

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3322

Appeal MA13-612

City of Ottawa

June 17, 2016

**Summary:** The city received a request for records relating to toxic mould found at identified premises. The city located records responsive to the request and granted partial access to them. The sole issue on appeal is whether the city conducted a reasonable search for records responsive to the request. In this order, the adjudicator upholds the city's search 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 City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information from the Health Department and Property Standards. The requester stated:

I am seeking communications with respect to the documented health hazard of toxic mould at [specified address] Ottawa, Ontario, from May 2012 until the current time. I am interested in the communications re: [unit number], the adjoining hydro room, and the contaminated shaft for the closet in [unit number], up to the next story, 2nd floor laundry room.

I do not need communications written to me or written by me.

1. The communications I am seeking include **emails, reports, notes, letters, records of phone calls, diagrams:**

- All communications authored by, or received by City Inspectors:
  - Property standards: Inspector [named individual]
  - Health Department: Inspector [named individual]
- All communications between the City and [a named organization]. This includes, but is not limited to, records of phone calls and visits with [named organization's] management, and a letter authored by [named individual] in August 2012.
- Follow-ups re: the mould abatement and closing off of the former back bedroom of [unit number]. Any diagrams of the former back bedroom of [unit number] being partitioned away from former [apartment].

2. [Named organization's] application to Property Standards to extend the time within which to comply with the City Order to make the premises habitable.

[2] The city located a number of responsive records and granted access to them, in part, withholding portions that contain the personal information of other individuals under the mandatory personal privacy exemption at section 14(1), read in conjunction with the presumption at section 14(3)(d) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision.

[4] During mediation, the appellant advised that she is not appealing the city's decision to withhold portions of the records pursuant to the exemption at section 14(1) of the *Act* however, she believes that additional records responsive to her request ought to exist. It is her position that the following records should exist:

1. Engineering Report – The appellant believes that an engineering report assessing the structural soundness of framing supports of an identified unit number and a utility room at the address identified in the request exists. She submits that the report should be a follow-up to the Building Permit dated November 6, 2012.
2. Application to the Property Standards Appeal Board – the appellant states that part of the responsive records provided to her include an email that stated a fee was paid for this application but there is no copy of the application itself.
3. Letters from the Executive Director, of the previously named organization, to a named Bylaw Enforcement Officer – The appellant states that the Bylaw

Enforcement Officer informed her of the letter or email. She identifies that the letter would be dated between September 2012 and November 22, 2012.

4. Health Inspector's Report – The appellant believes that the Health Inspector conducted an investigation prior to the Bylaw Enforcement Officer. She acknowledges that there may not be a formal report however, she submits that in the audio recording from the Property Standards Board hearing a lawyer referred to notes of the Health Inspector.
5. Additional notes of the Bylaw Enforcement Officer – The appellant believes that correspondence between the Bylaw Enforcement Officer's office and the previously named organization, as well as notes concerning other tenants and fire hazard issues should exist.

[5] The city conducted an additional search for the specific records identified by the appellant during mediation. No additional records were located.

[6] The appellant advised that she wishes to pursue the appeal on the basis that additional records should exist. Accordingly, the issue to be determined in this appeal is whether the city has conducted a reasonable search for responsive records.

[7] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought and received representations from the city and the appellant which were shared in accordance with this office's *Practice Direction Number 7* and its *Code of Procedure*.

[8] For the reasons that follow, I find that the city's efforts to locate records containing the information sought by the appellant were reasonable and I uphold its search. As a result, I dismiss the appeal.

## **DISCUSSION:**

[9] The sole issue to be decided in this appeal is whether the city has conducted a reasonable search for records responsive to the request.

[10] 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.<sup>1</sup> 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. 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.<sup>2</sup> To be responsive, a record

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

<sup>2</sup> Orders P-624 and PO-2559.

must be “reasonably related” to the request.<sup>3</sup>

[11] 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.<sup>4</sup> 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.<sup>5</sup>

[12] 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.<sup>6</sup>

### **Representations**

[13] The city takes the position that it conducted a reasonable search for records responsive to the appellant’s request. In support of its position, the city enclosed with its representations an affidavit sworn by the analyst at the Access to Information and Privacy Office who coordinated the search. In that affidavit, the analyst affirms that, based on the wording of the request, she determined that the responsive records would be in the custody or the control of the city’s Bylaw and Regulatory Services Branch of the Emergency and Protective Services Department and the Ottawa Public Health Department. The analyst affirms that she conducted a thorough search of the two departments and returned to each department on more than one occasion to ensure that all responsive records were retrieved.

[14] The analyst further affirms that as a result of discussions that were held during mediation, she conducted an additional search for responsive records held in the Building Code Services Branch of the City Planning Department. The analyst affirms that once the appellant identified five particular records that she believed should exist, she focused the search on those particular records and some additional records were located. Those records were disclosed to the appellant, in part, with a supplementary decision.

[15] The analyst explains that in addition to relying on the specific contact whose role it is to retrieve responsive records from each of the relevant departments or branches of the city, she ensured that knowledgeable operational staff were contacted and involved, including the Program Manager at the Building Code Services Branch and the Public Health Inspector.

