

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-3590

Appeal MA16-383-2

City of Timmins

April 13, 2018

**Summary:** The City of Timmins received a request under *MFIPPA* for access to records related to two cheques received in 2013 and 2014. The city issued several revised decisions to the requester disclosing records. Due to his belief that additional responsive records should exist, the requester appealed the city's decision. In this order, the adjudicator upholds the city's search for responsive records.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "record"), 17.

**Orders and Investigation Reports Considered:** Orders 17, MO-2096, MO-2285, and MO-2957.

### OVERVIEW:

[1] This order addresses the sole issue of the adequacy of the searches conducted by the City of Timmins (the city) in response to the following requests under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

- 1) Please provide all documentation including cheque images, receipts and bank statements as well as memos, designations for funds, meeting minutes and email and written communications related to the deposit of a cheque for \$35,000 from the Town of Iroquois Falls/Iroquois Falls

Community Development Team received by the City of Timmins in March 2014. ...<sup>1</sup>

Please include information in regards to where these funds were deposited (which sub account), and where these funds have been directed or spent including cheque images, receipts and bank statements as well as memos, designations for funds, meeting minutes and email and written communications related.

2) Please provide all documentation including cheque images, receipts and bank statements as well as memos, designations for funds, meeting minutes and email and written communications related to the deposit of a cheque for \$30,000 from the Town of Iroquois Falls/Iroquois Falls Community Development Team received by the City of Timmins in the second half of 2013.

Please include information in regards to where these funds were deposited (which sub account), and where these funds have been directed or spent including cheque images, receipts and bank statements as well as memos, designations for funds, meeting minutes and email and written communications related.

[2] In its initial decision,<sup>2</sup> the city denied access because the recipients of the cheques – the Northeastern Ontario Municipal Association (NEOMA) and the Northern Mayors' Task Force (NMTF) – are not institutions to which *MFIPPA* applies. The requester appealed the decision to this office, which resulted in Appeal MA16-383 being opened as a deemed refusal matter.

[3] Shortly after the deemed refusal appeal was opened, the city issued a revised decision, granting access to some of the responsive records related to the parts of the request that had been "partially completed" by the Secretary Treasurer of the NEOMA and NMTF. The city indicated that although it had access to the remainder of the records, those records belonged to NEOMA and NMTF, and the city had asked those organizations for their consent to release the records. Several weeks later, the city issued a second revised decision advising the requester that NEOMA had consented to the disclosure of the responsive records. The city enclosed the records with this second revised decision. These access decisions resolved the deemed refusal matter and Appeal MA16-383 was closed.

[4] The appellant was not satisfied with the searches conducted by the city and filed a second appeal. This office opened Appeal MA16-383-2 to address the search issue

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<sup>1</sup> The request included specific cheque and bank account information, which is not set out in this order.

<sup>2</sup> The city also responded to both requests together, advising the appellant that it was doing so because items 1) and 2), above, were "very similar in nature."

and appointed a mediator to explore the possibility of resolution. During mediation, the appellant was given an opportunity in a teleconference to explain the basis of his belief that further records in the form of additional emails, meeting minutes and other written communications should exist. Based on this guidance, the city conducted a further search and issued a third revised decision disclosing more records, some of which it identified as not responsive to the request, but which it claimed were provided "for [the appellant's] convenience." While the mediation process was ongoing, the appellant and the city continued to correspond directly. At the request of the appellant, the city provided a detailed description of its searches. Ultimately, however, the appellant continued to believe that further records responsive to his request must exist and a mediated resolution of the appeal was not possible.

[5] The appeal was moved to the adjudication stage where an adjudicator conducts an inquiry. I started my inquiry by sending a Notice of Inquiry to the city, first, to seek representations. After receiving the city's search representations, I sent them to the appellant to invite his representations in response. The appellant provided representations.

[6] In this order, I find that the city conducted a reasonable search for responsive records.

## **DISCUSSION:**

[7] The appellant's detailed representations raise some issues that go beyond the scope of my authority in this appeal under *MFIPPA*. This order cannot, and does not, address the appellant's concerns about the obligations of the city or other local municipalities, or their officers or employees, under the *Municipal Act* or the *Municipal Conflict of Interest Act*. In the discussion below, I will summarize the relevant parts of the appellant's submissions that address the reasonableness of the city's search and the possible existence of additional responsive records that the city has not already identified through the searches conducted.

