Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3619

Appeal MA17-144

City of Welland

June 7, 2018

Summary: The City of Welland (the city) received a multi-part access to information request, in the form of questions, pertaining to parking infractions for the years 2015 and 2016. The city initially advised that there were no responsive records but ultimately disclosed three records to the appellant, two of which the city had created to respond to the request. The appellant was not satisfied with the manner in which the city processed the request, the reasonableness of the city's search for responsive records or the mediation process. In this order, the adjudicator determines that the city complied with its obligations under the *Act* and that because the appellant received information responsive to the questions posed, the appeal is at an end. The appeal is dismissed.

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", 4(1), 17, 19, 22(1), 22(4); Regulation 823, section 1.

Orders Considered: Orders M-493 and MO-2129.

OVERVIEW:

[1] The City of Welland (the city) received a multi-part access to information request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*), in the form of questions, pertaining to parking infractions for the years 2015 and 2016.

[2] The city initially issued a decision letter advising that no responsive records existed. The letter set out the following:

> It is noted that in essence you are seeking an analysis of the parking infractions, which is not itself a record maintained by the city. We suggest that you reformulate your request to be one for a specific record, for example, Parking Penalty Notice as it relates to your licence plate.

[3] The requester (now the appellant) appealed the decision, taking the position that other responsive records ought to exist.

[4] After the appeal was received by this office, but before it was assigned to mediation, during a meeting between the city and the appellant, addressed in more detail below, the city disclosed a record to the appellant entitled "By-Law Enforcement - Year End Review 2016".

[5] The city subsequently disclosed to the appellant two further records listing the number of parking infractions and the number of cancelled or overturned infractions after the screening and hearing process for the years 2015 and 2016. This was set out in the Mediator's Report in the following way:

> Prior to this file being assigned to a mediator in this office, the city produced two records. The records were for the years 2015 and 2016. The records listed the number of parking infractions and the number of Cancelled or Overturned infractions after the screening and hearing process.
>
> The records were subsequently mailed to the appellant.
>
> Upon receiving these records, the appellant advised this office that the records did not satisfy the request and the appellant asked that the appeal proceed to the next stage of the appeals process.

[6] Although the appellant had by then received responsive records, in light of the appellant's position at mediation, the matter was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending the city a Notice of Inquiry setting out the facts and issues in the appeal. The city provided responding representations. I then sent a Notice of Inquiry to the appellant along with the city's representations[1]. The appellant provided responding representations. Those were shared with the city who provided reply representations. The city's representations were shared with the

---

[1] I severed two dates on an affidavit but the balance of the city's representations was shared in its entirety.

appellant who provided representations in sur-reply.

[8] In sur-reply, the appellant clarified that responsive information was received, but that was never the cause for the inquiry. Rather, it was the appellant's concerns regarding the conduct of the city and its employees in addressing and processing the request, and that, in the appellant's view, the Mediator's Report does not reflect the appellant's assertion that the city failed to comply with the provisions of the *Act*. My inquiry is therefore proceeding on this basis.

[9] In this Order, I determine that the city complied with its obligations under the *Act* and that because the appellant received information responsive to the questions posed, the appeal is at an end. The appeal is dismissed.

DISCUSSION:

[10] When the appeal was received by this office at intake, the city had not provided records that were responsive to the appellant's request. The city submits that in order to respond to the request it ultimately provided the appellant with the following three responsive records:

> "By-Law Enforcement - Year End Review 2016"
>
> "Tickets Issued and Tickets for Screening and Hearing January 1, 2015 to December 31, 2015", and
>
> "Tickets Issued and Tickets for Screening and Hearing January 1, 2016 to December 31, 2016"

[11] As set out above, the appellant was not satisfied with the manner in which the city processed the request.

Making and responding to a request

[12] Several sections of the *Act* deal with the formalities of making and responding to an access request.

[13] Section 4(1) of the *Act* sets out a person's general right of access to records. That section states, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or

> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious

[14] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that a request is being made under this Act;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[15] Section 19 of the *Act* provides that:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
>
> (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

[16] Section 22 of the *Act* describes the content of a notice of refusal under section 19. Section 22 reads, in part:

> (1) 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; or

(b) where there is such a record,

(i) the specific provision of this *Act* under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

…

(4) A head who fails to give the notice required under section 19 or subsection 21 (7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[17] Section 2(1) of the *Act* specifically defines a "record" as follows:

"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;

[18] Section 1 of Regulation 823 under the *Act* states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the *Act* if the process of producing it would unreasonably interfere with the operations of an institution.

