Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3078

Appeal MA13-316

City of Toronto

July 28, 2014

Summary: The appellant seeks access to records that record the in-camera sessions in which an agreement with the Toronto Port Authority was discussed. The appellant claims that the city did not conduct a reasonable search for responsive records. This order finds that the city conducted a reasonable search and the appeal is dismissed.

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 City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> A detailed transcript or DVD of the in camera sessions preceding the Nov 30-Dec 4, 2009 council meeting, pertaining to the macro-agreement with the [Toronto] Port Authority. Of particular interest would be all discussions pertaining to the real estate portion of the deal, long since completed.

[2] After searching for responsive records, the city issued a decision letter to the requester, advising him as follows:

> The search by staff of Secretariat has found no records that respond to your request, and they advise that the in-camera portion of the City Council meetings is not recorded, and consequently there are no DVDs or transcripts available. Access cannot be granted, as no such record exists.

[3] Upon receipt of the city's decision letter, the requester submitted a clarified request, which reads as follows:

> … a detailed record of the resolutions, decisions and proceedings, as per the wording of the Ontario *Municipal Act*, Section 239 pertaining to regulations governing such closed meetings, for the in-camera sessions preceding the November 30, 2009 to December 4, 2009 Council Meetings pertaining to the macro-agreement with the Port Authority, of particular interest being all discussions pertaining to the real estate portion of the deal, long since completed.

[4] The city then issued a revised decision to the requester, advising him that:

> The further search by staff of Secretariat has found a rather significant amount of responsive records routinely available on the City's website relating to your request, and you can find these records at the following links [the titles and web links for four records].
>
> Section 6(1)(b) of [the *Act*] has been relied upon to deny access in full to two pages of records found by staff of Secretariat, as they relate to the substance of deliberations of a closed (in-camera) meeting of City Council held between November 30, 2009 and December 7, 2009.

[5] The requester, now the appellant, appealed the city's decision, claiming that it is in the public interest that all records documenting the in-camera sessions relating to the Toronto Port Authority macro-agreement be released.

[6] During mediation, the appellant informed the mediator that he was aware of a closed-session meeting that took place between November 30 and December 7, 2009 to discuss the macro-agreement with the Toronto Port Authority. The appellant stated that he believed that the meeting was approximately 90 minutes long and was concerned that the city located only two pages of responsive records, thereby raising the issue of the reasonableness of the city's search.

[7] After discussions with the mediator, the city issued a revised decision to the appellant, granting him access to the records previously withheld pursuant to section 6(1)(b) of the *Act*. Accordingly, these records and the application of the exemption in section 6(1)(b) are no longer at issue.

[8] Upon review of the records, the appellant advised the mediator that he believes that the macro-agreement with the Toronto Port Authority was discussed by city councilors at the closed session meeting. The appellant stressed that the agreement involved millions of dollars and that more records should exist that document the discussions at the closed meetings.

[9] In response, the city advised the mediator that the closed-meeting session may have included discussions about issues other than the macro-agreement. The city advised that the other pages of the closed session meeting notes do not relate to the appellant's request and that it provided the appellant with all responsive records, including the links to the records that are posted on its website.

[10] Because mediation did not resolve all of the issues in this appeal, the matter was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry.

[11] I began my inquiry by inviting the appellant to make representations in response to issues set out in a Notice of Inquiry. The appellant submitted representations. I then invited the city to make representations in response to the issues raised in the Notice of Inquiry and the appellant's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction* 7. The city also submitted representations.

[12] In this decision, I uphold the city's search as reasonable and dismiss the appeal.

DISCUSSION:

Did the institution conduct a reasonable search for records?

[13] 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.

[14] 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

[1] Orders P-85, P-221 and PO-1954-I.

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]

[15] 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]

[16] 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]

[17] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist.[6]

[18] 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]

[19] The appellant submits that the city did not conduct a reasonable search for responsive records. The appellant submits that the city's initial response, in which it stated that no responsive records exist, clearly indicates a lack of reasonable effort as records were located after he amended his request. The appellant submits that the city's second response demonstrates that staff put very little effort into locating relevant and publicly available records on its own website in response to his original request. The appellant states that he has reviewed the documents available online and submits that the information available through that source is inadequate.

