Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3654

Appeal MA17-561

City of Hamilton

August 24, 2018

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for various records relating to the City of Hamilton's by-law enforcement approach and activities. The city disclosed all the records it identified as responsive to the request. The appellant appealed, on the basis that the city did not identify all responsive records for one part of the request. This order finds that the city construed the appellant's request too narrowly and orders the city to issue a new access decision for the number of zoning violation notices issued for the entire city. The appellant also appealed the reasonableness of the city's search for records relating to the second part of her request. This order finds the city's initial search for records was not reasonable but its subsequent efforts to locate and disclose records were reasonable and render another search unnecessary.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

OVERVIEW:

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

> Number of Zoning Violation Notices – issued – 2014/2015/2016 and June 30, 2017

> Referencing – The City of Hamilton Zoning Bylaw 6593 Section 18(14)(i)(ii) a-j, 18A (14b)(i)(ii)(iii), 14(d) (i)-(x)
>
> Also require procedure used by MLE to triage complaint investigation
>
> Also requiring procedures used by MLE to investigate complaint received in 2014- 2015 – 2016 - 2017
>
> Steps (procedure) once complaint is received at MLE.
>
> How are they prioritized. (daily)

[2] The city granted access to all of the responsive records they located. The appellant appealed the following two aspects of the city's decision:

- that she requested information about the number of zoning violation notices issued for the entire city, but the city limited its search to a specific address.
- that the city has records that have not been disclosed regarding how complaints are triaged.

[3] The city confirmed that it processed the request regarding the number of zoning violation notices issued in relation to one specific address. The city took the position that the appellant should submit a new request for access to the number of zoning violations with respect to the entire city.

[4] The appellant decided to pursue the appeal to the adjudication stage, where an inquiry is conducted. The city and the appellant were invited to make representations on the scope of the request and the reasonableness of the city's search for records. The city's representations, which were shared with the appellant, provided some additional responsive records.

[5] This order finds that the city must respond to the appellant's request for the number of zoning violation notices issued according to its plain and ordinary meaning, treating the request as a request for city-wide information, not a request for information relating to a specific property.

[6] This order also finds that the city did not initially conduct a reasonable search for records regarding how complaints are triaged. However, its subsequent efforts searching for and disclosing responsive records were reasonable and there is no benefit in ordering the city to conduct a further search for records responsive to that part of the request.

DISCUSSION:

A. What is the scope of the appellant's request for zoning violation notices?

[7] The appellant and the city have different positions on the scope of the appellant's request for "Number of Zoning Violation Notices – issued – 2014/2015/2016 and June 30, 2017."

[8] The city interpreted the request as a request for records relating to a specific property. It submits that it did so because all of the appellant's four previous requests, and one subsequent request, were focussed on one specific property. The city submits that, viewed in this context, it saw no ambiguity in the appellant's request and interpreted it as a request for zoning violations for a specific property. It submits that the appellant should have specifically referenced the entire city in the request if that is what the appellant wanted.

[9] The appellant's representations in response to the city make clear that they intended the request to relate to the entire city, not a specific property.

[10] Section 17 of the *Act* is the relevant section of the *Act* for determining the correct approach to the scope of a request for records. It imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. Section 17 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;
>
> (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).

[11] Previous orders of this office have made clear that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act* and that any ambiguity in the request should generally be resolved in the

requester's favour.[1]

[12] It is clear to me that the city did not take such an approach in responding to the appellant's request.

[13] The appellant intended her request to relate to the city, not a specific property. The plain and ordinary meaning of the request is clear - there is nothing in the wording of the request that limits it to a specific property. Previous requests the appellant made may have referenced a specific property. However, the request to the city at issue in this appeal does not reference a specific address anywhere in the request. I note this is contrary to a city employee's affidavit evidence that the request included a specific property address.

[14] I am also satisfied that the appellant provided sufficient detail to identify the records responsive to the request.

[15] The institution did not contact the requester to clarify the request. Rather than responding to the literal meaning of the request, it unilaterally narrowed the scope of the request without informing the appellant. The city did this based on its own theory of what the appellant wanted, relying on the context of the request. The city should at least have tested its theory about the appellant's intent with the appellant before deviating from the plain and ordinary meaning of the request.

