decision dated April 4, 2011 which responded to some of the remaining points. Both decision letters indicated that access was provided to certain records, and access was denied to some records on the basis of the exemptions in sections 14(1) and 38(b) (personal privacy). The decisions also indicated that, for several items in the request, no responsive records exist.

[3] The appellant appealed the decisions of March 16th and April 4th, and this appeal file (MA11-169) was opened. During mediation, the appellant confirmed that she believed that certain additional responsive records existed. Accordingly, the issue of whether the TCHC's search for records was reasonable was also raised as an issue in this appeal.

[4] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the TCHC, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the TCHC's representations, to the appellant, who also provided representations to me.

[5] In the Notice of Inquiry sent to the parties, I also noted that, during mediation, the appellant specifically identified the additional records that she believed ought to exist, and the search issue was confined to those specific records in this appeal, as set out in more detail below.

Preliminary matters

Scope of this appeal

[6] In its decision letter of April 4, 2011, the TCHC stated that it was still searching for certain additional records, and that it would issue a third decision. That third decision, dated May 3, 2011, resulted in appeal file MA11-165-2, which was also assigned to me and resulted in Order MO-2739. Because the records at issue, the exemptions claimed, and the reasonable search issues raised in that appeal are different than the ones in this appeal, these files were processed separately. Accordingly, this order, which deals with Appeal MA11-169, only addresses issues raised in the March 16th and April 4th decision letters, as well as the specific reasonable search issues identified by the appellant relating to this appeal.

Appellant's request to include other items in this appeal

[7] In her representations, the appellant argues that other items included in her request ought to be part of this appeal. The appellant also provides lengthy representations in support of her position that the Mediator's Report, prepared at the end of the mediation stage and provided to the parties, is inaccurate and that other

items are at issue in this appeal. In addition, she also refers to her confusion about what is covered in this appeal, and how this relates to her other appeals.

[8] It is not surprising that there is some confusion about this appeal and the other appeals the appellant has with this office which also involve the TCHC. The appellant has submitted numerous, multi-part requests to the TCHC. The TCHC has responded with numerous decisions, often providing an initial decision, and then supplementary decisions in the process. Many of these decisions have been appealed, and numerous items requested and at issue in one appeal overlap with other similar requests in other appeals.

[9] The Mediator's Report sent to parties at the completion of the mediation stage of an appeal identifies the remaining records and issues, and parties are invited to identify any errors and omissions in the Mediator's Report. The Mediator's Report sent to the appellant in this appeal specifically indicated that the records remaining at issue were records 2-1 to 2-17, 2-19 to 2-21, 2-23 to 2-42 and parts of records 2-18 and 2-22. It also identified that the issue of whether the searches conducted by the TCHC were reasonable applied to the following:

- records relating to signature page of Resident Lease Expiration (C8),
- records relating to the job description of a named individual in Unit "K" (E6),
- records relating to imposing the market rent for a 1-bedroom apartment at an identified apartment complex in 2009 and 2010 (B6), and
- records relating to the pages with signatures of approval of Resident Log December 1, 2010 (C7).

[10] When the Mediator's Report was sent to the appellant in this appeal, she did not identify any significant errors in it, and this file was transferred to the inquiry stage of the appeal. The appellant now indicates that she disputes much of the information contained in the Mediators Report.

[11] Generally, when issues are defined or narrowed in the mediation stage, they are no longer at issue in the appeal. Adjudicator Laurel Cropley addressed this in Order PO-1755, in which an appellant wanted to withdraw an agreement he had made during mediation. Adjudicator Cropley stated:

In my view, it is too late to make such a claim at this stage in the process, particularly in light of the steps taken by the Mediator to clarify [the appellant's] concerns. In so finding, I am not saying that a party may not change his or her mind and back away from an agreement made in mediation, but that a decision must be made in a timely fashion and within the procedures which have been established by this office and which have been clearly communicated to the parties. To find otherwise would not only delay the inquiry process in that I would be required to

essentially start the inquiry over again in order to introduce the new issues, but it would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely and orderly resolution of the appeal.

[12] I agree with the approach taken by Adjudicator Cropley.

[13] However, due to the confusion resulting from the large number of requests, items requested, decisions and appeals involving the TCHC and the appellant, I have carefully considered the appellant's concerns about items that ought to be included in this appeal.

[14] The appellant states that, during mediation, documents were removed from the appeal without a proper explanation and without her consent. She also states that, in addition to the four items identified by the mediator, the following items also raise the question of whether the search for records was reasonable: A1, B1, B2, B3, B4, B5, C1, C2, C4, C6, C12, C13, C14, D3, D8, D9, D10, D12, E1, E2, E3 and E4.

