Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3187

Appeal MA14-45

City of Toronto

April 28, 2015

Summary: The appellant made a request to the City of Toronto (the city) for records relating to a named tennis club during a specified time period, including records generated during a meeting between the appellant and identified city staff held on a particular date. The city granted partial access to the requested records, with the exception of records relating to the meeting, which the city advised do not exist. By the end of the mediation stage, the sole issue in the appeal was the reasonableness of the city's search for records relating to a September 18, 2012 meeting between two city employees and the appellant. In this order, the adjudicator upholds the city's search for records and dismisses the appeal.

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 made a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) that read as follows:

> - Request for any records, notes, e-mail, letters and all communications between managers and employees of P, F & R [Parks, Forestry & Recreation division] with outside parties from 1 June, 2013 to December 15, 2013, regarding [a named tennis club].

- Request for any records, notes, e-mail, letters and all communications between all employees of P, F & R, regarding [the tennis club] from June 1, 2013 to December 15, 2013.

- Request for any records including notes, e-mails, minutes taken at September 20th, 2012 meeting between [two named division employees] and Director of Operations of [the tennis club] [name of appellant] (executive member).

- Request for any records, notes about [the tennis club] generated between P, F & R managers and any outside party as a result of the Sept. 20th, 2012 meeting.

- Any notes between P, F & R managers regarding Sept. 20th, 2012, meeting.

[2] The city located responsive records and granted partial access to them, relying on the mandatory exemptions at sections 10 (third party information) and 14 (personal privacy) of the *Act* to deny access to the withheld portions.

[3] In respect of records relating to a September 20, 2012 meeting, the city stated that Parks, Forestry & Recreation division staff reported that the meeting had been held on October 15, 2012, and that minutes had not been taken at this meeting.

[4] The appellant sent the city a written response to its decision. Among other things, he clarified that the meeting had been held on September 18, 2012.

[5] In light of this, the city conducted a second search for records relating to a meeting held on or around September 18, 2012. The city issued a second decision letter to the appellant setting out the results of this search:

> In our January 20, 2014 decision letter Parks Forestry & Recreation Division staff had erroneously identified the meeting as having taken place on October 15, 2012. They have now confirmed that the meeting took place on September 18, 2012 at [identified time and place] and that no responsive records have been located.
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> No minutes were taken, thus no responsive records have been found. Access therefore cannot be granted to these records, as they do not exist.

[6] The appellant appealed the city's decisions to this office on the basis that records relating to the September 18, 2012 meeting ought to exist. During the mediation stage of the appeal process, the appellant confirmed he does not challenge the city's application of sections 10 and 14 to withhold portions of the records disclosed to him.

As a result, the only issue in this appeal is the reasonableness of the city's search for records relating to the September 18, 2012 meeting.

[7] In support of his position that such records ought to exist, the appellant explained that he had attended the meeting, and said he witnessed the city division staff named in his request taking notes at the meeting. The appellant also reported that he had asked one of the staff members to send him a copy of the meeting notes, and that this individual had agreed, but failed to do so. For these reasons, the appellant challenges the adequacy of the city's search for records relating to this meeting.

[8] The mediator conveyed the appellant's comments to the city. The city conducted a third search for records relating to the meeting, but again located no records.

[9] As no further mediation was possible, the appeal was transferred to the adjudication stage for a written inquiry under the *Act*. The adjudicator previously assigned to this appeal sought and received representations from the city and the appellant. The city's representations were shared with the appellant in accordance with this office's *Practice Direction Number 7* and section 7 of its *Code of Procedure*.

[10] The appeal was then transferred to me to complete the inquiry. For the reasons that follow, I uphold the reasonableness of the city's search for records, and I dismiss the appeal.

DISCUSSION:

[11] The sole issue in this appeal is whether the city 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 city's decision. If I am not satisfied, I may order further searches.

[12] The *Act* does not require an 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]

[13] 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]

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[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.

[14] The city was asked to provide evidence, by way of affidavit, of all steps taken in response to the appellant's request, including details of its searches for records. The city's submissions include affidavits from six city employees, including the two division staff named in the appellant's request. One of the named staff is a supervisor and the other is a programmer for the Community Recreation Branch for a particular district within the city's Parks, Forestry & Recreation division. The other affiants are: the manager of the Community Recreation Branch for the district; the Director of Management Services for the Parks, Forestry & Recreation division; the administrative assistant to the Director; and the manager of the city's Access and Privacy Unit.

[15] The city's evidence indicates that in response to the appellant's request, it conducted three searches for records relating to a meeting involving the appellant and the two named division staff. The city initially searched for records related to a September 20, 2012 meeting, based on the inaccurate date supplied by the appellant in his request, and in its first decision letter itself mistakenly identified the meeting as having taken place on October 15, 2012. The city subsequently remedied both errors by conducting a second search for records relating to a meeting held on the correct date, September 18, 2012, or thereabouts, and it issued a second decision letter reporting on the results of its second search. The city conducted a third search during the course of mediation, but again found no responsive records.