[16] There is no evidence that the city's approach was intended to frustrate the purpose of the *Act* and its obligations under it. However, that was the result of its actions. Accordingly, I order the city to respond to the appellant's request according to its plain and ordinary meaning, namely as a request for the number of zoning violation notices the city issued in 2014/2015/2016 and up to June 30, 2017.

B. Did the institution conduct a reasonable search for records regarding how complaints are triaged?

[17] The appellant's appeal was also founded on her view that the city had not disclosed all records responsive to her request for records regarding how complaints are triaged.

[18] Where a requester claims that additional records exist beyond those identified by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17.[2] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

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[1] Orders P-134 and P-880.
[2] Orders P-85, P-221 and PO-1954-I.

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

[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.[5]

[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.[6]

[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.[7]

[23] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[8]

[24] The institution was required to submit affidavit evidence that provided a written summary of all steps taken in response to the request for records regarding how complaints are triaged. In particular, it was asked:

> 1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
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> 2. If the institution did not contact the requester to clarify the request, did it:
>
> (a) choose to respond literally to the request?
>
> (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform

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[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] Order MO-2246.
[8] Order MO-2213.

> the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
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> 3. Please provide details of any searches carried out for records regarding how the city triages complaints including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to this portion of the request.
>
> 4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[25] The city's representations submit that staff contacted the appellant to clarify that her request for records regarding how complaints are triaged was regarding complaints of all types, not just zoning complaints.

[26] The city says it identified its *Zoning By-law Complaints and Investigations Policy* (MLE002) as responsive to the appellant's request and disclosed it to the appellant.

[27] It submits that during mediation of the appeal that the city made further inquiries with staff and conducted further searches for records. The particular steps the city took are outlined in the affidavit evidence of city employees that was shared with the appellant during the inquiry.

[28] One city employee's affidavit includes as exhibits two city reports, dated May 3, 2011 and August 11, 2015, that discuss the prioritization of complaints. The city explains these reports were prepared by city employees and submitted to the city's Planning Committee.

[29] The reports were shared with the appellant along with the city's representations during this inquiry. The city says that the reports are not responsive to the appellant's request because they are not an official written "procedure or policy" because no such policy existed prior to the creation of a Municipal Law *Progressive Enforcement* policy (MLE 037), which the city says came into effect in January 2018.[9]

[30] I have reviewed the two reports. I am satisfied that adopting a liberal interpretation of the appellant's request that upholds the purpose and spirit of the *Act,* both reports are responsive to the appellant's request. While they may not be "official policy documents", they are substantive documents that outline in some detail the city's

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[9] I note that because the MLE 037 policy did not exist at the time of the appellant's 2017 request, it is not a responsive record for the purpose of this appeal.

proposed approach to prioritising by–law enforcement activity, the topic of the appellant's request. The reports are clearly the sort of documents the appellant was interested in receiving as she sought to understand the city's approach to by-law enforcement. The reports fall squarely within the scope of the appellant's request.

[31] The city submits that the reports are publicly available, so it would have advised the appellant the city could refuse to disclose the reports under section 15(1) of the *Act*[10] and would instead have provided the appellant with direction on how to access the reports. The city submits that before it could advise the appellant about the reports and how to access them the appeal moved to the inquiry stage.

[32] The city's explanation does not remedy the inadequacy of failing to identify the two reports in its initial response to the appellant's request. The city's original search for records regarding how complaints are triaged was not reasonable because it did not identify these reports as responsive.

[33] However, the detailed affidavits of city staff provided in response to this inquiry about the steps they took to locate additional responsive records after the appellant lodged this appeal satisfies me that the city has now completed a reasonable search for records and disclosed all responsive records regarding how complaints are triaged. I therefore see no value in ordering the typical remedy for finding that an institution has failed to conduct a reasonable search, namely ordering a further search for responsive records.

ORDER:

1. I uphold the reasonableness of the city's search for records regarding how complaints are triaged.

2. I order the city to issue a decision under the *Act* that responds to the appellant's request for the number of zoning violation notices the city issued in the 2014/2015/2016 years and up to June 30, 2017.

3. For the purposes of the access decision referred to in order provision 2 above, the date of this order is to be treated as the date of the request.

Original Signed by: August 24, 2018

Hamish Flanagan
Adjudicator

[10] Section 15(a) permits an institution to refuse to disclose a record if it has been published or is currently publically available.