### **Did the city conduct a reasonable search for responsive records?**

[8] The appellant believes that there must be more records responsive to this request that the city has simply not yet located. 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>3</sup> If I am satisfied that the search carried out by the city was reasonable in the circumstances, I will uphold its decision. If I am not satisfied, I may order further searches.

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<sup>3</sup> Orders P-85, P-221 and PO-1954-I.

[9] The *Act* does not require the city to prove with absolute certainty that further records do not exist. However, the city was required to provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records<sup>4</sup> within its custody or control.<sup>5</sup> To be responsive, a record must be "reasonably related" to the request.<sup>6</sup>

[10] 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>7</sup>

[11] 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.<sup>8</sup>

### ***Representations***

[12] The City Clerk/FOI Coordinator provided evidence of the searches conducted by the city in response to the request by submitting two affidavits. In sum, the city's position is that: "In response to the request, we have provided over 250 items requiring over 30 hours of search time for a total value of \$950.00. No further records are in the possession of the City of Timmins." One of the city's affidavits lists the records that were provided to the appellant, while the other affidavit describes what and where the City Clerk searched for responsive records.

[13] In the first affidavit, the city submits that it has "provided all records responsive to the request" and, specifically, that it provided copies of the following records:

- All minutes from the NMTF in the possession of the city
- All minutes from the NEOMA for the time periods concerning the request
- NEOMA bank statements
- NEOMA financial statements
- General ledger accounts from the City of Timmins
- The two cancelled cheques

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<sup>4</sup> Orders P-624 and PO-2559.

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

<sup>6</sup> Order PO-2554.

<sup>7</sup> Orders M-909, PO-2469 and PO-2592.

<sup>8</sup> Order MO-2246.

- All correspondence related to the request in the city's possession, including correspondence from the Iroquois Falls Community Development Team and the Boreal Forest Alliance
- All internal city emails related to the request

[14] In the city's second affidavit, the City Clerk describes the searches he conducted, which included:

- the office of the CAO's administrative assistant, which is where all the minutes and records of the NMTF and NEOMA in the city's possession were stored. In this office, he located:
  - minutes for NMTF meetings
  - minutes for NEOMA meetings for the relevant time periods
  - any correspondence responsive to the request
  - financial and banking records (i.e., bank statements and financial statements) for NEOMA
  - correspondence related to the request from the Iroquois Falls Community Development Team and the Boreal Forest Alliance
- the city's Director of Finance and Treasurer was asked to provide copies of the general ledger accounts and copies of the cancelled cheques
- the Information and Technology Department was asked to search the former/retired CAO's email account to identify any records pertaining to the transfer of funds from NEOMA to FONOM [Federation of Northern Ontario Municipalities] and to provide copies of all internal city emails related to the request.

[15] The appellant is not satisfied that the records provided to him by the city so far represent the complete array of existing documents related to the two cheques and the associated transactions. The appellant argues that the city must have more records because the city's former (now retired) CAO was the Secretary Treasurer of NEOMA and was a key player, effectively, in these transactions. He questions why the city did not interview this individual, or search his personal email or messages, prior to his retirement in order to seek the answers to questions he (the appellant) has about these matters.

[16] Several times in his representations, the appellant makes this connection between the "dual role" of the former CAO and the city's custody or control over additional responsive records. Specifically, the appellant submits that the NEOMA and

the NMTF

... records and finances are under the custody and control of the City of Timmins as identified in a letter [written by the former mayor of Timmins] of January 25<sup>th</sup>, 2010, and the financial ledgers, thus records are available under the act.

[17] The appellant is focused on the two cheques identified in his request because he regards them as examples of “unsanctioned municipal cash flow” due to the lack of documentation to satisfy him that there was both proper authority and a proper “financial trail” for these transactions. The appellant’s submissions suggest that the decision-making around these matters is suspicious because of the lack of adequate documentation by the involved individuals, organizations and municipalities.<sup>9</sup> He submits that there should be records that support the authority of Timmins, NEOMA and/or NMTF to carry out or process these transactions. He also questions the trail of approvals that he says led to the funds later being transferred to the Federation of Northern Ontario Municipalities (FONOM). The appellant identifies certain types of records that would, in his view, support this authority, such as a council endorsement, resolution or minutes approving the transfers.

[18] The appellant’s representations feature a number of questions raised by his review of the records disclosed to him. Many of these questions are not related to the searches conducted, but rather to the activities or actions of the various organizations or individuals identified in his representations.<sup>10</sup> I address the matter of “question and answer” in my reasons, below.