[16] The affidavits provide details of the steps taken by various city staff in conducting all three searches. In particular, the evidence indicates that upon receipt of the appellant's request, the manager of the city's Access and Privacy Unit asked the Director of Management Services for the division named in the appellant's request to conduct a search for responsive records. The Director asked her administrative assistant to conduct a search of physical and electronic records in the Director's office. She also asked her assistant to instruct three division staff members, who she reasonably believed may have responsibility for responsive records, to conduct their own searches.

[17] Each of the three staff members provided affidavits outlining three searches of physical and electronic files conducted in response to three separate requests from the Director's administrative assistant. The assistant also provided her own affidavit, describing in detail the three searches she conducted of physical and electronic files in the Director's office, and the three separate communications she made to the three division staff members asking that they conduct searches of their own physical and electronic files. While the first two searches were for any meeting notes and/or minutes of the September 18, 2012 meeting, the third request to staff asked that they search for "any record, no matter the format, which could be considered notes regarding the meeting." In the result, despite three searches, no records relating to the meeting were located.

[18] The four division staff who conducted the searches state they are aware of applicable record retention requirements and that, to the best of their knowledge, there are no records relating to the September 18, 2012 meeting. In addition, the city states it had discussions with division staff in light of the appellant's assertion that these individuals took notes at the meeting, and that one of them promised to send the appellant a copy of these notes. Following these discussions, the city maintains its position that neither staff member took notes at the meeting or promised to send notes to the appellant after the meeting. The city thus submits that the records sought by the appellant do not exist, and that the appellant has not provided a reasonable basis to conclude otherwise.

[19] The appellant's representations are largely devoted to his allegations of fraud and misconduct by members of the tennis club and a number of city officials, which he reports having already made to various investigative agencies. He says that the purpose of the meeting was to present city officials with his evidence of fraud by certain tennis club members. He describes having witnessed both division staff members named in his request taking notes at the meeting, which he indicates lasted at least two hours; he also describes their support at that meeting for taking immediate action based on his evidence.

[20] The appellant draws a connection between the city's failure to act on his allegations in the days and months following the meeting and the city's failure to locate responsive records in this appeal. This is because, he says, the city has an interest in not making public records that would reveal its failure to take appropriate action after having been informed, over two years ago, of widespread fraud within a club that operates out of a city-owned facility. He contends that the two division staff present at the meeting must have hidden or destroyed their meeting records in order to cover up this misconduct by the city. Therefore, he submits that these two individuals have provided affidavits that are false, and that the affidavits from the other city staff are irrelevant, given they describe efforts to locate records that cannot be found.

[21] Having considered the representations of both parties, I am satisfied that the city has conducted a reasonable search for records in the circumstances and has met its obligations under section 17 of the *Act*.

[22] 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.[5] Of the four city staff who conducted searches, two were present at the meeting with the appellant; the other two staff are the manager and the administrative assistant to the Director for the division named in the appellant's request. I accept that these four individuals have the requisite levels of experience and knowledge to locate any responsive records, if they exist. The

[5] Orders M-909, PO-2469 and PO-2592.

remaining two affidavits are from the manager of the city's Access and Privacy Unit and from the Director of Management Services for the relevant division. While the appellant questions the relevance of some of these affidavits, they demonstrate that the city took steps, once it received the appellant's request, to assign responsibility for the conduct of searches to those city employees who senior-level staff reasonably believed would be best placed to locate responsive records.

[23] The appellant's representations mainly summarize his allegations and evidence of fraud by the tennis club, which he says he presented in detail at the September 18, 2012 meeting. He notes that none of the city's affiants describes the purpose of the meeting or what was discussed there. I find these submissions have little bearing on the sole issue in this appeal, which is the reasonableness of the city's search for records responsive to his request. In this inquiry, the city was asked to provide affidavit evidence of the steps taken to search for responsive records; it was not required to address the appellant's evidence of fraud presented at the meeting, or to create fresh records documenting the meeting. I draw no conclusions from the fact the affidavit evidence does not refer to the appellant's presentation at that meeting.

[24] Furthermore, although the appellant has supplied a theory for the failure of the city to locate responsive records, I am not persuaded there is a connection between the city's failure to act on his allegations of fraud and the absence of any records of the meeting. The appellant reports having witnessed two city employees creating the records he seeks, while the city states in its representations that these employees deny having done so. As the appellant has not provided any other evidence to challenge the adequacy of the city's searches, I find there is no reasonable basis to conclude that responsive records exist.

[25] Finally, I recognize the appellant has proposed a number of remedies to resolve this appeal, including the removal of the tennis club executive and an order for an audit of the tennis club and an investigation of city staff. These remedies are not appropriate or available to this office to dispose of an appeal brought under the *Act.* Where an appeal concerns the reasonableness of an institution's search for records, the sole remedy available under the *Act* is an order for further searches. In this appeal, as I accept the city has conducted a reasonable search in accordance with section 17, I uphold its decision that no responsive records exist. As a result, I dismiss the appellant's appeal.

ORDER:

I dismiss this appeal.

Original Signed By: April 28, 2015
Jenny Ryu
Adjudicator