Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3280

Appeal MA15-175

City of Toronto

January 22, 2016

Summary: The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to records relating to a particular property. The city located responsive records and disclosed them to the appellant. The appellant believes that additional responsive records exist. This order finds that the appellant has not provided a reasonable basis for the adjudicator to conclude that additional responsive records exist, and determines that the city's search was reasonable.

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

Orders Considered: Orders MO-2821 and MO-2878.

BACKGROUND:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to records relating to a particular property. Specifically, the request was for "all notes, email, written documentation, memoranda, photographs, recordings, or otherwise", for a specific period of time.

[2] The requester identified four locations where the information he was seeking could be located, namely, in the office of a named city councillor, in the Transportation Services and Toronto 311 divisions of the city, and in the Toronto Police (the police)

record holdings.

[3] The request for records of the police was transferred to that institution; therefore, these records are not at issue in this appeal.

[4] Concerning the records located in the office of the city councillor, and the Transportation Services and Toronto 311 divisions, the city located a number of records and issued a decision granting partial access. The city cited the mandatory personal privacy exemption in section 14(1) of the *Act* to withhold the remainder of the records.

[5] The city subsequently issued a supplementary decision, indicating that additional records had been found by the office of the named city councillor (now a former city councillor), and granting partial access to them, pursuant to section 14(1) of the *Act*. The city further explained that it had relied on section 14(1) to sever the personal information of individuals as the disclosure would constitute an invasion of privacy.

[6] The requester (now the appellant) appealed the city's decisions.

[7] In the course of mediation, the appellant indicated that he believes additional records responsive to the request should exist. The city undertook another search for records but reported that no additional records were located. The appellant later indicated that he continues to believe that additional records exist. As a result, the reasonableness of the city's search remained at issue.

[8] The appellant further indicated that he was not interested in the information withheld by the city pursuant to section 14(1) of the *Act*. Accordingly, section 14(1) and all the records withheld by the city were no longer at issue in this appeal.

[9] The appellant indicated that he wished his file to proceed to the adjudication stage of the appeal process to deal with the reasonableness of the city's search.

[10] Accordingly, this file was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the city and the appellant advising them that I had scheduled an in-person oral inquiry on a specific date at the IPC[1] offices into the reasonableness of the city's search for responsive records.

[11] In the Notice of Inquiry, I advised the parties that they would provide their representations at the oral inquiry. I also advised the parties that if they intended to rely on written documentation at the oral inquiry, they should provide this documentation to me, with a copy to the other party, by no later than one week before the date of the oral inquiry.

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[1] IPC is the Information and Privacy Commissioner, Ontario, Canada.

[12] The oral inquiry did not proceed; however, as detailed below, I received written representations from the parties on the reasonableness of the city's search for additional responsive records.

[13] In this order, I uphold the city's search for responsive records and dismiss the appeal.

DISCUSSION:

[14] As indicated above, I sent a Notice of Inquiry to the parties, advising them of the date of the scheduled oral inquiry. The Notice of Inquiry also set out the nature of the issues in dispute and the tests I would be applying in conducting the inquiry. In addition, the Notice of Inquiry set out the questions I was inviting the city to address.

[15] After receipt of the Notice of Inquiry, the appellant advised that he would not attend the oral inquiry, nor, as requested, did he provide any alternative dates that he would be available to attend the oral inquiry.

[16] In response, the appellant was informed that:

> …The IPC Adjudicator has reviewed your email and reiterates that if you do not attend the hearing, then she will make her decision based on the oral submissions of the City provided at the hearing and any written documentation the City provides one week before the hearing.
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> Although you provided various documentation to the Mediator during the earlier mediation stage, this oral hearing is a new step in the appeal process in which the IPC Adjudicator is deciding a specific issue. If you want the Adjudicator to rely on any evidence that supports your position that additional records responsive to your request exist, the Adjudicator advises that you need to follow the procedure outlined in the Notice of Inquiry (NOI) you received and *Practice Direction 8* (attached). For example, page 4 of the NOI states: "the appellant will be asked to inform the Adjudicator of any details you are aware of concerning records which have not been located, or any other information to indicate that the search carried out by the City of Toronto was not reasonable."
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> The Adjudicator indicates that, if participating in the process, you should provide that specific documentation one week before the hearing and attend the hearing to provide oral testimony regarding what additional records exist in response to your request which you do not already have. Accordingly, would you kindly consider and confirm again whether you will

> attend the hearing on [date]? And if not attending, confirm whether you want to continue or withdraw your appeal?

