Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3612

Appeal MA17-396

The Corporation of the City of Oshawa

May 25, 2018

Summary: The appellant made a request to the City of Oshawa under the *Act* for records relating to the 2016 Audit Service Plan prepared by a third party. The city issued an access decision disclosing responsive records in part. The appellant appealed to this office claiming that additional responsive records should exist. During mediation, the city located additional records, and disclosed them to the appellant in part. In this order, the adjudicator upholds the city's search as reasonable 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.

BACKGROUND:

[1] The Corporation of the City of Oshawa (the city) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I am seeking copies of the 2016 Audit Service Plan from [a named third party] as referenced in [a report]. I am also seeking copies of all communications records, transmittal documents accompanied to the plan, and all communications records between staff (city) and [the third party] and/or council members and [the third party] and/or all communication records between city staff and council members pertaining to the 2016 Audit Service Plan for the period 30 days prior to the date of the 2016 Audit Service Plan up to the February 9, 2017 finance committee meeting.

> Records to include any handwritten or electronic communications, notes, briefing notes or telephone/text messages and notes of verbal or telephone communications.

[2] Upon receipt of the request, the city conducted a search and located records responsive to the request. The city notified the third party to obtain its view on disclosure of the responsive records. Upon receipt of submissions from the third party, the city issued a decision to the requester disclosing the responsive records in part, with severances made pursuant to section 10(1)(a) (third party information) of the *Act*. The partially disclosed records included the 2016 Audit Service Plan and related email correspondence.

[3] The requester appealed the city's decision to this office, becoming the appellant in this appeal.

[4] During mediation, the appellant advised the mediator that he believed that additional responsive records should exist. The appellant confirmed that he is not interested in pursuing access to the information withheld pursuant to section 10(1) of the *Act*.

[5] Following discussions with the mediator, the city conducted another search, which identified additional responsive records. These additional records were disclosed to the appellant in full.

[6] The city also located a new record, the Master Service Agreement, which it considered to be outside the scope of the appellant's request. Regardless, the city notified the third party to seek its views on releasing the record to the requester. After considering the third party's position, the city issued a decision disclosing the additional record in part, again with severances pursuant to section 10(1)(a) of the *Act*. The appellant advised the mediator that he is not interested in the information that was withheld pursuant to section 10(1)(a). The appellant continued to believe that further records should exist.

[7] The city provided the mediator with affidavits from the city staff and city councillors in support of the searches conducted in response to the appellant's request. The affidavits described the position held by each affiant, the locations searched, the duration of the search, and the results of the search. With the consent of the city, the mediator shared the affidavits with the appellant.

[8] Mediation did not resolve the appeal and the file was transferred to the adjudication stage of the appeal process. Given the extent of the disclosures and the affidavit evidence provided by the city during mediation, I began my inquiry by inviting the appellant's representations in response to the Notice of Inquiry. I then invited the city to provide representations in response to the Notice of Inquiry and the appellant's representations, which were shared with the city in accordance with *Practice Direction*

Number 7 and the IPC's *Code of Procedure*. The city provided representations, which I shared with the appellant. The appellant provided reply representations, which are summarized in this order.

[9] In this order, I find that the city's search was reasonable, and I dismiss the appeal.

DISCUSSION:

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

[11] 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[2] within its custody or control.[3] To be responsive, a record must be "reasonably related" to the request.[4]

[12] 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]

[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.[6]

The appellant's representations

[14] The appellant states that the city's initial release of records contained a series of emails between city employees and employees of a third party. The appellant notes that no index was provided with these records, nor were any severances or withheld records noted. The appellant takes issue with the fact that the city did not provide an index of records or provide any formal statement about severances or whether other

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order MO-2185.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2246.

records exist but were withheld.

[15] The appellant submits that mediation was successful insofar as it resulted in the city providing additional records that were mentioned in the emails originally disclosed. The appellant states that his need to appeal the decision and engage in mediation to obtain those additional records suggests that the city failed, refused, or otherwise withheld records relevant to the request. The appellant submits that the additional disclosures at mediation validate his questions regarding how the city defines records, the city's records management policy, and the city's ability to retain, search, and produce records responsive to requests under the *Act*.