[19] The appellant identifies the following other records or types of records that he argues should exist, based on his review of the records disclosed to him:

- NEOMA financial reports, such as the report referred to in the minutes for the March 13, 2010 NEOMA meeting held in Smooth Rock Falls.
- NMTF quarterly reports to municipalities. The appellant submits that a disclosed letter that was sent to Northern Ontario mayors/reeves on January 25, 2010 refers to all participating municipalities receiving a report about the funds collected from municipalities on a quarterly basis; he questions why there are no

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<sup>9</sup> To illustrate the “connections to the cash” that concern him, the appellant provided me with a list of relevant members or staff with a named forestry company, the Town of Iroquois Falls, The Iroquois Falls Community Development Team, NEOMA, NMTF and FONOM, for several time periods that include dates from 2011 to present (2016).

<sup>10</sup> For example, issues to do with NEOMA’s banking or finances, such as: where its bank account is located; why there was a delay in transferring funds; or why there is a discrepancy between the revenue/expenses numbers disclosed to him by Timmins and financial statements previously supplied to him, the source of which is not specified.

such reports identified in the searches of the CAO administrative assistant's office.

- Additional NEOMA minutes since "all participating municipalities will receive minutes," as well as the financial reports.
- Expenditure authorizations that might, for example, explain the difference between the opening bank balance of the NMTF in January 2013 compared to the closing balance in 2010.<sup>11</sup>
- Written instructions, including any that would establish "Who instructed the chair of the IFCDT to write a cheque to NMTF?"

[20] Given his belief that not all responsive records have been located, the appellant suggests that the city should provide a "research and record location methodology" to support its position that it has conducted an adequate search. Finally, in the absence of a search that he finds satisfactory, the appellant suggests that he be permitted, personally, "to full[y] research the files to complete my MFIPPA and discover the records. As noted earlier 'reasonable search' is the issue, please allow me to be the solution."

### ***Analysis and findings***

[21] A reasonable search is one in which an experienced employee, who is knowledgeable in the subject matter of the request, makes a reasonable effort to locate records that are reasonably related to the request.<sup>12</sup> In the circumstances of this appeal, I am satisfied by the city's evidence and the circumstances that a reasonable effort was made to identify and to locate responsive records in the city's custody or under its control.

[22] Regarding the appellant's suggestion that responsive NEOMA and NMTF records were (or are) "under the custody and control" of the city due to the involvement of the city's former CAO, I note that there is no dispute that certain records responsive to this request were in the custody of the city, at least, and that the city responded to the request on that basis. However, I also note that this observation is distinct from a finding that all responsive NEOMA and NMTF (financial) records would be in the city's custody or under its control for the purpose of section 4(1) of the Act, simply because the city's former CAO was closely involved in these particular transactions. Nor am I persuaded by this aspect of the appellant's representations that this individual's role in the transactions provides a reasonable basis for believing that further records may exist

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<sup>11</sup> The appellant notes the source of the 2013 figure as a April 19, 2016 letter sent to the appellant by the former city CAO who acted concurrently at the Secretary Treasurer of NEOMA. The source of the 2010 figure in this submission is not specified.

<sup>12</sup> Orders M-909, PO-2469 and PO-2592.

that have not yet already been identified by the city.

[23] As I observed above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding such records exist. Before continuing, I will confirm the scope of the appellant's request, which was for "all documentation ... related to the deposit of a cheque for \$35,000 from the Town of Iroquois Falls/Iroquois Falls Community Development Team received by the City of Timmins in March 2014" and "all documentation ... related to the deposit of a cheque for \$30,000 from the Town of Iroquois Falls/Iroquois Falls Community Development Team received by the City of Timmins in the second half of 2013." The appellant's request lists numerous examples of records, but use of the phrase "all documentation," when given the required liberal interpretation, clearly conveys his intention to seek access to all records related to these two cheques. However, many of the additional records or types of records identified by the appellant in his representations do not fall within the scope of this particular request. For example, the report referred to in the minutes of the March 13, 2010 NEOMA meeting held in Smooth Rock Falls is not responsive to this request. Similarly outside scope would be NMTF quarterly reports that account for funds collected from municipalities (referred to in the NMTF's January 25, 2010 letter) or any documents that would explain the difference between the opening bank balance of the NMTF in January 2013 and its closing balance in 2010.