[20] The appellant submits that the city's initial decision to deny access to two pages of records demonstrates that the city is not committed to being open and transparent. The appellant states that, at the time of the request, the agreements that represent the subject of his request had long since been completed, so there was no reason to keep the details of these meetings secret. While the appellant appreciates that the two pages were eventually released, he feels that there should be more responsive records.

[21] The appellant submits that the agreement with the Toronto Port Authority was a major priority item for the city. However, the appellant states that it appears that nothing of substance related to the deal was discussed in open council. The appellant

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[2] Orders P-624 and PO-259.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.
[7] Order MO-2213.

submits that it is extremely strange that only two pages of responsive records were located for a 90 minute in-camera session, even if the macro-agreement was not the only matter discussed during the meeting. The appellant also submits that it is unusual that not one of the 45 members of a "very divided council" had questions for city staff about the agreement and the potential liabilities.

[22] In addition, the appellant makes a number of submissions with regard to potential wrong-doing on the part of the city and its disregard for the law, specifically section 239 of the *Municipal Act*. The appellant states that he cannot know specifically what records the city has or whether it has destroyed relevant documents. However, the appellant submits that "the pattern of stonewalling and obfuscation on this and related requests is troubling". The appellant also alleges that the city staff in charge of withholding or releasing the records may also be the individuals who could be affected by the potential disclosure of the records. In any case, the appellant submits that, if additional records do not exist, the city has broken the law by failing to properly record the in-camera session or by destroying the records.

[23] In response to the appellant's submissions, the city submits that the appellant has made a number of serious and unsupported allegations of wrongdoing on the part of the city. The city submits that while the appellant claims that the non-existence of additional responsive records was the result of corruption or a violation of the city's legal obligations, he did not provide support for these allegations other than his own interpretation of the city's legal obligations.

[24] The city submits that it conducted a reasonable search for responsive records, and submits that the original request appeared to seek access to copies of an audio or video recording, transcript or other similar type of "recording" of specific in-camera portions of City Council meetings. Upon receipt of the request, the city states that staff from Secretariat, City Clerk's Office, searched for the requested records and advised the Access and Privacy Officer that "the in-camera portion of City Council meetings are not recorded, so staff are unable to provide any DVDs or transcripts of the in-camera sessions". The city states that while it does produce audio recordings, video recordings, and transcripts of "open" sessions of meetings of City Council, and committees of council, it does not produce similar documents for the in-camera portions of such meetings.

[25] The city notes that the audio/video recordings of "open" portions of City Council and Committee meetings are, in addition to the specific records, prepared by the City Clerk's Office in fulfilment of the City's legislative requirements under the *City of Toronto Act, 2006* (*COTA*) for the City Clerk to record without note or comment all resolutions, decisions and other proceedings at a meeting of City Council. Therefore, the initial decision letter sent to the appellant advised that in-camera portions of City Council meetings are not subject to audio or video recording and, consequently, there are no DVDs or transcripts available.

[26] The city states that the appellant then amended his request for "a detailed record of the resolutions, decisions and proceedings, as per the wording of the Ontario *Municipal Act*, Section 239 pertaining to regulations governing such closed meetings, for the in-camera sessions preceding the November 30, 2009 to December 4, 2009". Upon receipt of the amended request, the city submits that it did not seek further clarification as it was clear that the appellant sought access to a detailed record of the closed meeting sessions. The city notes that section 239 of the *Municipal Act* does not apply to the City of Toronto and, therefore, it does not create records "as per" the *Municipal Act*. In any case, the city states that it interpreted the appellant's request in an expansive, responsive and purposeful way and searched for records that reflect the legislative requirements of section 190 of *COTA*, the equivalent of section 239 of the *Municipal Act*.

[27] The city submits that all searches were conducted by the Manager of Secretariat, City Clerk's Office for documents responsive to the amended request and located a number of documents that the city creates routinely in furtherance of its obligations under section 190 of *COTA*. The city advises that these records are available on its website and provided the appellant with links for those that responded to his request. The city further identified two pages of records that were originally withheld under the exemption in section 6(1)(b). It disclosed these records to the appellant during mediation. The city advises that, given the recent dates of the records request, no records would have been destroyed in accordance with approved retention schedules.