[16] The appellant maintains that the city has been aware that the definition of "records" in its Records Retention By-law has been outdated since September 2013, when a report was provided to city council recommending that its by-laws be clarified to "address security and accessibility with respect to emails and other electronic records." The appellant submits that updating the records management program is now slated for after the next municipal election. The appellant submits that the city's failure to address the known deficiency should be considered "at best willful neglect, and at worst, criminal behavior of obstruction."

[17] The appellant states that the Master Service Agreement obtained during mediation refers to a variety of methods by which the third party may communicate with its client, the city. The appellant asserts that the various methods of communication identified by the third party should be covered by the city's definition of records, and that the city's failure to search those methods of communication constitutes a failure to conduct a reasonable search.

[18] The appellant identifies the city's Executive Director of Financial Services (Executive Director) as someone who was in frequent contact with the third party. The appellant notes that the affidavit provided by the Executive Director during mediation identifies that she searched her email records, hardcopy files, and computer drives, but does not show that she searched the alternate forms of communication identified in the Master Service Agreement. For example, the Executive Director's affidavit did not indicate that voicemail messages were searched. The appellant acknowledges that it is unlikely that the Executive Director would have voicemail messages saved from many months prior, unless there is a program or policy in place for archiving those messages. If that is the case, the appellant states that there is no excuse for those records not being searched.

[19] The appellant also identifies the Manager, Financial Planning and Reporting, as being an individual who was in frequent contact with the third party, though she did not provide an affidavit of search during mediation. The appellant states that 13 of the 14 affidavits provided during mediation were not from direct contacts with the third party. The 13 affidavits were from the Mayor, elected councillors, and executive or administrative assistants to the Mayor and council. The appellant maintains that the

excessive use of affidavit evidence during mediation is an attempt to distract from the fact that the Manager, Financial Planning and Reporting did not provide an affidavit, despite evidence that she was in frequent communication with the third party.

[20] The appellant states that the third party Audit Service Plan provides specific dates for implementation of the audit. The appellant believes that the third party would have communicated any issues arising from the audit to the city, either immediately upon recognition or shortly thereafter, depending on risk, severity, or for the purpose of clarification. Based on the records disclosed, the appellant notes that no such communication appears to have taken place.

[21] The appellant notes that the 2016 Audited Financial Statements did not come before council until November 2017, and that the 2015 Audited Financial Statements are dated June 23, 2016. He suggests that there must be a reason why the 2016 statements were delayed, and that there should be communication between the third party and the city during or after the specified audit dates in the Audit Plan. The appellant acknowledges that some of these communications may be outside the scope of the request dates, but maintains that there may have been significantly more communication during the access request parameters than has been disclosed.

[22] As further justification for his belief that the city failed to conduct a reasonable search, the appellant submits that there is a "well-documented history of the city's tactics of delay, deflect, deny and outright refusal to provide records." The appellant believes that the city uses "unnecessary and unjust practices" to frustrate requesters in an attempt to limit access to records. The appellant maintains that there is a systemic issue at play at the city, which is wasting the time of both requesters and this office.

[23] In support of this position, the appellant points to a number of recent IPC Orders where he submits that adjudicators have found that the city has failed to conduct reasonable searches, has withheld information, and/or has applied exemptions improperly. In particular, the appellant cites Orders MO-3281, MO-3511, MO-3442-I, MO-3493-I, MO-3532-F, MO-3513-I MO-3525, and MO-3541. For each appeal, the appellant provides background information, the outcome of the appeal, the number of additional records disclosed as a result of adjudication, if applicable, and the total time to process the appeal.

[24] With reference to those orders, the appellant maintains that an "average citizen" must spend in excess of two years, and on average more than three years, to get an accurate response from the city. He questions the city's accountability and transparency on this basis.

[25] The appellant submits that the city believes that it is above the law. As evidence of this, the appellant refers to former Adjudicator Higgins' decision in MO-3511, in which the appellant submits that the adjudicator discussed the city's evasive tactics and unnecessary prolonging of the process. He also submits that the city has been cited for

"abusive legal tactics and evasive and contradictory employee witnesses" by the Ontario Court of Justice.[7] The appellant submits that because of these documented attempts to evade and abuse the process, there is a real and legitimate lack of confidence in the city's initial responses to freedom of information requests.

