

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3532-F

Appeal MA16-83

The Corporation of the City of Oshawa

November 29, 2017

Summary: The appellant made a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the materials contained on the F: drive of a city computer provided to a named investigator retained by the city. The city issued a decision stating that it has no records that respond to the request. The appellant appealed, claiming that the city had not conducted a reasonable search for records. In Interim Order MO-3493-I, the adjudicator ordered the city to conduct a further search for records. The city conducted a further search. In this order, the adjudicator upholds the reasonableness of the city's search.

BACKGROUND:

[1] The appellant submitted a request to the City of Oshawa (the city) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All materials contained on the F drive of the city owned computer provided

to [a named investigator] during his investigation of [a particular matter].

[2] The city issued a decision stating that it has no available records which respond to the request. The appellant appealed the city's decision to this office.

[3] In Interim Order MO-3493-I, I found that the city had not conducted a

reasonable search for records and I ordered it to conduct a further search. Specifically, I stated the following:

The city provided some information to the effect that the F: drive was never accessed or used by the investigator. While this is useful background information, I note that the appellant's request was for all materials on the F: drive. His request was not restricted to records on the F: drive that the investigator accessed or used.

According to the [city's Records and Information Analyst's] affidavit, she asked the city's IT branch for all records responsive to the appellant's request, and the IT branch advised her that it had no relevant records in its possession.

In my view, experienced personnel in the IT branch would be expected to be knowledgeable in the subject matter of the request, since the request was for records on a computer drive. However, nowhere in the analyst's affidavit does it state the experience or qualifications of the individual or individuals in the IT branch who informed her that no responsive records exist. More importantly, nowhere does the affidavit state that anyone in the IT branch actually conducted a search and if such a search was, in fact, conducted, who in the IT branch conducted the search and the steps involved in the search. The affidavit simply states that the IT branch advised that it had no responsive records.

In the Reply Notice of Inquiry sent to the city, I specifically asked the city to advise whether the city searched the F: drive. In response, the city referred back to the analyst's affidavit and stated that "therefore, the [IT branch] conducted a search of the F: drive and communicated its results that it had no relevant records". With respect, I do not read the analyst's affidavit as stating that the IT branch did, in fact, conduct a search. The affidavit states only that IT branch advised that it had no responsive records. Moreover, the statement in the city's reply that "the [IT branch] confirmed no records existed on the F: drive" also does not indicate that the IT branch, in fact, searched the F: drive. It is, therefore, not clear that anyone in the IT branch actually conducted a search and if such a search was conducted, I have not been provided with the particulars of the search.

I acknowledge that, from the other evidence provided by the city, it is possible that no records exist. While the appellant points to the city clerk's May 30, 2013 email to the investigator as evidence that documents were placed on the F: drive, the city states that the reference to the F: drive in that email relates to the investigator's email account, not the F: drive. However, the city's explanation on this point lacks detail and is provided third hand, with the analyst having been provided this explanation by the clerk who was in turn informed of it by the IT branch. In any event, I am

not satisfied, based on the information provided to me by the city, that a reasonable search has been conducted. I will, therefore, order the city to carry out a further search for responsive records and to provide information to this office regarding the results of its search.

[4] In Interim Order MO-3493-I, I ordered as follows:

1. I order the city to conduct a further search in response to the appellant's request. The search should be conducted by an experienced individual or individuals in the city's IT branch. I further order the city to provide me with an affidavit sworn by an individual in the IT branch who has direct knowledge of the search, including the following information:

- The name(s) and position(s) of the individual(s) who conducted the search
- The steps taken in conducting the search
- The results of the search
- If no records are located, a detailed explanation for why no records are located, given the contents of the city clerk's May 30, 2013 email.

2. I order the city to provide me with the affidavit by **October 5, 2017**.

3. If the city locates records as a result of its search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

4. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1 and 2 of this order.

[5] The city conducted a further search and provided me with two affidavits outlining the additional search. I provided copies of the affidavits to the appellant and invited additional representations from him. The appellant provided representations in response.

[6] In this order, I uphold the city's further search as reasonable and dismiss the appeal.

DISCUSSION:

[7] The only issue in this appeal is whether the city has conducted a reasonable search for records responsive to the appellant's access request.

The city's affidavits

[8] In accordance with my order in Interim Order MO-3493-I, the city filed two additional affidavits: one sworn by the city's Records Information System Manager for City Clerk Services, and one sworn by the Systems and Security Operations Manager for Information Technology Services (the IT manager).

[9] The affidavits are brief. The IT manager states as follows:

Regarding [the investigator's] account at the City of Oshawa, the account, mailbox, and (F:) drive were terminated upon completion of his work for the City.

There are no tapes which have a copy of his (F:) drive.

[10] The Records Information System Manager's affidavit states:

The records provided to City Clerks Services by the Information Technology Services Department have been reviewed, and there is no way to determine which records were stored on [the investigator's] drive or elsewhere on his City issued computer or drives.

The appellant's representations

[11] The appellant submits that the city has tried to "deny, distract and defer" the existence of the F: drive for two years. He submits that the city initially denied the existence of the F: drive, then suggested that the investigator never accessed the F: drive, and then stated that the reference to documents on the F: drive (in the May 30, 2013 email) was actually a reference to emails. The appellant calls into question the credibility of the information contained in the two new affidavits.

[12] The appellant submits that the IT manager's affidavit fails to provide all of the information stipulated in the first order provision of Interim Order MO-3493-I. He submits that details of the search are lacking. For example, the affidavit does not provide any proof that the F: drive was searched in response to the Interim Order. There is no indication that any backup media have been searched for copies of the data contained on the F: drive.