[16] At the conclusion of its representations, the city submits that under the *Act*, it is not required to prove with absolute certainty that further records do not exist and that both its initial searches, as well as the subsequent steps taken to identify and retrieve additional records, were reasonable. The city also submits that it is possible that some

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<sup>3</sup> Order PO-2554.

<sup>4</sup> Orders M-909, PO-2469 and PO-2592.

<sup>5</sup> Order MO-2185.

<sup>6</sup> Order MO-2246.

of the detailed information sought by the appellant has either not been retained as a record by the city and/or is within the custody or control of another entity, such as the appellant's landlord.

[17] The appellant submits that it is her belief that the documents that she seeks are "housed in a different department than [she] assumed" and provides a suggested location where the city might find an engineer's report. She also mentions that it is her belief that an individual who is identified by name in the records that were disclosed to her was the Building Inspector at the time.

[18] In support of her position that additional records should exist she submits:

On the Floorplan portion of the attachment, there are handwritten notes referring to "potential fire when drywall is being replaced." And "Shall not be left without a fire watch. Framing shall not be replaced nor removed without the Engineer's approval and report to City Inspector." The page in the attachment entitled "Construction Notes" states at the bottom, "if framing is damaged beyond remediation, work is to cease and an engineer is to be brought in to assess and determine if any affected elements are structural."

The contaminated portion could not be remediated. The framing was removed between the hydroelectric room and the bedroom. That entire area was severed from what was formerly Unit 6. That is, there was significant structural work that required involvement from both the Engineer and the City Inspector. The matter would have required documents for the Engineer's Approval, the Engineer's Report, and whatever documentation the Building Inspector made.

[19] The appellant submits that she seeks access to any and all such documents.

[20] In reply, the city submits that it continues to take the position that the searches that it conducted for records responsive to the request, as set out in the analyst's affidavit attached to its original representations, were reasonable.

[21] In response to the issues raised by the appellant in her representations, the analyst conducted a further search for responsive records to ensure that the City Building Code Services Branch did not have any additional records in their custody or control. The city explains that officials in the Building Code Services Branch receive building permit applications and related documentation, and issue the required permits. It submits that, "[a]s with other municipalities, permit related documentation varies depending on the file, and on occasion files include documents produced by engineers."

[22] The city provided a supplementary affidavit detailing the analyst's additional search. She affirms that she contacted the Building Inspector identified in the appellant's representations in order to obtain clarification with respect to the portion of the appellant's representations that suggest the possible existence of an assessment by

an engineer. The analyst states that she contacted that particular Building Inspector not only because he was named by the appellant in her representations but also because he is the building official identified on the building permit as the Building and Mechanical Inspector.

[23] The analyst states that she spoke directly to the Building Inspector who stated that he suspects that the two documents referred to by the appellant in her representations were submitted by the owner of the building in order to obtain a building permit. She states that he explained that it is the owner's responsibility to retain an engineer and therefore, if there was ever an engineer report produced, it may be in the possession of the owner and not the city. He further explained that he considers the building permit to be still active and that, to date, no further inspection has been requested nor has an inspection been conducted by a building inspector.

[24] The analyst further states that she contacted the Building Technical Clerk in the Building Services Branch to confirm whether there were additional engineering documents contained in the building permit file. A scanned version of the complete building permit file was provided to the analyst, who confirmed that there were no engineering records such as approvals, letters or reports in the file. The analyst affirms that the only records in the file were the two pages that were enclosed with the city's supplementary decision letter to the appellant sent at an earlier stage of the appeal.

[25] In sur-reply, the appellant responds that the Health Inspector identified in her original request indicated that a report would be produced. The appellant states however, that she does not know if a report was ever produced in the end.

### **Analysis and finding**

[26] Having carefully reviewed the representations of the parties, I am satisfied that the search conducted by the city for records responsive to the appellant's request was reasonable and is in compliance with its obligations under the *Act*.

[27] As previously explained, 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 that are reasonably related to the request. In the circumstances of this appeal, I find that the city has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and to locate responsive records within its custody or control. The city conducted a number of searches for records responsive to the request in a number of different locations. I accept that these searches were coordinated by the analyst, in association with other individuals knowledgeable in the subject matter of the request. I also accept that all individuals involved expended a reasonable effort to locate responsive records.

[28] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, she must still provide a reasonable basis for concluding that such records exist. While I acknowledge that the appellant believes that additional records exist, in my view, she has not provided a

reasonable basis to explain her belief, in light of the efforts taken by the city to locate such records. Despite the appellant's expectation that additional documents should exist, the issue before me is not whether records ought to exist or should have been created, but whether the city's search for responsive records was reasonable. On my review of the evidence and the explanations provided by the city, I accept that it was.

[29] I am satisfied that the city has discharged its onus and has demonstrated that it has conducted a reasonable search in compliance with its obligations under the *Act*. Accordingly, I uphold the city's search for records responsive to the appellant's request and dismiss the appeal.

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_ June 17, 2016