The city's representations

[26] During mediation, the city provided affidavit evidence from the Executive Director of Finance Services, the Mayor, the Executive Administrative Assistant to the Mayor, and the Executive Assistant to the Mayor. These affidavits are brief. They set out the affiants' positions, the length of time searching email, hardcopy files and computer drives, and the number of responsive records found, if any.

[27] The city also provided affidavit evidence from nine city councillors and one councillor's administrative assistant in Clerk Services. Nine of the affidavits set out the affiants' positions, the length of time spent searching email, hardcopy files and computer drives, and the number of responsive records found, if any. Eight of the affidavits set out the keywords used to conduct searches. Six affidavits indicated that the affiant searched their voicemails for responsive records, and five indicated that the affiant searched their personal notes. One affidavit set out the affiants' position, and indicated that the affiant has no personal knowledge of the matter, as they were not employed by the city during the period responsive to the request.

[28] During my inquiry, the city provided written representations and two additional affidavits in response to the appellant's submissions and the Notice of Inquiry. One affidavit was from the city's Manager, Financial Reporting and Planning, and the other was from the city's Manager, Records Information System [RIS Manager].

[29] The affidavit from the Manager, Financial Reporting and Planning, states that the affiant searched her emails and found three records responsive to the request, which were disclosed to the appellant during mediation.

[30] The affidavit from the RIS Manager states that he has knowledge of the city's records retention schedule per By-Law 45-2002. A copy of By-Law 45-2002 was appended to the affidavit. The RIS Manager states that any records related to city finances, external financial audits, year-end audited financial statements, and the tendering process relevant to this request, would have been created in 2016 and 2017, and that those records are not eligible for destruction until, at a minimum, after December 31, 2023.[8] Depending on how the records are classified, some must be retained indefinitely,[9] and others until at least December 31, 2032.[10] The RIS Manager

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[7] *Oshawa (City) v 536813 Ontario Limited*, 2016 ONCJ 665 (CanLii).
[8] Records classified as "C-1000 – Finance General" records.
[9] Records classified as "C-3200 – External Audit" and C-4020 – Financial Statements" records.
[10] Records classified as "C-5400 – Tender" records.

also states that he reviewed the annual listing of boxes and files that had been destroyed in 2016 and 2017, and he did not identify any records that would have been responsive to the appellant's request. Given the timeframe, the nature of the records sought, and the types of records that would be responsive to the request, the affiant states his belief that responsive records would not have been eligible for destruction, nor would they have been destroyed pursuant to the city's records retention schedule.

[31] The city maintains that the *Act* does not dictate how institutions should retain records, beyond being able to retain information in an accessible manner. The city points to section 4.1 of the *Act*, which requires institutions to ensure that "reasonable measures respecting the records" are in place with a view to preserving the records.[11]

[32] The city notes that the *Act* does not require institutions to prove with absolute certainty that further records do not exist, but it must provide sufficient evidence to show that a reasonable effort was made to identify and locate responsive records.[12] Based on the affidavit evidence and the documents already disclosed, the city submits that it has conducted a thorough and effective search for records related to the appellant's request. The city maintains that records relevant to the appellant's request were not destroyed. The city also submits that it is its practice to foster and maintain an open and collaborative dialogue with requesters, including assisting requesters as much as possible to obtain records available to them under the *Act*.

The appellant's reply representations

[33] In response to the city's submissions, the appellant states that, as evidenced by the city's representations, he was forced to use the mediation and adjudication process to gain access to unreleased records. He maintains that the city deflects from his previous assertion that additional types of records may, and should, exist, and has not responded to his questions regarding the excessive use of affidavit evidence.

[34] The appellant maintains that the city bases its position on the lack of enforcement under the *Act* to provide for thorough records management. He reiterates that the city has been aware since at least September 2013 that its current records management system is "outdated, inefficient, and unreasonable." He states:

> Reliance on a known deficient records management system should not be construed as taking "**reasonable measures** respecting the records in the custody or under the control of the institution **are developed,**

[11] Section 4.1 of the *Act* states,

> Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.

[12] Orders P-624, PO-1744, and PO-2559.