Responsiveness and reasonable search

[19] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

[20] 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.[4] To be responsive, a record must be "reasonably related" to the request.[5] 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.[6]

[21] 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.[7]

[22] 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.[8]

Creating a record

[23] Generally speaking, an institution is not required to create a new record in response to a request under the *Act*.[9] In addition, this office has previously stated that government organizations are not obliged to maintain records in such a manner as to

---

[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2185.
[8] Order MO-2246.
[9] See Order MO-1989 upheld in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

accommodate the various ways in which a request for information might be framed.[10]

[24] In Order M-493, former Senior Adjudicator John Higgins provided some guidance with respect to the extent to which an institution should respond to questions directed to it by a requester, stating:

> In my view, when such a request is received, the [institution] is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section 17 of the *Act*, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", then the [institution] may have recourse to the clarification provisions of section 17(2).

[25] In Order MO-2129, in the course of addressing a request for information that appeared to exist within the record holdings of an institution, but not in the format asked for by the appellant in that appeal, Adjudicator Colin Bhattacharjee went on to address the obligations of the Toronto Police Services Board (the Police) in the circumstances of that appeal, determining that:

> … If the request is for information that currently exists in a recorded format different from the format asked for by the requester, as is the case in this appeal, the Police have dual obligations.
>
> First, if the requested information falls within paragraph (a) of the definition of a record (e.g., paper records), the Police have a duty to identify and advise the requester of the existence of these related records (i.e., the raw material). However, the Police are not required to create a record from these records that is in the format asked for by the requester (e.g., a list).
>
> Second, if the requested information falls within paragraph (b) of the definition of a record, the Police have a duty to provide it in the requested format (e.g., a list) if it can be produced from an existing machine readable record (e.g., a database) by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution, and doing so will not unreasonably interfere with the operations of the Police. In such circumstances, the Police have a duty to create a record in the format asked for by the requester.

---

[10] See the postscript to Order M-583. But also see Orders PO-2904 and PO-3100.

> In my view, a reasonable search for records responsive to an access request would include taking steps to comply with these two obligations.
> …

The city's representations

[26] The city takes the position that it "properly and transparently" responded to the request and fully complied with all its obligations under the *Act*.

[27] The city submits that the appellant's request was not for records but rather an internal review and analysis of certain records that might be in the city's possession. The city submits that the analysis requested by the appellant was not one conducted by the city "in the normal course" and therefore it suggested that the appellant reformulate the request.

[28] The city further states that one of its representatives met with the appellant in a further effort to clarify the request. The city submits that notwithstanding the meeting the appellant failed to reformulate the request in the way the city suggested. The city submits, however, that the appellant was provided a copy of a record entitled "By-Law Enforcement - Year End Review 2016" at this meeting in an effort to assist in obtaining the information that the appellant sought.

[29] The city submits that the documents entitled "Tickets Issued and Tickets for Screening and Hearing January 1, 2015 to December 31, 2015" and "Tickets Issued and Tickets for Screening and Hearing January 1, 2016 to December 31, 2016" were created for the purposes of attempting to assist the appellant with the request and were not records maintained by the city, or in existence, at the time of the request.

[30] With respect to its search efforts, the city submits that upon receipt of the request a city Law Clerk asked the then Vital Statistics & Customer Service Clerk 1 whether there were records responsive to the questions posed by the appellant in the request. The city states that its Law Clerk was informed that no responsive records existed because the city does not create the type of record sought by the appellant.

[31] The city submits that the Law Clerk then asked the city's Supervisor of Traffic, Parking and By-Law Enforcement whether there were records responsive to the questions posed by the appellant in the request. In particular, the Law Clerk asked whether there were reports that were responsive to "How many parking infractions were issued in the years 2015 and 2016?". The Supervisor of Traffic, Parking and By-Law Enforcement then relayed the enquiry to the city's Senior By-law Enforcement Officer who conducted a search of relevant electronic files, being his work email and the city's Enforcement Drive. The city's Senior By-law Enforcement Officer also conducted a search of the city's relevant physical files, namely, their parking paper files. The city's Senior By-law Enforcement Officer initially advised that the only record he was able to obtain was not responsive to the requests as it simply compared parking infractions

from previous years rather than reporting the infractions for both years.

[32] After further discussion between the city Law Clerk and the city's Senior By-law Enforcement Officer regarding the request, the city's Senior By-law Enforcement Officer provided the city Law Clerk with the record entitled "By-Law Enforcement - Year End Review 2016", which the city viewed as being responsive to a portion of the request. The city disclosed this record to the appellant.