[28] With regard to the search, the city states that it is the appellant's position that the only two options for the lack of audio or video recordings of the in-camera meeting are either "significant corruption" or violation of the city's legal obligations. However, the city submits that the appellant's interpretation of the city's legal requirements is incorrect. The city states that it documents all proceedings of open and closed portions of City Council meetings as required by section 190 of *COTA* by creating the minutes. While section 190 of *COTA* does not prevent video or audio recording of meetings, the city submits that it does not require such recordings. The city states that the written minutes were prepared by the City Clerk's office in accordance with its obligations under section 190 of *COTA*. The city further states that while open portions of City Council meetings are the subject of video recording, closed or in-camera portions are not. The city submits that the current appeal appears to be solely based on the appellant's assumption that in-camera portions of the meetings would also be audio or video recorded. The city submits that the appellant's unsupported opinion as to an interpretation of legislation cannot establish the necessary reasonable basis required for a finding that the city did not conduct a reasonable search for records.

[29] With regard to the appellant's concern that a 90 minute in-camera session produced only a two page record, the city submits that City Council considered a number of matters in the 90 minute in-camera session. The city states that it informed

the appellant that a larger document exists with respect to the entire 90 minute in-camera session and that the entire document does not relate to the subject matter of his request. The city states that while a larger document dealing with the entirety of the in-camera exists, the other pages of the record relating to the in-camera portion of the meeting did not relate to the appellant's request. The city submits that there was only two pages of notes taken with respect to the 90 minute in-camera session which relate to the subject matter of the appellant's request.

[30] With regard to the appellant's concern that not one of the 45 members of City Council had questions about the agreement, the city notes that the documents disclosed to the appellant show that this is not the case. The city submits that the documents disclosed to the appellant report that a member of council did ask questions of city staff during the in-camera session with regard to the agreement. As such, the city submits that the appellant's example of a deficiency in the records produced, upon which he relies on to establish that further documents exist, is incorrect.

[31] Based on my review of the parties' representations, I am satisfied that the city provided sufficient evidence to discharge its responsibility under the *Act* and that it made a reasonable effort to identify and locate records responsive to the appellant's request. I find that the searches were conducted by experienced employees knowledgeable in the subject matter of the request, in accordance with the city's obligations under the *Act*.[8] I find that the city provided me with sufficient evidence to demonstrate that it made a reasonable effort to locate records responsive to the appellant's request. As noted above, the *Act* does not require an institution to prove with absolute certainty that additional records do not exist. Additionally, the institution is not required to go to extraordinary lengths to search for responsive records.

[32] In this case of this appeal, I find that the city interpreted the appellant's requests broadly, in order to locate records responsive to his request. Reviewing the city's representations, I find that they have provided sufficient evidence to demonstrate that they conducted a reasonable search for records and addressed the appellant's outstanding concerns in a satisfactory manner. I agree with the city that the appellant's concerns that there appeared to be little debate over the agreement and the fact that there were only two pages of records relating to the subject matter of the request do not establish a reasonable basis for his belief that additional responsive records should exist.

[33] In conclusion, I am not satisfied that there is a reasonable basis for the appellant's belief that additional records that are responsive to his request should exist. I find that the city's representations to be sufficiently detailed and that it responded to each of the appellant's concerns in a satisfactory manner. With regard to the appellant's allegation that the city has broken the law by failing to properly record the

[8] Order M-909 and PO-1744.

in-camera session or by destroying the records, there is no evidence before me that the city failed to properly record the in-camera session in accordance with some statutory obligation or that it destroyed responsive records. Furthermore, I do not agree with the appellant's allegation that the fact that the city did not locate responsive records in response to his original request, but located records in response to his amended request, demonstrates it did not conduct a reasonable search. I note that the appellant's amended request was significantly broader than his original request, which, as the city submits, would explain why records responsive to the amended request were located. I also note that a consideration of whether the city has met its legal obligations under the *COTA* with regard to closed meetings is neither within my jurisdiction nor is it within the scope of this appeal. The only issue before me is whether the city conducted a reasonable search for responsive records. Reviewing the appellant's submissions, I find that he has not demonstrated that there is a reasonable basis for his belief that additional records exist. Moreover, in light of the city's detailed submissions regarding the nature and extent of the searches conducted, as well as its submissions that address the appellant's concerns, I am satisfied that the city's searches were reasonable.

ORDER:

I uphold the city's search as reasonable and dismiss the appeal.

Original signed by: July 28, 2014
Justine Wai
Adjudicator