[15] With respect to the appellant's concerns that documents were removed from this appeal without her consent, on my review of this issue, I do not accept the appellant's position. Her main concerns relate to the description of the records (that is, how they are numbered) and her request that the decision letter be worded differently than it is. With respect to the numbering of the records at issue, I agree with the appellant that they are numbered based on the numbers assigned to them in another appeal, but find that this is of assistance in identifying the records and their relationship to her other appeal. With respect to the appellant's concern that the decision letter ought to have been worded differently, I find that this is not an issue in this appeal and does not affect the identification of the records at issue.

[16] I have also considered the items that the appellant believes also raise the reasonable search issue. In doing so, I have reviewed the background to this file and the records and issues in other files with this office. After conducting this review, I do not accept the appellant's view that these additional items raise the question of the reasonableness of the search in this appeal.

[17] To begin, I note that items C14, D3, D9, D12 and E4 were at issue in appeal MA11-165-2 and addressed by me in Order MO-2739.

[18] With respect to items C12, C13 and E3, each of these items were clearly identified by the appellant as not being at issue in this appeal. In addition, the issue identified by the appellant concerning items A1, B1, B2, B3, B4, B5, C1, C2, C4, D10, E1 and E2 is simply that the appellant believes the wording of the responses to these items by the TCHC should have been worded differently. Furthermore, the mediator noted

specifically that these items were removed from the scope of this appeal, and I will not review them in this order.

[19] Lastly, regarding items C6 and D8, the issue identified by the appellant during this appeal was that a certain identified date on a record was inaccurate, and should be modified. This issue was also clearly removed from the scope of this appeal during mediation.

[20] As a result, I will not review the other items identified by the appellant in this appeal.

Access issues addressed in another appeal

[21] In the Notice of Inquiry sent to the parties, one of the identified issues was whether the exemptions in sections 14(1) and/or 38(b) applied to part of pages 2-18 and 2-22, and all of pages 2-1 to 2-17, 2-19 to 2-21 and 2-23 to 2-42.

[22] In its representations on this issue, the TCHC stated that this specific issue is being addressed in another appeal involving the appellant and the TCHC (Appeal MA11-32), and that representations on this issue were provided in that appeal.

[23] The appellant argues that the same documents can be requested in different appeals, and that portions of documents may be withheld for different reasons in different appeals. She also argues that the TCHC ought to be required to support its position every time that access to a document is denied.

[24] I have compared the withheld portions of records in this appeal with those at issue in Appeal MA11-32, and find that these records, including the portions that are withheld, are the same records. In addition, the TCHC has claimed the same exemptions for the withheld records in both of these appeals. Because these records and the exemptions claimed for them are being addressed in the context of Appeal MA11-32 by another adjudicator, I will not review them in the current appeal.

Request E6

[25] With respect to item E6, this request is for the job description of a named Operating Unit Manager for an identified unit (Unit "K"). The TCHC's response to this same request in its May 3, 2011 letter indicates that this specific item was already requested by the appellant in another request to the TCHC, and the TCHC refers to its earlier request number. I note that this earlier request was also appealed by the appellant, and that issues regarding the responsive record, including the search issues, are addressed in the order resulting from that appeal (Order MO-2770). Because this issue is addressed in that order, I will not review this issue in the current appeal.

[26] As a result of my findings on these preliminary issues, the only issue remaining in this appeal is whether the searches conducted for records responsive to items B6, C8 and C7 were reasonable, and I will review that issue below as it relates to those three items.

Did the TCHC conduct a reasonable search for records?

[27] 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.

[28] A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). 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 one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

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

[30] 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.

[31] 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.

Representations and findings

[32] The TCHC takes the position that it has made all reasonable efforts to obtain the documents requested by the appellant. It refers to its representations provided in appeal MA11-165-2, and then states:

For each of the requested records, TCHC assigned one of its paralegals, [a named paralegal], to coordinate the search efforts. [The named paralegal] is experienced with the appellant's request and claims, having handled all of the appellant's previous MFIPPA requests. She is also knowledgeable about TCHC's responsibilities under MFIPPA and is responsible for a number of MFIPPA files and duties. As such, she is cognizant of the duty to conduct a reasonable search for records.

In response to the appellant's request, [the named paralegal] contacted all relevant staff to request all documents related to the appellant (not just the document requested by the appellant with respect to the FOI request). She went through these documents, as well as the appellant's tenant file and litigation files to respond to the appellant's request.

A testament to [the named paralegal's] considerable efforts is the hundreds of pages of records that have been provided to the appellant as part of this and other ... requests.

[33] The TCHC also refers to the results of the searches for each of the items remaining at issue in this appeal, and then states:

Aside from what was provided to the appellant in her previous ... request[s], [the named paralegal] was not able to find any other relevant documents.