[17] In reply, the appellant stated that he wished to continue with the appeal and provided the following written submissions to support his position that additional responsive records exist:

> I am in possession of a multitude of telephone notes as well as emails with [named former city councillor's] office dated [31 emails dated between September 2009 and October 2014].
>
> In many of these phone calls and emails, reference is also made to communications and emails made between [named former city councillor's] office with Transportation Services, By-Law Departments, Toronto Police, 311, Animal Services.
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> Why have these specific documents (and potentially others) not been provided?

[18] The appellant was then advised that I would inform the city that he would not attend the oral inquiry but still wished the hearing to proceed and that he relied on these three paragraphs in support of his position that additional responsive records exist.

[19] The appellant was also advised that following the hearing in his absence, I would issue an order on whether the city's search was reasonable and he would receive a copy of this order. The appellant was provided with a deadline to provide me with a copy of the 31 emails highlighting those portions that contained references to additional communications.

[20] The city was then provided with a copy of the three paragraphs from the appellant and was advised that the appellant would not be attending the oral inquiry. The city then provided the following response:

> First to address the second paragraph of the appellant's notes…, regarding any correspondence to/from By Law Departments, Toronto Police and Animal Services, his request was transferred out in part to Toronto Police Services, so out of scope for both the request and the appeal. The requester did not ask for records from either By Law Department or Animal Services, so again out of scope for both the request and the appeal. The City will not address these items any further.
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> With respect to the [31 emails], the City will re-iterate, these are constituent records that belong to the Councillor and are NOT in the City's custody or control, even if these communications are with the requester

> himself. The Councillor provided what she considered "city business" emails exchanged with Transportation Services as requested. Any other records the Councillor may have, are her personal records, not the City's, as was explained to the appellant on numerous occasions. There are a number of IPC Orders that support this position.
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> 311 is not an operational division. They simply take calls from the public, log the details and forward through their database to the appropriate division for action. 311 has no authority to do anything further with these calls, therefore there would be no reason for the Councillor to have contacted 311 staff. Without having seen the documents …, the City has absolutely no evidence that the Councillor did exchange email with 311 staff.
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> The City has adequately addressed all the issues put forward by [the appellant], and if the appellant is not going to attend the oral inquiry, respectfully, the City sees no point in conducting it. We have nothing further to add. If there are other issues, then the appellant needs to be at the inquiry so the City can hear and address his issues. We ask that the inquiry be re scheduled to a time when the appellant can attend; this is his appeal. The obligation on the requester…is to provide a "reasonable basis for concluding that additional records might exist" (Order MO-3052). So far the appellant has not provided any basis that additional records in the City's custody or control, exist, which is why his attendance at the hearing is necessary.
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> If the IPC determines that inquiry is to go ahead in the absence of the appellant, the City requests copies of all the emails noted below, along with a statement of the issues to be addressed…

[21] In its response, the city also addressed the issue as to whether there was a verbal, not written, agreement between it and the appellant concerning the property referred to in the request.[2]

[22] I then decided to cancel the oral inquiry and proceed with it in writing, for the following reasons:

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[2] The city attached to its email a copy of an email chain about a verbal agreement concerning the property. The appellant already had been provided with a copy of this email chain by the city.

- the appellant had refused to attend[3] and did not provide the highlighted 31 emails identifying the missing records as requested;[4]

- the city had provided me with specific details of its position in response to the appellant's submissions.

[23] I provided the appellant with the city's response and attachment and asked that he provide me with any response he had to the city's submission by a specific date. I advised the appellant that after that date, I would proceed to issue an order in this appeal, unless I needed further representations from the appellant or the city. The appellant did not provide any further communication.

[24] I, therefore, proceeded with this appeal based on the written information I received from the appellant and the city as outlined above.

Analysis/Findings

[25] 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.[5] 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.

[26] 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.[6] To be responsive, a record must be "reasonably related" to the request.[7]

[27] 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.[8]

[28] 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.[9]

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[3] Nor, as requested, did the appellant provide any alternate available dates in the near future when he would attend an oral inquiry at the IPC office.
[4] The appellant was provided with a deadline to provide these 31 highlighted emails.
[5] Orders P-85, P-221 and PO-1954-I.
[6] Orders P-624 and PO-2559.
[7] Order PO-2554.
[8] Orders M-909, PO-2469 and PO-2592.
[9] Order MO-2185.

[29] 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.[10]

[30] The city has provided the appellant with disclosure of records; however, the appellant believes additional records exist.