[24] In responding to the request, the city provided explanations to the appellant about some aspects of it for which no responsive records were located. City staff conducted several searches in response to the request, including during the mediation stage, and this resulted in additional records being disclosed to the appellant. The appellant had questions about some of these disclosed records and made inquiries based on their content, some of which I have set out in this order. The appellant is concerned, for example, that the city's former CAO was not questioned further before he retired about his knowledge of the events surrounding the issuing of the two cheques, given that he was NEOMA's Secretary/Treasurer at the relevant time. Further, I note that some of the appellant's questions appear to arise because of his review of records he received in response to other access requests.<sup>13</sup>

[25] Previously in these reasons, I addressed the scope of this request because some documentation the appellant believes ought to exist would not be responsive to the request in this appeal. However, due to the numerous questions posed by the appellant – and their iterative nature – I will also address the city's obligation as an institution to answer the appellant's questions as part of my review of whether the city's searches were reasonable according to MFIPPA. To begin, the fact that the appellant may not accept the explanations provided as sufficient evidence of there not being further

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<sup>13</sup> The appellant provided an April 2016 letter he received from the city's former CAO for my consideration.



records does not, by itself, render his belief that additional responsive records should exist a reasonable one.<sup>14</sup> In Order MO-2957, Adjudicator Steve Faughnan considered the issue of a request being submitted in the form of questions. The adjudicator set out the relevant provisions of the Act, including the following definition of "record" in section 2(1):

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;<sup>15</sup>

[26] Noting the requirement that a requester must provide a reasonable basis for concluding that such records exist, Adjudicator Faughnan observed that, generally speaking, an institution is not required to create a new record in response to a request under the *Act*.<sup>16</sup> He reviewed past orders on this subject, including Order MO-2285, where former Senior Adjudicator John Higgins discussed Order 17 and the question of the kinds of information or documents to which access should be given, according to the *Williams Commission Report*.<sup>17</sup> The former senior adjudicator commented that Order 17 established that:

a right to "information" does not embrace the right to require the government institution to provide an answer to a specific question; rather, it is generally interpreted as requiring that access be given to an existing document on which information has been recorded.

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<sup>14</sup> Orders MO-2554, MO-3494 and others.

<sup>15</sup> In Order MO-2957, the adjudicator also set out section 22 of *MFIPPA*, which outlines the contents of a notice of a refusal (under section 19) to grant access in response to a request. Specifically, section 22(1)(a) provides that a "notice of refusal to give access to a record or a part thereof under section 19 shall set out, (a) where there is no such record, (i) that there is no such record, and (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists".

<sup>16</sup> See Order MO-1989 upheld in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

<sup>17</sup> Page 241 of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

[27] Order MO-2957 contains the following passage from Order MO-2096 about an institution's obligation to respond to questions posed by a requester after reviewing records received through an access request:

Although the documents that the appellant received may raise questions in her mind to which she thinks there should be answers, this does not necessarily mean that answers exist in the documents that she received or in other documents.... [T]here is no requirement under the *Act* that an institution answer the questions that the contents of records might raise. The issue is whether there are records in existence that might provide an answer to these questions. As I noted in Order PO-1655:

Previous orders of this office have considered the circumstances in which requests for information are set out in the form of questions (Orders M-493, M-530 and P-995). In two of these cases, it was determined that the questions could be interpreted as requests for records. In my view, this is not the case here. Based on my reading of part 7 and the Ministry's explanation, I agree that the appellant has asked a question of the Ministry and is seeking an answer rather than seeking information or records which would respond to it.

In PO-1655, I concluded that the institution had no obligation to simply answer questions or provide explanations of information contained in the records.

[28] Taken together, Orders 17, MO-2096, MO-2285, and MO-2957 establish that a "right to information" does not require an institution to provide an answer to a specific question; rather, the institution must consider what records in its possession might contain information that would partly or fully answer the questions asked in a request.

[29] The appellant's view is that further records such as emails, meeting minutes and other written correspondence should exist to show the "financial trail" for these two transactions that concern him. However, he has not provided me with a reasonable basis for concluding that any additional records exist in the city's record holdings. Furthermore, I do not accept the appellant's submission that a "research and record location methodology" is required to support the city's position that it made a reasonable effort to identify *records* that were responsive his request. As previously stated, a reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request. I am satisfied that the city deployed the appropriate staff for the searches and that it has provided a reasonable explanation of the basis and the extent of the multiple searches conducted.

[30] In conclusion, I am satisfied that the city has demonstrated that it made a

reasonable effort to identify and to locate responsive records in its custody or under its control, and that its search for records responsive to the appellant's request was reasonable. Accordingly, I find that the city has met its search obligations under *MFIPPA*.

**ORDER:**

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

Original Signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

\_\_\_\_\_ April 13, 2018