> **documented and put into place** to preserve the records in accordance with any recordkeeping or records retention requirements, rules of policies, whether established under an Act or otherwise, that apply to the institution." (emphasis added)

[35] The appellant notes that Schedule A of the city's Corporate Record Retention Schedule defines "record" as "information, however recorded, in textual, numeric, graphic, video, audio or electric form." He maintains that this definition includes voicemail, text message or other forms as identified by the third party as forms of communication. Given that these formats are identified in the city's record retention policy, the appellant maintains that it is reasonable to expect that they would be retained in an accessible format.

[36] The appellant also questions the validity of the affidavit evidence provided during my inquiry. He maintains that one affiant did not complete their own search for records, contrary to what was stated in their affidavit, and outlines his reasons for this belief. Namely, he notes that the name that appears at the top of the records attached to the affidavit is that of a legal secretary, rather than the affiant who attests to searching for and locating the particular records. He concludes, therefore, that the affiant did not complete her own search for records.

[37] He also maintains that the RIS Manager's affidavit relates strictly to the city's deficient records management system and the possible deletion of records, but does not show evidence of searching existing records for additional responsive information. He states that this affidavit is a deflection of responsibility to conduct a reasonable search, and suggests that the affiant has been shown to provide questionable affidavit evidence to the IPC in the past.

[38] The appellant questions the experience and judgment of the individuals that conducted the searches on behalf of the city, as well as of the counsel providing representations supporting the searches as being reasonable.

[39] He states that unless the city is willing to admit that they purposely and knowingly do not retain these types of records, he continues to believe that additional records may exist, including in the forms prescribed by the third party, and should be provided.

Analysis and findings

[40] 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.[13] I have considered the parties' complete submissions, including the affidavits provided by the city. In the

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

circumstances of this appeal, I find that the city has provided sufficient evidence to establish that it conducted a reasonable search for responsive records, as required by section 17 of the *Act*.

[41] During the course of this appeal, the city provided 15 affidavits from city staff and city councillors attesting to the searches that were conducted.[14] The affidavits were typically a few sentences long and described the position of each affiant, the locations searched, and the duration and result of each search. In some cases, the affidavit included the specific keywords that were used to look for responsive records, such as "audit", the name of the third party, and "FIN-17-18". Most of the affiants searched their email, hardcopy files, and computer drives. In some cases, affiants also attested to searching their voicemails and/or personal notes. While brief, I am satisfied that these affidavits adequately describe the search effort conducted by various staff members and councillors who could reasonably be expected to have records responsive to the appellant's request. On the basis of this evidence, I am also satisfied that the city staff and councillors expended reasonable efforts to locate records responsive to the appellant's request.

[42] Both the Notice of Inquiry and the appellant's representations asked the city to consider whether it was possible that responsive records existed but no longer exist. In response, the city provided an affidavit from the RIS Manager, which supports the city's position that any responsive records would not yet be eligible for destruction according to the city's record retention schedule. I am satisfied that the searches conducted by the city would be expected to locate all existing responsive records.

[43] I will now consider some additional points raised in the appellant's representations.

[44] The appellant submits that the city's excessive use of affidavit evidence was an attempt to distract from the fact that the Manager, Financial Planning and Reporting did not provide an affidavit during mediation, despite evidence that she was in frequent communication with the third party. I note that the Master Service Agreement Appendices state:

> The Municipal Council is responsible for the oversight of the financial reporting process and our work as auditors. We are required to communicate with the Municipal Council about certain matters that may arise during our audit and that may be significant to their role…

[45] Based on my review of the records, I am satisfied that the city requested that its councillors conduct searches and provide affidavits on the basis that it was possible that the councillors held records responsive to the appellant's request.

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[14] And one affidavit from a councillor who attested to having no personal knowledge of the matter.

[46] Moreover, I note that the city did provide an affidavit of search from the Manager, Financial Planning and Reporting during my inquiry. In that affidavit, the manager affirms that she found three email records responsive to the request, which were disclosed to the appellant during mediation. I am satisfied that the affidavit addresses the appellant's concern regarding records that could have been generated by the "frequent" communication between the Manager, Financial Planning and Reporting and the third party, insofar as it confirms that there were communications between that manager and the third party, and that they were identified and disclosed to the appellant during mediation. In addition, I note that the content of these records do not, on their face, suggest that the manager has additional responsive records that have not yet been disclosed.