[31] The city has relied on the wording of the appellant's request which sought records about his property in three city locations, namely, in the office of a named city councillor and in the Transportation Services and Toronto 311 divisions of the city. The time frame for his request was from 2003 until the date of the request on October 14, 2014.

[32] As outlined above, the appellant's positon is that he has specifically not received records containing further communications between the former city councillor's office with the police and with the Transportation Services, By-Law, 311, and Animal Services departments. He relies on the 31 emails, some of which he asserts contain references to these further communications. He states that the 31 emails, which he did not provide me with a copy of, contain proof of additional responsive records.

[33] The appellant's request did not include records containing communications within the Animal Services and By-law departments of the city. His request was only for records of the city in three locations, the former councillor's office, 311, and Transportation Services Division. Therefore, any records containing communications within the city's Animal Services and By-law departments are outside the scope of his request. As well, although part of the request, I accept the city's uncontested evidence that 311 is not a separate department within the city.

[34] The appellant claims that he has not been provided with the further communications the councillor had, as evidenced by the 31 emails referred to in his submission. I find that without these 31 emails, I cannot ascertain what responsive records within its custody or control have not been located by the city. As stated by the city, not all councillor records are within its custody or control.

[35] In Order MO-2878, Adjudicator Frank DeVries found that records about a specific property that relate to a councillor in his role as an individual constituent representative are not controlled by the city. He found that to the extent that records of this nature may be in the possession of the city because they are located either in hardcopy at the office of the municipal councillor, or electronically on the city's server, such possession amounts to "bare possession" and that, for the purposes of the *Act* in these circumstances, the records are not in the custody of the city.

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[10] Order MO-2246.

[36] Adjudicator DeVries relied on the findings of former Senior Adjudicator Sherry Liang in Order MO-2821, where she considered the nature of the records that are held by municipal councillors as follows:

> … prior decisions of this office have found councillors' constituency records to be excluded from the *Act*…
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> Although the distinction between "constituency records" and "city records" is one framework for determining custody or control issues, it does not fully address the activities of municipal councillors as elected representatives or, as described in *St. Elizabeth Home Society*,[11]…"legislative officers." Records held by councillors may well include "constituency records" in the sense of having to do with an issue relating to a constituent. But they may also include communications with persons or organizations, including other councillors, about matters that do not relate specifically to issues in a councillor's ward and that arise more generally out of a councillor's activities as an elected representative.
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> The councillors have described such records as "personal" records but it may also be appropriate to call them "political" records. In any event, it is consistent with the scheme and purposes of the *Act*, and its provincial equivalent, that such records are not generally subject to access requests. In *National Defence*,[12] the Court stated that the "policy rationale for excluding the Minister's office altogether from the definition of "government institution" can be found in the need for a private space to allow for the full and frank discussion of issues" and agreed with the submission that "[i]t is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records" that Parliament sought to protect by not extending the right of access to the Minister's office.[13]
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> The policy rationale applies with arguably greater force in the case of councillors who, unlike Ministers, do not have responsibility for a government department and are more like MPP's or MP's without a portfolio. A conclusion that political records of councillors (subject to a finding of custody or control on the basis of specific facts) are not covered by the *Act* does not detract from the goals of the *Act*. A finding that the city, as an institution covered by the *Act*, is not synonymous with its

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[11] *St. Elizabeth Home Society v. Hamilton (City)* (2005), 148 A.C.W.S. (3d) 497 (Ont. Sup. Ct.).
[12] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.
[13] *National Defence*, cited above, paragraph 41.

> elected representatives, is consistent with the nature and structure of the political process. In arriving at this result, I acknowledge that there is also a public interest in the activities of elected representatives, and my determinations do not affect other transparency or accountability mechanisms available with respect to those activities.

[37] I adopt these findings in Orders MO-2821 and Order MO-2878 that records related a councillor in his role as an individual constituent representative are not controlled by the city. As the appellant has not provided me with a copy of the 31 emails, I cannot ascertain whether the communications at issue in these emails concern "constituency records" that are not in the city's custody or control as opposed to "city records", which are in its custody or control.

[38] I find the appellant by failing to provide the evidence he refers to in his material, has not provided a reasonable basis for concluding that additional responsive records in the city's custody or control exist.[14] I find that the city has conducted a reasonable search for responsive records as required by section 17; therefore, I uphold its search and dismiss the appeal.

ORDER:

I uphold the city's search for responsive records and dismiss the appeal.

Original Signed by: January 22, 2016
Diane Smith
Adjudicator

[14] Order MO-2246.