[33] After discussions between the Acting City Clerk and the mediator in the course of mediation, the Acting City Clerk communicated directly with the then Vital Statistics & Customer Service Clerk 1 regarding responsive records. The then Vital Statistics & Customer Service Clerk 1 searched the city's Ticket Tracer system and provided the Acting City Clerk with records that contained information that they believed might assist the appellant's request which was then used to create two further responsive records.

[34] The city submits that the city Law Clerk and Acting City Clerk undertook reasonable steps in requesting that two senior by-law enforcement employees and one customer service employee responsible for aspects of the ticket process be consulted in responding to the request. It submits that these individuals were provided with the scope of the request, are qualified and familiar with the types and manner of records maintained in the normal course of business and are able to respond to what if any, records were responsive to the appellant's request for responses to questions on the number of certain parking statistics.

[35] In support of its position, the city provided affidavits from the city Law Clerk, the then Vital Statistics & Customer Service Clerk 1, the city's Senior By-law Enforcement Officer and the Acting City Clerk attesting to and confirming their search efforts.

[36] In its reply representations, the city explains that the record entitled "By-Law enforcement - Year End Review 2016" was located only after the initial search was performed. The city submits that because it believed that it was only a partially responsive record, it was reviewed internally to ensure it was responsive. Once that determination was made, it was disclosed to the appellant. The city submits that as the appellant has now received the three records, there is no merit to this appeal.

The appellant's representations

[37] The appellant submits that their position was always that:

> … there had to be records as all tickets are forwarded to the MTO [Ministry of Transportation] for collection and also they are numbered and in books so there could be a physical count of the tickets or books that they come in.

[38] The appellant submits that the city rebuffed the appellant's multiple overtures to obtain the responsive records that the appellant believed to exist or to have the city

assist the appellant in formulating the request in a manner to the appellant's satisfaction.

[39] The appellant submits that although the three records were disclosed to them, the appellant remained dissatisfied with the manner in which the city processed the appellant's request. The appellant also took issue with the content of the Mediator's Report. In their sur-reply representations, as set out above, the appellant explained that the issue is not the receipt of the information but rather the failure of the city to process the request in accordance with the provisions of the *Act* and the failure of the mediator to note that deficiency in his report. In the appellant's submission, the conduct of the city should be censured by this office.

[40] The appellant further submits in sur-reply that simply contacting one person and not initiating any further search request before issuing a decision refusing access is not an appropriate response to the appellant's request. The appellant has a greater concern with the city only conducting the searches only after the meeting between the appellant and the city employee.

[41] The appellant then provides various examples in support of their position that the city did not comply with its obligations under the *Act*, including the appellant's concern regarding the time delay between the request and the receipt of the first record.

Analysis and finding

[42] I am satisfied that the city's representations and the affidavits it filed in support of its position demonstrate that it made a reasonable effort to address the appellant's request and provide a thorough explanation for why it proceeded in the manner it did. Although responsive records were only disclosed after the meeting discussed above, they were comprised of a record that existed as well as two further responsive records that the city created to respond to the request.

[43] It would have been preferable for the city to have determined whether there was raw material relating to the questions posed by the appellant before providing its response. In that respect, I agree with the approach outlined by Adjudicator Bhattacharjee in Order MO-2129 above. I also agree with the appellant that the request could not be modified in the manner suggested by the city as the appellant sought a broader scope of information.

[44] However, in the circumstances, I am satisfied that the city's response to the appellant's request, as well as its search for responsive records, is in compliance with its obligations under the *Act*. Accordingly, as the appellant ultimately received responsive information, there are no further issues to adjudicate and this appeal is at an end.

[45] I make one final observation.

[46] The appellant should be aware that mediation and adjudication are separate steps in the appeal proceeding[11]. It is at the adjudication stage that an adjudicator considers the arguments and evidence provided to support the parties' respective positions and determines the unresolved issues in the appeal. As set out at section 40 of the *Act*[12], the mediator does not decide the issues and has a different role, which includes attempting to achieve a settlement of the matter under appeal. In this appeal, if the appellant had a concern that matters were not effectively addressed in the Mediator's Report, the appellant had ample opportunity to raise them before me, and did so in a complete manner in their representations.

ORDER:

The appeal is dismissed.

Original Signed by:	June 7, 2017

Steven Faughnan
Adjudicator

[11] Order MO-3588-R.
[12] Section 40 reads: The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.