[47] As stated above, although an appellant will rarely be in a position to indicate precisely which records have not been identified by the institution's response, he must still provide a reasonable basis for concluding that such records exist.[15] The appellant's representations point out that the Master Service Agreement allows for various methods of communication between the city and the third party, and yet the affidavit evidence only indicates that a few specific locations were searched.

[48] I have reviewed the Master Service Agreement and note that it does specifically refer to communication methods, including "letter delivered in hard copy or electronically via email, by way of a link to our website or otherwise", as well as transmissions "by fax, email and voicemail". The affidavits typically indicate that affiants searched their email, hardcopy files, and computer drives. In some cases, they indicate that voicemails and personal notes were searched. When it comes to search, the reasonableness standard makes room for different individuals executing the necessary searches differently.[16] Based on the evidence before me, I am satisfied that the city staff and city councillors searched for records in places where hard copy or emailed letters, faxes, and other correspondence specifically mentioned in the Master Service Agreement may reasonably have been located.

[49] The appellant also questions why no records were provided that address the delayed 2016 Audited Financial Statements; however, he also acknowledges that those communications, if they occurred, may have taken place outside the scope of his request dates. Given that the 2016 Audited Financial Statements did not go before council until November 2017,[17] it is likely that communications addressing this delay may have taken place after the final date of the request period, which was February 9, 2017. Accordingly, I do not find that this alone provides a reasonable basis for concluding that additional responsive records should exist.

[50] Furthermore, I note that the appellant received previously undisclosed records

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[15] Order MO-2246.
[16] PO-3715.
[17] According to the appellant's submissions.

that were referred to in the original disclosures during mediation. The appellant's submissions do not point out any outstanding references to communications or documents that would suggest that there are additional undiscovered and/or undisclosed records. Accordingly, I am not satisfied that the appellant has provided a reasonable basis for concluding that additional records exist.

[51] The appellant also raises concerns about the validity of the affidavit evidence and, in particular, who conducted the searches. I am not satisfied that the name of a legal secretary appearing at the top of the email records is indicative of false statements being sworn by the affiants, nor do I find that it indicates that the affiants did not conduct their own searches. Regardless of how the legal secretary's name came to appear at the top of the email records cited by the appellant, I am not satisfied that this fact alone raises legitimate grounds to question the validity of the affidavit evidence provided by the city. I am also not persuaded of any deficiencies or concerns with respect to RIS Manager's affidavit.

[52] Finally, the appellant submits that there is a real and legitimate lack of confidence in the city's initial responses to freedom of information requests. In support of this claim, he refers to several IPC orders in which adjudicators have determined that the city's searches were not reasonable. The appellant also cites what he views as deficiencies in the city's records management program.

[53] While I acknowledge the appellant's concerns about the city's response to previous access requests, as well as his concerns with the quality of the city's records management system, the issue before me is whether the city has conducted a reasonable search in response to the access request in this appeal. I must look at the evidence provided in this appeal and determine whether, in the circumstances, the city has engaged experienced employee(s), who is/are knowledgeable in the subject matter of the request, to make a reasonable effort to locate records that are reasonably related to the request. The city has provided affidavit evidence from city councillors and staff who had or could reasonably have communicated with the third party about the 2016 Audit Service Plan, as well as from a manager knowledgeable in the city's records retention procedures. Based on the evidence and submissions before me, I am satisfied that the city has met its obligations to conduct a reasonable search as required by the *Act*.

[54] In summary, based on my review of the parties' submissions, I am satisfied that the individuals who carried out the city's search are employees who would be expected to be knowledgeable in the subject matter of the request, and that those individuals made a reasonable effort to locate all of the records responsive to the request. I find that the appellant has not provided a reasonable basis for me to conclude that the searches conducted by the city were not reasonable, nor has he provided a reasonable basis for concluding that additional records exist. Accordingly, I uphold the city's search as reasonable.

ORDER:

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

Original Signed by: May 25, 2018

Jaime Cardy
Adjudicator