It should also be stated that the appellant's main argument is that certain records should exist, but has not provided a reasonable basis for concluding that the records do exist. The onus is on the appellant to provide a reasonable basis for concluding that the records do exist, and we respectfully submit that the appellant has not provided the requisite proof to show that there is a reasonable basis to conclude the records exist.

[34] The TCHC then provides specific representations on each of the requested items remaining at issue. The appellant also addresses each of these items, and I will review each of them in turn.

Request B6: records relating to imposing the market rent for a 1-bedroom apartment at [a named apartment complex] in 2009 and 2010

[35] The TCHC's representations on this item state:

With respect to the records related to imposing the market rent for a 1-bedroom apartment at a named address in 2009 and 2010, [the named paralegal] spoke to the individual responsible for setting the rent for market rent units, who stated that there are no documents responsive to the appellant's request. [The named paralegal] was advised that there are no meetings or memos related to the setting of market rent.

[36] In response, the appellant identifies three concerns she has with the position taken by the TCHC. First, she states that there "is no document B6 in [the request resulting in this appeal]." She then suggests that the TCHC's response could be related to similar requests made by her, namely requests D1, D2 and D3. The appellant also states that her unit is not a market rent unit, but a Rent-Geared-to-Income (RGI) unit, and that the named paralegal therefore spoke with the wrong individual in conducting the search. Lastly, the appellant states that additional documentation is needed relating to the rental decision regarding her rent.

[37] I have carefully examined the request in B6, and the requests in D1, D2 and D3. On my review of the original request resulting in this appeal, there is no request B6; however, it is clear that request B6 was incorporated into this appeal at a later stage in the process, and issues regarding the search for records responsive to this request were clearly identified in the Mediator's Report. Accordingly, I find that the issue of the search for records responsive to request B6 is at issue in this appeal.

[38] After reviewing the representations of the parties, and in the absence of representations from the appellant specific to request B6, I am satisfied that the searches conducted by the TCHC for records relating to imposing the market rent for a 1-bedroom apartment at a named apartment complex in 2009 and 2010 were reasonable. The TCHC has indicated that it contacted the individual responsible for setting the rent for market rent units, and confirmed that no responsive records exist. The appellant refers to requests D1, D2 and D3; however, these requests are different in nature than request B6, and relate specifically to the setting of her rent, not the more general information requested in B6. Furthermore, I note that requests D1 and D2 are not at issue in this appeal, and that I addressed request D3 in Order MO-2739.

[39] Accordingly, 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.

Request C8: records relating to signature page of Resident Lease Expiration

[40] In its representations the TCHC states:

With respect to the records relating to the signature page of the Resident Lease Expiration [C8], this document was provided to the appellant as per her previous FOI request [resulting in Appeal MA11-32] without any severances. The search did not reveal any other documents with signatures. This is not surprising as these documents do not require signatures.

[41] In response the appellant disputes the statement made by the TCHC that the Lease Expiration List does not require a signature. She states that this "cannot be true" and argues that the truthfulness of this statement should be confirmed by affidavit evidence. In support of her position, she states that the Lease Expiration List is a "very important document," and she reviews the purpose of the Lease Expiration List and the possible consequences if this record were to contain inaccurate information. She also states that "financial documents of this significance cannot be issued without a name, position and signature of the person, who wrote it and who approved it," and identifies which individual, in her opinion, ought to approve the list.

[42] On my review of the representations of the parties, I am satisfied that the searches conducted by the TCHC for records responsive to request C8 were reasonable. The TCHC indicated where it searched for records, and also specifically stated that the Lease Expiration list does not require signatures, and that therefore no responsive records were located. The appellant does not provide representations supporting the position that a responsive record does exist; rather, her position is that the list ought to have a signature on it because of its importance.

[43] 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.

*Request C7: records relating to the pages with signatures of approval of Resident Log
December 1, 2010*

[44] In its representations the TCHC states:

With respect to the records related to the pages with signatures of approval of Resident log December 1, 2010 [C7], this issue is also being addressed [in Appeal MA11-32]. Aside from what was provided to the appellant in her previous FOI request, [the named paralegal] was not able to find any other relevant documents.

[45] In her representations the appellant disputes the TCHC's position that this record is at issue in Appeal MA11-32. She also argues that access decisions relating to that request ought to be addressed in this appeal. The appellant does not appear to dispute the TCHC's position that the pages of the Resident Log with signatures of approval do not exist; rather, she states that she wants an affidavit confirming the nature of the searches.

[46] As indicated above, where the search issue is raised, 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] In the circumstances, based on the evidence of the TCHC and in the absence of any additional evidence from the appellant, I am satisfied that the TCHC's searches for records responsive to request C7 were reasonable.

ORDER:

I uphold the TCHC's search for responsive records, and dismiss this appeal.

Original signed by:
Frank DeVries
Adjudicator

August 10, 2012