[13] The appellant takes issue with the city now, after two years, stating that the F: drive has been deleted, without indicating the date of deletion or the individual(s) who deleted the drive, and with no evidence of the approval or instruction to delete it. He submits that proof of an instruction or approval should be provided.

[14] With respect to the affidavit of the Records Information System Manager, the appellant states that this affidavit, too, does not meet the requirements of the Interim Order. The affidavit does not specify the records reviewed, and does not state that this individual conducted a search.

[15] The appellant states that he believes that someone initially instructed the IT branch on what records to load onto the F: drive for the investigator. He submits that some records should exist, possibly from the City Clerk, that instruct IT as to the documents to upload to the F: drive for the investigator. He submits that there is no evidence that the city searched for such a record, and that the assertion that there is no way to determine which records were stored on the investigator's F: drive or elsewhere on his city issued computer or drives is not credible. The appellant submits that while this may be considered to be outside the scope of his original access request, after 2 years of denying, deflecting, and deferring, the city has not attempted to show even a false impression of transparency and willingness to settle this appeal. He submits that even if the materials given to the investigator were provided by hardcopy, city staff should have documented the materials provided to the investigator through the City Clerk.

[16] The appellant notes other recent orders that have required the city to conduct further searches, and suggests that there may be a systemic issue at the city when it comes to access requests and searches. The appellant submits that the two additional affidavits provided by the city do not establish that a reasonable search has been conducted.

[17] Finally, the appellant submits that the city is well known for excessive legal force and financial penalties against citizens, and refers in some detail to other legal proceedings in which the city has been involved.

Analysis and findings

[18] 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 Where an adjudicator is satisfied that the search carried out was reasonable in the circumstances, the institution's decision will be upheld. Otherwise, further searches may be ordered.

[19] 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.² To be responsive, a record must be "reasonably related" to the request.³

[20] 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 A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

effort to identify and locate all of the responsive records within its custody or control.⁵

[21] 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.⁶

[22] The affidavit provided by the IT manager states that the investigator's F: drive was "terminated" upon completion of the investigator's work for the city, and that no tapes exist that contain a copy of the F: drive. I understand this to mean that the F: drive was deleted and that no backup exists. I also understand the affidavit of the Records Information System Manager to mean that there is no other way to determine what the contents of the F: drive were before the F: drive was deleted.

[23] Given this latest information, and without commenting on the propriety of the city having deleted the F: drive with no backup, I am satisfied that the city has made a reasonable effort to identify and locate responsive records. In light of the recent information, I am not satisfied that there is any reasonable basis for concluding that any responsive records exist. While the appellant submits that there is no evidence that the city searched the F: drive, I accept that the city cannot search the F: drive because it no longer exists.⁷

[24] I have also considered the appellant's submission that there should be some records that instruct the IT branch about what documents to upload to the F: drive for the investigator. The appellant submits that there is no evidence that the city searched for such a record, and that the city's assertion that there is no way to determine which records were stored on the investigator's F: drive or elsewhere on his city issued computer or drives is not credible.

[25] I find, however, that the appellant's concerns are outside the scope of his initial access request. His request was specific, and asked for the materials contained on the investigator's F: drive on the city's computer. The appellant's suggestion that city staff should have documented the materials provided to the investigator through the City Clerk is similarly outside the scope of his initial request in this case.

[26] Under the circumstances, I see no point in ordering the city to conduct a further search for records on the F: drive.

[27] I do not wish, however, to be seen as endorsing the approach the city took in responding to this access request and appeal. The city's responses to the various

⁵ Order MO-2185.

⁶ Order MO-2246.

⁷ There is no suggestion in the parties' representations that the F: drive was deleted after the appellant submitted his access request. The city's affidavit states that the F: drive was deleted upon completion of the investigator's work for the city. The investigator's final report was completed in September 2013 and the appellant's access request was made in December 2015.

inquiries made of it have been, in some instances, vague and evasive, and have unnecessarily prolonged the request and appeal process. For example, in the affidavit initially provided to me, the city's Records and Information Analyst advised as follows:

I contacted the City's Information Technology Services Branch for all records responsive to the Appellant's Access Request. I requested that this Branch provide copies of all records responsive to the Appellant's Access Request. That Branch advised me and I verily believe that it had no relevant records in its possession.

[28] In the Reply Notice of Inquiry, I asked the city to respond to the following questions:

1. Did the city search the F: drive created for the investigator? If not, why not? Please explain.
2. If the city did search the F: drive created for the investigator, were any records found? If no records were found, please explain, in light of the May 30, 2013 e-mail.

[29] In response, the city provided representations referring back to the analyst's affidavit and stating that "therefore, the [IT branch] conducted a search of the F: drive and communicated its results that it had no relevant records".

[30] However, the city has most recently advised that, in fact, it had terminated the investigator's F: drive upon completion of his work for the city. Therefore, the city's statement in its reply representations that the IT branch searched the F: drive is inaccurate.

[31] This office follows a written process for most appeals, and relies on parties to provide full and frank information in their representations. The city could have stated in its initial affidavit and representations that the F: drive had been deleted. Instead, it unnecessarily prolonged the appeal process by providing vague and incomplete answers to questions posed of it at each stage. The city should take more care with the information it provides to this office in future appeals.

ORDER:

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

Original Signed by: _____

Gillian Shaw
Adjudicator

November 29, 2017